

Status Quo [32]

NOTE: The content of this document has not been reviewed by legal counsel, nor does it represent a consensus view of the Design Team or indicate any kind of preference among options presented to the Senior Review Committee.

Summary Description:

- The right of employees to organize, bargain collectively and participate in labor organizations was found by Congress to safeguard the public interest, contribute to the effective conduct of public business, and facilitate settlement of disputes.
- Bargaining not required over specified management rights, government-wide regulations, or agency regulations supported by a "compelling need."
- Management must negotiate over procedures used to exercise management rights and appropriate arrangements for employees adversely affected by exercise of those rights.
- Bargaining generally must be completed *before* management acts.
- The FLRA administers the labor relations program; it investigates and adjudicates unfair labor practice claims, determines bargaining units and conducts elections; makes negotiability determinations; resolves exceptions to certain arbitration awards; the FLRA may take any remedial action it deems appropriate to carry out policies of chapter 71.
- The FSIP resolves bargaining impasses if voluntary efforts fail; the FSIP's final ruling binds the parties.

Key Features:

- Federal Labor Relations Authority (FLRA) investigates, prosecutes and adjudicates unfair labor practice (ULP) charges/complaints; makes appropriate bargaining unit determinations and conducts elections of exclusive representatives; makes negotiability determinations; and resolves exceptions to arbitration awards not involving Ch. 43 or Ch. 75 actions that could have been appealed to the Merit Systems Protection Board.
- FLRA has broad remedial authority; many final FLRA decisions are subject to review in U.S. court of appeals. There is no judicial review of unit determinations or decisions on exceptions to arbitration awards (unless they involve allegations of ULPs). FLRA may petition U.S. court of appeals for enforcement of an order and for appropriate temporary relief or restraining order. In connection with a ULP complaint, the FLRA may petition U.S. district court for temporary relief, including a restraining order.
- Federal Service Impasses Panel (FSIP), an entity within the FLRA, resolves bargaining impasses if voluntary efforts, including the Federal Mediation and Conciliation Service (FMCS), fail.
- An exclusive representative bargains for and represents the interests of all employees in a bargaining unit. An exclusive representative shall be given the opportunity to be represented at formal discussions and during investigatory examinations if the employee reasonably believes that examination may result in disciplinary action and requests representation.
- Good-faith bargaining is required over conditions of employment (personnel practices, policies, and matters affecting working conditions). Bargaining is not required over specified management rights, matters inconsistent with federal law or government-wide regulations, or agency regulations for which compelling need exists. Bargaining is required over procedures used to exercise management rights and appropriate arrangements for employees adversely affected by the exercise of management rights. Agencies may elect to bargain over permissive topics.
- Employees' right to organize, bargain collectively and participate through labor organizations of their own choosing in decisions which affect them was found by Congress to safeguard the public interest, contribute to the effective conduct of public business, and facilitate settlement of disputes.

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- Collective bargaining agreements must have negotiated grievance procedures with binding arbitration. The grievance procedure is broad in scope. Arbitrations of matters that could have been appealed to the MSPB under Ch. 43 or Ch. 75 may be appealed to the U.S. Court of Appeals for the Federal Circuit as if they had been decided by the MSPB. Other arbitration decisions are subject to exceptions filed with the FLRA.

Implications (This section contains "possible advantages/benefits" and "possible problems/challenges" and "other implications" suggested by design team members. The views expressed in these "implications" represent the opinions of one or more members of the design team and therefore reflect sometimes opposing points of view. These opinions do not reflect the collective judgment of the entire design team on any of the issues addressed, nor have they been reviewed by legal counsel.):

Possible Advantages/Benefits

- Could meet the requirements of the Homeland Security Act that any personnel system applicable to DHS employees ensure that employees may organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them.
- Is modeled, in large part, on the system applicable to the private sector, which brings some measure of parity to the two systems.
- Is administered/regulated by a third-party agency, with regulations and a body of case law (subject to judicial review) that need not be replicated.
- Agencies and unions have developed operating practices and relationships based on their familiarity with the current system; maintaining the current process might not have the disruptive effect that may accompany a new system.
- The collective bargaining model encourages parties to interact with each other. Attempting to address issues bilaterally diminishes the need for third-party involvement in problem solving.
- Agencies can deal with large numbers of employees through an exclusive representative, which should allow for personnel policies and practices to be set more quickly and uniformly.
- Work processes might benefit from input from front-line employees through their exclusive representative.

