

THE WHITE HOUSE
Office of the Press Secretary

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EXECUTIVE ORDER
Comments in Italics

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DEVELOPING EFFICIENT, EFFECTIVE, AND COST-REDUCING
APPROACHES TO FEDERAL SECTOR COLLECTIVE BARGAINING

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to assist executive departments and agencies (agencies) in developing efficient, effective, and cost-reducing collective bargaining agreements (CBAs), as described in chapter 71 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Policy. (a) Section 7101(b) of title 5, United States Code, requires the Federal Service Labor-Management Relations Statute (the Statute) to be interpreted in a manner consistent with the requirement of an effective and efficient Government. Unfortunately, implementation of the Statute has fallen short of these goals. CBAs, and other agency agreements with collective bargaining representatives, often make it harder for agencies to reward high performers, hold low-performers accountable, or flexibly respond to operational needs. Many agencies and collective bargaining representatives spend years renegotiating CBAs, with taxpayers paying for both sides' negotiators. Agencies must also engage in prolonged negotiations before making even minor operational changes, like relocating office space.

To the contrary, historically, agencies we deal with have dragged their feet on bargaining agreements. Perhaps the most extreme example is the HQ/WASO National Park Service agreement which took over 10 years to renegotiate. In another example, an agency representative contracted to serve as the agency's chief spokesperson bragged that he was getting paid by the hour. In our ground rules, we typically propose aggressive bargaining schedules and we routinely propose the use of private neutrals to expedite the resolution of bargaining disputes.

Our agreements do not make it harder to reward high performers or hold low-performers accountable. Agencies have the reserved right to establish performance expectation levels. Agencies also have the right to determine the amount of money that will be devoted to rewarding high performers. And agencies may initiate disciplinary or performance based actions against poor performers at any time. Our contracts contain procedures aimed at ensuring that all of this is

done fairly, and not for arbitrary, or non-merit reasons. Frequently lacking are managers who have the skills or will to address poor performance on an individual basis.

Federal employees and, indeed, most Americans would not consider a closure of their workplace, with the corresponding impact on their commuting time, childcare arrangements, etc, to be "minor". But in any event, our contracts contain relatively tight timeframes for negotiating mid-term changes. And agencies have no obligation to bargain "de minimis" changes, or changes that do not have a foreseeable and appreciable impact on employees. Employees and the American public benefit from mid-term bargaining because it increases the likelihood that changes in operations are better thought out and don't overlook potential negative outcomes for employees and taxpayers.

(b) The Federal Government must do more to apply the Statute in a manner consistent with effective and efficient Government. To fulfill this obligation, agencies should secure CBAs that: promote an effective and efficient means of accomplishing agency missions; encourage the highest levels of employee performance and ethical conduct; ensure employees are accountable for their conduct and performance on the job; expand agency flexibility to address operational needs; reduce the cost of agency operations, including with respect to the use of taxpayer-funded union time; are consistent with applicable laws, rules, and regulations; do not cover matters that are not, by law, subject to bargaining; and preserve management rights under section 7106(a) of title 5, United States Code (management rights). Further, agencies that form part of an effective and efficient Government should not take more than a year to renegotiate CBAs.

The administration has its own problems with effective and efficient government and ethical conduct. That aside, the Federal Service Labor Management Relations Statute was enacted to achieve these objectives. 5 USC 7101. Agencies' reserved rights under the Statute are very broad. See 5 USC Section 7106. All CBAs are subject to agency head review under Section 7114(c) of the Statute before going into effect, a process that permits agencies heads to disapprove provisions that their representatives already agreed to at the bargaining table if those provisions are contrary to law (including management's reserved Statutory rights) and government-wide rules or regulations.

Sec. 2. Definitions. For purposes of this order:

- (a) The phrase "term CBA" means a CBA of a fixed or indefinite duration reached through substantive bargaining, as opposed to (i) agreements reached through impact and implementation bargaining pursuant to sections 7106(b)(2) and 7106(b)(3) of title 5, United States Code, or (ii) mid-term agreements, negotiated while the basic comprehensive labor

contract is in effect, about subjects not included in such contract.

The Statute defines "collective bargaining agreement" more broadly, as "an agreement entered into as a result of collective bargaining". 5 USC Section 7103(a)(8). This definition has been held to include mid-term agreements, including those resulting from so-called "I and I" bargaining.

- (b) The phrase "taxpayer-funded union time" means time granted to a Federal employee to perform non-agency business during duty hours pursuant to section 7131 of title 5, United States Code.