Possible Problems/Challenges

- The process of obtaining necessary information and completing bargaining can be lengthy.
- Parties may be forced to address disputes associated with a single matter in multiple forums. For example, issues connected with a bargaining impasse may require 1) a negotiability decision through the FLRA negotiability process; 2) a ULP decision; 3) and action by the FSIP. Each of these three decisions is issued independently of the other two, which seems inefficient and contribute to delays in problem-solving.
- Many important terms and conditions of employment might be excluded from the good-faith bargaining requirement by a broad management rights clause. It might promote the use of impact and implementation bargaining to address substantive issues indirectly.
- The system does not require, or even encourage, pre-decisional input from employees through their unions.
- The agency-head review process can result in negotiated agreements being disapproved, undoing the mutual intent of the parties to the agreement.
- Changes in the composition of the FLRA/FSIP can result in changes of philosophy/case law to which parties must adjust.

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- The system does not allow parties to select private neutrals to resolve impasses unless the FSIP first gives its approval.
- Excludes groups of employees from coverage either by statute or executive order.
- Management has determined that this system does not allow swift implementation of operational decisions.
- Might direct significant operational resources from DHS mission and focus them on maintaining a complex labor relations system.
- Maintains current and often adversarial process of labor management relations.

Other Implications

- The provisions of this option will have to be reviewed for consistency with the Homeland Security Act.

Cost

- Maintaining the current system would not require additional expenditures that would be necessary to establish new administrative bodies.

Evaluation in Terms of Guiding/Design Principles:

Mission Centered

- Permits management to determine mission, budget, organization, number of employees, and internal security practices of the agency.
- Permits management to hire, assign, direct, layoff, and retain employees; to suspend, remove, reduce in grade or pay or take other disciplinary action.
- Permits management to assign work, make determinations with respect to contracting out, and to determine personnel by which agency operations shall be conducted.
- Permits management to make selections for appointments to fill positions from among properly ranked and certified candidates for promotion or from any other appropriate source.
- Permits management to take whatever actions may be necessary to carry out agency mission during emergencies.
- Administration of program by FLRA relieves agencies from diverting resources away from activities that are more directly mission-related.

Contemporary and Excellent

- Program has evolved since its inception; applicable principles have been constantly updated by the FLRA and courts, frequently through comparison to NLRB approach to like topics.

Generate Trust and Respect

- The "rules of the road" are well-known; adherence to the system can cause the parties to treat each other with trust and respect. Trust and respect not generated when rules are not adhered to.
- Parties know that relief is available from an impartial third party to remedy illegal acts.

Transition & Implementation:

- No transition/implementation issues to confront; the same system has been in place for 25 years.