"Taxpayer-funded union time" is a pejorative label for official time that assumes such time does not benefit the government or the public. In enacting the Statute, Congress specifically found that collective bargaining safeguards the public interest and contributes to the effective conduct of public business. 5 USC Section 7101(a)(1). Under Section 7131(a), union representatives are entitled to official time to negotiate collective bargaining agreements, when they would otherwise be in duty status. For other representational activities, Congress decided that the amount of such time that is "reasonable, necessary, and in the public interest" should be determined in an agreement between agencies (not Executive level Departments, the WH, OPM or OMB) and the representatives elected by the agencies' employees. Section 7131(d). In short, under the Statute, official time is time spent conducting agency business. Moreover, official time is prohibited for internal union business, including membership solicitation and conducting union elections. Section 7131(b).

Ignored by this EO is the Statute's requirement that federal sector unions represent the interests of all employees, regardless of their membership. Section 7114(a)(1). Compulsory union membership or contract administration fees are not allowed under the Statute. 5 USC Section 7102 (employees have the right to "refrain from" joining a labor organization). Official time has always been considered as an offset to the requirement that unions represent employees who may vote for union representation and enjoy the benefits of the contracts unions negotiate, but refuse to contribute to the financial support of the union.

Sec. 3. Interagency Labor Relations Working Group. (a) There is hereby established an Interagency Labor Relations Working Group (Labor Relations Group).

(b) Organization. The Labor Relations Group shall consist of the Director of the Office of Personnel Management (OPM Director), representatives of participating agencies determined by their agency head in consultation with the OPM Director, and OPM staff assigned by the OPM Director. The OPM Director shall chair the Labor Relations Group and, subject to the availability of appropriations and to the

extent permitted by law, provide administrative support for the Labor Relations Group.

(c) Agencies. Agencies with at least 1,000 employees represented by a collective bargaining representative pursuant to chapter 71 of title 5, United States Code, shall participate in the Labor Relations Group. Agencies with a smaller number of employees represented by a collective bargaining representative may, at the election of their agency head and with the concurrence of the OPM Director, participate in the Labor Relations Group. Agencies participating in the Labor Relations Group shall provide assistance helpful in carrying out the responsibilities outlined in subsection (d) of this section. Such assistance shall include designating an agency employee to serve as a point of contact with OPM responsible for providing the Labor Relations Group with sample language for proposals and counter-proposals on significant matters proposed for inclusion in term CBAs, as well as for analyzing and discussing with OPM and the Labor Relations Group the effects of significant CBA provisions on agency effectiveness and efficiency. Participating agencies should provide other assistance as necessary to support the Labor Relations Group in its mission.

(d) Responsibilities and Functions. The Labor Relations Group shall assist the OPM Director on matters involving labor-management relations in the executive branch. To the extent permitted by law, its responsibilities shall include the following:

(i) Gathering information to support agency negotiating efforts, including the submissions required under section 8 of this order, and creating an inventory of language on significant subjects of bargaining that have relevance to more than one agency and that have been proposed for inclusion in at least one term CBA;

(ii) Developing model ground rules for negotiations that, if implemented, would minimize delay, set reasonable limits for good-faith negotiations, call for Federal Mediation and Conciliation Service (FMCS) to mediate disputed issues not resolved within a reasonable time, and, as appropriate, promptly bring remaining unresolved issues to the Federal Service Impasses Panel (the Panel) for resolution;

(iii) Analyzing provisions of term CBAs on subjects of bargaining that have relevance to more than one agency, particularly those that may infringe on, or otherwise affect, reserved management rights. Such analysis should include an assessment of term CBA provisions that cover comparable subjects, without infringing, or otherwise affecting, reserved management rights. The analysis should also assess the consequences of such CBA provisions on Federal effectiveness, efficiency, cost of operations, and employee accountability and performance. The analysis

should take particular note of how certain provisions may impede the policies set forth in section 1 of this order or the orderly implementation of laws, rules, or regulations. The Labor Relations Group may examine general trends and commonalities across term CBAs, and their effects on bargaining-unit operations, but need not separately analyze every provision of each CBA in every Federal bargaining unit;

(iv) Sharing information and analysis, as appropriate and permitted by law, including significant proposals and counter-proposals offered in bargaining, in order to reduce duplication of efforts and encourage common approaches across agencies, as appropriate;

(v) Establishing ongoing communications among agencies engaging with the same labor organizations in order to facilitate common solutions to common bargaining initiatives; and

(vi) Assisting the OPM Director in developing, where appropriate, Government-wide approaches to bargaining issues that advance the policies set forth in section 1 of this order.