**Detailed Description
By System Component and System Element**

L		Labor Relations System
System elements:		Summary description:
1	Administration	<ul style="list-style-type: none"> • Program is administered by the FLRA, with 3 members and a General Counsel appointed by the President with advice and consent of the Senate. FLRA members and General Counsel are appointed to 5-year terms. No more than 2 of the 3 FLRA members may be adherents of the same political party. • The FLRA determines appropriate units for representation by a labor organization, resolves negotiability issues, conducts elections to determine exclusive representatives, and resolves exceptions to arbitration awards that do not involve unacceptable performance and adverse actions that could have been appealed to the MSPB. • The FLRA's General Counsel investigates and prosecutes ULP complaints. ULP complaints are heard by ALJ's, subject to review by the FLRA. • The FLRA is empowered to hold hearings, administer oaths, take testimony or depositions under oath, issue subpoenas and may require an agency or labor organization to cease and desist from violations of Ch. 71 and take any remedial actions it considers appropriate to carry out the policies of Ch. 71. • The FSIP, an entity within the FLRA, may assist parties in resolving bargaining impasses and, in the absence of voluntary agreement, can take whatever action is necessary to resolve the impasse. FSIP's final action is binding on the parties during the term of their agreement. Prior to seeking FSIP assistance, the parties must engage in mediation. Parties need FSIP's permission to resolve impasses through private arbitration.
2	Employee rights	<ul style="list-style-type: none"> • Congress found that employees' right to organize, bargain collectively and participate through labor organizations of their own choosing in decisions which affect them safeguards the public interest, contributes to the effective conduct of public business, and facilitates settlements of disputes. • Employee has right to form, join, or assist any labor organization or refrain from such activity without fear of penalty or reprisal. This includes the right to act for a representative of a labor organization and the right to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under Ch. 71.
3	Union rights & obligations	<ul style="list-style-type: none"> • Labor organization defined as an organization composed in whole or in part of employees, in which employees participate and pay dues, which has a purpose of dealing with agency concerning grievances and conditions of employment; but

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	<p>that definition does not include an organization which discriminates in membership (on basis of race, color, creed, national origin, sex, age, preferential or non-preferential civil service status, political affiliation, marital status or handicapping condition); one that advocates overthrow of constitutional form of government in U.S.; an organization sponsored by an agency; or an organization that participates in a strike against the govt. or imposes a duty or obligation to participate in a strike.</p> <ul style="list-style-type: none"> • Unions can only be recognized if they are free from corrupt influences and influences opposed to basic democratic principles. Unions are required to file financial reports with the DOL, provide for bonding of officials/employees and comply with trusteeship and election standards. These requirements are administered by the DOL via regulations that conform generally to standards applicable to labor organizations in the private sector. • "Exclusive representative" means a labor organization that is certified by the FLRA as the exclusive representative of employees in an appropriate unit. An exclusive representative is entitled to act for and negotiate collective bargaining agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to union membership. • An exclusive representative shall be given the opportunity to be represented at any formal discussion between agency reps and unit employees concerning any grievance, personnel policy or practice or other general conditions of employment. • An exclusive representative has the right to be represented at any examination of a unit employee in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests representation. ("Weingarten"-type rights). • The rights of an exclusive representative do not preclude an employee from being represented by an attorney or another representative of the employee's own choosing in a grievance or appeal action except in the case of negotiated grievance or appeal procedures. • Upon request from an exclusive representative and to the extent not prohibited by law, an agency must furnish data which is normally maintained by the agency in the normal course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, and which does not constitute guidance, advice, counsel or training provided by mgt. officials or supervisors relating to collective bargaining. This is part of the agency's duty to negotiate in good faith.

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4	Management rights	<ul style="list-style-type: none"> • Subject to the obligation to bargain over procedures, appropriate arrangements for adversely affected employees, and, at the election of the agency, permissive topics (see below), nothing affects management's right to . . . <p>determine mission, budget, organization, number of employees, and internal security practices of an agency;</p> <p>in accordance with applicable laws, hire, assign, direct, layoff, and retain employees; suspend, remove, or reduce in grade or pay or take other disciplinary action; assign work, make determinations with respect to contracting out, to determine the personnel by which agency operations shall be conducted; make selections to fill positions from among properly ranked and certified candidates for promotion or any other appropriate source; and take whatever actions may be necessary to carry out the agency mission during emergencies.</p>
5	Bargaining unit	<ul style="list-style-type: none"> • An appropriate unit is one in which employees have a clear and identifiable community of interest and which will promote effective dealings with, and efficiency of the operations of the agency involved. A unit may be established on an agency, plant, installation, functional or other basis. • A unit shall not be appropriate if it includes any management official or supervisor; a confidential employee; an employee engaged in personnel work in other than a purely clerical capacity; an employee engaged in administering Ch. 71; both professional and nonprofessional employees unless a majority of professional employees vote for inclusion in the unit; any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or any employee primarily engaged in investigative or audit functions of internal security employees if functions are undertaken to ensure duties are discharged with honesty and integrity. • The FLRA investigates a petition filed by a person alleging a 30% showing of interest to certify or decertify an exclusive representative. If the FLRA believes that there is a question concerning representation, it will provide a hearing opportunity followed by, if appropriate, an election on the question by secret ballot. No election may be held in any appropriate unit or subdivision if an election was held in the preceding 12 months. A labor organization with a showing of interest of at least 10%, with a collective bargaining agreement for the unit, or with other evidence that it is the exclusive rep of the employees involved, may intervene in a petition and be placed on the ballot. • Exclusive representation may not be accorded to any union that the FLRA determines is subject to corrupt influences or influences opposed to democratic principles.

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	<ul style="list-style-type: none"> • A lawful collective bargaining agreement between the agency and an exclusive representative bars an election unless the agreement has been in effect for more than 3 years or the petition for exclusive recognition is filed within a “window period” preceding the expiration of the contract. • Also see Sec. 842(b) of Homeland Security Act contains additional provisions relating to DHS bargaining units, positions, and employees. • Also see Sec. 842(a) of Homeland Security Act for additional provisions relating to President’s authority to exclude agency or subdivision from coverage of Ch. 71 under sec. 7103(b)(1). Not really a “bargaining unit” issue, but may impact which groups are covered by Ch. 71.
6	<p>Negotiations</p> <ul style="list-style-type: none"> • “Collective bargaining” means the performance of the mutual obligation of an agency and the exclusive rep in an appropriate unit to meet at reasonable times and to consult and bargain in good faith to reach agreement with respect to “conditions of employment” affecting employees and to execute, upon request, a written document incorporating any collective bargaining agreement reached. This obligation does not compel either party to agree to a proposal or make a concession. • “Conditions of employment” means personnel practices, policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, excluding matters relating to prohibited political activities, the classification of any position, or matters specifically provided for by Federal statute. • Agencies and exclusive reps must meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. This duty includes the obligation to approach negotiations with a sincere resolve to reach an agreement, to be represented by duty authorized reps who are prepared to discuss and negotiate on any condition of employment, to meet at reasonable times and convenient places as frequently as may be necessary and to avoid unnecessary delays, and if agreement is reached, to execute a written document recording the agreed terms and take steps to implement them. Agencies must also provide data (see access to information above). • There is no duty to bargain over matters that are inconsistent with federal law or govt.-wide rule or regulation or agency rules or regulations for which there is a compelling need. • Bargaining is not required over proposals that interfere with management rights (see above). Nothing precludes bargaining over procedures which mgt. will observe in exercising its authority or over appropriate arrangements for employees adversely affected by the exercise of its authority.

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		<ul style="list-style-type: none"> • Agencies may elect to bargain over numbers types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work. • Disputes over negotiability can be submitted to the FLRA for resolution. The FLRA decides whether a proposal/provision is negotiable, but makes no decision on the merits. • The head of an agency has 30 days from the date of execution to review an agreement to determine whether the agreement is in accordance with Ch. 71 and any other applicable law, rule or regulation. If the agency does not act in the 30 day period, the agreement shall take effect and bind the parties. • Collective bargaining agreements must contain grievance procedures that are fair and simple, provide for expeditious processing, assure the union's right to present and process grievances, assure the employee's right to present a grievance on the employee's own behalf and the union's right to be present, and allow for binding arbitration to be invoked by either the agency or the union. • Grievance means any complaint by any employee concerning any matter relating to the employment of the employee; by any labor org. concerning any matter relating to the employment of any employee; or by any labor org. or agency concerning a collective bargaining agreement or any law, rule, or regulation affecting conditions of employment. • FMCS provides assistance to parties in the resolution of impasses. If voluntary efforts, including FMCS, fail to resolve an impasse, it can be submitted to the FSIP (see above). • National consultation rights are provided for a labor org. which represents a substantial number of agency employees, but has not been accorded exclusive recognition on an agency basis.
7	Unfair labor practices	<ul style="list-style-type: none"> • Any person may file an ULP charge with the FLRA. An aggrieved party may pursue a ULP allegation under a negotiated grievance procedure or before the FLRA, but not under both procedures. • Charges must generally be filed within 6 months of the alleged ULP. The FLRA General Counsel must investigate charges and may issue a complaint (see above). • Ch. 71 defines numerous wrongful acts by either agencies or labor orgs. To be ULPs: For agencies, these include interference, restraint or coercion of employees in the exercise of their rights; encouraging or discouraging union membership by discrimination in connection with hiring, tenure, promotion, or other conditions of employment; refusing to negotiate in good faith with a labor