(e) Within 18 months of the first meeting of the Labor Relations Group, the OPM Director, as the Chair of the group, shall submit to the President, through the Office of Management and Budget (OMB), a report proposing recommendations for meeting the goals set forth in section 1 of this order and for improving the organization, structure, and functioning of labor relations programs across agencies.

There is already a great deal of information sharing among agencies concerning their collective bargaining obligations. The fact that labor organizations are not included in this "Labor Relations Group" reflects that the objective is not to improve collective bargaining relationships, collaboration and the conduct of public business, as envisioned in Section 7101 of the Statute, but to undermine these objectives.

Presumably, the activities of this Group will be funded by taxpayers, including the Group's salaries, travel expenses and overhead. In revoking EO 13522, which created Labor-Management Forums to improve the delivery of government services, President Trump stated the forums have not fulfilled the goal of promoting collaboration in the Federal workforce and produced few benefits. In effect, he was saying the LM Forums were a waste of money. With this EO, he creates a Group that is even less likely to achieve these objectives and, in itself, will be a waste of taxpayer's money.

Sec. 4. Collective Bargaining Objectives. (a) The head of each agency that engages in collective bargaining under chapter 71 of title 5, United States Code, shall direct appropriate officials within each agency to prepare a report on all operative term CBAs at least 1 year before their expiration or renewal date. The report shall recommend new or revised CBA language the agency could seek to include in a renegotiated agreement that would better support the objectives of section 1 of this order. The officials preparing the report shall consider the analysis and advice of the Labor Relations Group in making recommendations for revisions. To the extent permitted by law, these reports shall be deemed guidance and advice for agency management related to collective bargaining under section 7114(b)(4)(C) of title 5, United States Code, and thus not subject to disclosure to the exclusive representative or its authorized representative.

(b) Consistent with the requirements and provisions of chapter 71 of title 5, United States Code, and other applicable laws and regulations, an agency, when negotiating with a collective bargaining representative, shall:

(i) establish collective bargaining objectives that advance the policies of section 1 of this order, with such objectives informed, as appropriate, by the reports required by subsection (a) of this section;

(ii) consider the analysis and advice of the Labor Relations Group in establishing these collective bargaining objectives and when evaluating collective bargaining representative proposals;

(iii) make every effort to secure a CBA that meets these objectives; and

(iv) ensure management and supervisor participation in the negotiating team representing the agency.

This section creates more bureaucracy around federal sector collective bargaining, with the aim of dictating to agencies the terms of their CBAs, under the guise of guidance. This one-size-fits-all approach is at odds with the public interest, including the Statutory requirements that employees have a community of interest to be included in the same bargaining units and that agreements be negotiated at the level of exclusive recognition.

Sec. 5. Collective Bargaining Procedures. (a) To achieve the purposes of this order, agencies shall begin collective bargaining negotiations by making their best effort to negotiate ground rules that minimize delay, set reasonable time limits for good-faith negotiations, call for FMCS mediation of disputed issues not resolved within those time limits, and, as appropriate, promptly bring

remaining unresolved issues to the Panel for resolution. For collective bargaining negotiations, a negotiating period of 6 weeks or less to achieve ground rules, and a negotiating period of between 4 and 6 months for a term CBA under those ground rules, should ordinarily be considered reasonable and to satisfy the "effective and efficient" goal set forth in section 1 of this order. Agencies shall commit the time and resources necessary to satisfy these temporal objectives and to fulfill their obligation to bargain in good faith. Any negotiations to establish ground rules that do not conclude after a reasonable period should, to the extent permitted by law, be expeditiously advanced to mediation and, as necessary, to the Panel.

In the abstract, this sounds fine. As noted, unions generally seek shorter bargaining timeframes and agencies drag it out. But this EO, with model proposals generated by the LRG, envisions take-it-or-leave-it bargaining that is imposed by the currently appointed FSIP, all of which is inconsistent with agencies' statutory good-faith bargaining obligations.

- (c) During any collective bargaining negotiations under chapter 71 of title 5, United States Code, and consistent with section 7114(b) of that chapter, the agency shall negotiate in good faith to reach agreement on a term CBA, memorandum of understanding (MOU), or any other type of binding agreement that promotes the policies outlined in section 1 of this order. If such negotiations last longer than the period established by the CBA ground rules -- or, absent a pre-set deadline, a reasonable time -- the agency shall consider whether requesting assistance from the FMCS and, as appropriate, the Panel, would better promote effective and efficient Government than would continuing negotiations. Such consideration should evaluate the likelihood that continuing negotiations without FMCS assistance or referral to the Panel would produce an agreement consistent with the goals of section 1 of this order, as well as the cost to the public of continuing to pay for both agency and collective bargaining representative negotiating teams. Upon the conclusion of the sixth month of any negotiation, the agency head shall receive notice from appropriate agency staff and shall receive monthly notifications thereafter regarding the status of negotiations until they are complete. The agency head shall notify the President through OPM of any negotiations that have lasted longer than 9 months, in which the assistance of the FMCS either has not been requested or, if requested, has not resulted in agreement or advancement to the Panel.