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		<p>org.; and failing or refusing to cooperate in impasse procedures. For unions, these include interference, restraint or coercion of employees in the exercise of their rights; causing or attempting to cause an agency to discriminate against employees; refusing to bargain in good faith with an agency; calling or participating in a strike or work stoppage; and improperly denying membership to a unit employee.</p> <ul style="list-style-type: none"> • Final orders of the FLRA in most matters may be appealed to the U.S. court of appeals in the circuit where the aggrieved party resides or transacts business or to the U.S. Court of Appeals for the District of Columbia. • FLRA decisions concerning appropriate units are not subject to judicial review. • FLRA may petition any appropriate U.S. court of appeals for the enforcement of a FLRA order and for appropriate temporary relief or restraining order. • If it issues a ULP complaint, the FLRA may petition any appropriate U.S. district court for temporary relief, including a restraining order.
8	Grievance/ arbitration	<ul style="list-style-type: none"> • See above. • Certain matters are excluded from coverage of a grievance procedure: claims re: prohibited political activities; retirement, life insurance or health insurance matters; national security suspensions or removals per Sec. 7532; examination, certification, or appointment; or classification of a position which does not result in the reduction in grade or pay of an employee. • Parties to a collective bargaining agreement may negotiate to exclude any other matter from coverage of the grievance procedure. • With some exceptions, the grievance procedure is the exclusive administrative procedure for resolving disputes falling within its coverage. Employees have the option of using the grievance procedure or statutory procedures to address prohibited personnel practices (involving discrimination or not), unacceptable performance actions, and adverse actions. • Exceptions to arbitration awards other than those involving unacceptable performance or adverse actions can be filed with the FLRA. The FLRA reviews an arbitrator's award to determine whether it is contrary to law, rule, or regulation, or is deficient on other grounds similar to those used by federal courts in the private sector. • Arbitrations involving unacceptable performance or adverse actions can be appealed to the U.S. Court of Appeals for the Federal Circuit just as if the decision had been issued by the MSPB. • FLRA decisions on exceptions to arbitration awards are not subject to judicial review unless they involve allegations of ULPs.
9	Dues allotments	<ul style="list-style-type: none"> • Upon receipt of written authorization from an employee, agency must deduct regular and periodic dues and forward the amount to the union. This is done at no cost to the union. The authorization may not be revoked for 1 year except when the agreement between the union and agency ceases to apply or the employee is expelled or suspended from union membership.

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10	Official time	<ul style="list-style-type: none"> • Any employee representing an exclusive rep in negotiations is entitled to official time for such purposes, including attendance at impasse proceedings. The number of employees for whom official time is authorized shall not exceed the number of agency reps designated for such purposes. • Any employee representing an exclusive rep is entitled to official time in an amount the agency and exclusive rep determine is reasonable, necessary and in the public interest. Employees in appropriate units are entitled to same in connection with any other matter covered by Ch. 71. • Internal business of labor organizations must be performed during time the employee is in non-duty status.