Here, more bureaucratic, costly, reporting requirements for agencies are established, aimed at ensuring that the model proposals dictated by the LRG are ultimately imposed.

(c) If the commencement or any other stage of bargaining is delayed or impeded because of a collective bargaining representative's failure to comply with the duty to negotiate in good faith pursuant to section 7114(b) of title 5, United States Code, the agency shall, consistent with applicable law consider whether to:

- (i) file an unfair labor practice (ULP) complaint under section 7118 of title 5, United States Code, after considering evidence of bad-faith negotiating, including refusal to meet to bargain, refusal to meet as frequently as necessary, refusal to submit proposals or counterproposals, undue delays in bargaining, undue delays in submission of proposals or counterproposals, inadequate preparation for bargaining, and other conduct that constitutes bad-faith negotiating; or

(A formal allegation of an unfair labor practice filed with the FLRA is called a "charge", not a "complaint". A complaint is what is issued after the charge is investigated and found to have merit.)

- (ii) propose a new contract, memorandum, or other change in agency policy and implement that proposal if the collective bargaining representative does not offer counter-proposals in a timely manner.

A failure to submit timely proposals can result in a waiver of collective bargaining rights under current law. What is "timely" is determined on a case-by-case basis. This portion of the EO encourages less collaboration and more unilateral implementation. In that sense, the WH apparently views collective bargaining as an inconvenient box that must be checked, instead of an opportunity for achieving the objectives in Section 7101.

- (d) An agency's filing of a ULP complaint against a collective bargaining representative shall not further delay negotiations. Agencies shall negotiate in good faith or request assistance from the FMCS and, as appropriate, the Panel, while a ULP complaint is pending.

The FSIP has historically refused to assert jurisdiction over bargaining impasses when a bad faith bargaining charge is pending, e.g., when unions file charges over unilateral implementation of changes that are the subject of the bargaining. Evidently, the WH expects the FSIP not to follow this protocol when agencies file charges.

- (e) In developing proposed ground rules, and during any negotiations, agency negotiators shall request the exchange of written proposals, so as to facilitate resolution of negotiability issues and assess the likely effect of

specific proposals on agency operations and management rights. To the extent that an agency's CBAs, ground rules, or other agreements contain requirements for a bargaining approach other than the exchange of written proposals addressing specific issues, the agency should, at the soonest opportunity, take steps to eliminate them. If such requirements are based on now-revoked Executive Orders, including Executive Order 12871 of October 1, 1993 (Labor-Management Partnerships) and Executive Order 13522 of December 9, 2009 (Creating Labor-Management Forums to Improve Delivery of Government Services), agencies shall take action, consistent with applicable law, to rescind these requirements.

Apparently, this is a shot at interest based bargaining schemes in which parties' exchange interests, collaboratively come up with solutions that address the parties' respective interests, and then jointly capture those solutions in writing.

- (f) Pursuant to section 7114(c)(2) of title 5, United States Code, the agency head shall review all binding agreements with collective bargaining representatives to ensure that all their provisions are consistent with all applicable laws, rules, and regulations. When conducting this review, the agency head shall ascertain whether the agreement contains any provisions concerning subjects that are non-negotiable, including provisions that violate Government-wide requirements set forth in any applicable Executive Order or any other applicable Presidential directive. If an agreement contains any such provisions, the agency head shall disapprove such provisions, consistent with applicable law. The agency head shall take all practicable steps to render the determinations required by this subsection within 30 days of the date the agreement is executed, in accordance with section 7114(c) of title 5, United States Code, so as not to permit any part of an agreement to become effective that is contrary to applicable law, rule, or regulation.

This is a restatement of the agency head review requirement in the Statute, omitting that if an agency fails to disapprove contract provisions deemed contrary to law within 30 days, regardless of whether all practicable steps are taken, those provisions go into effect, subject to case-by-case determinations of whether the application of such provisions are contrary to law or excessively interfere with management's rights.

Sec. 6. Permissive Bargaining. The heads of agencies subject to the provisions of chapter 71 of title 5, United States Code, may not negotiate over the substance of the subjects set forth in section 7106(b)(1) of title 5, United States Code, and shall instruct

subordinate officials that they may not negotiate over those same subjects.

In NAGE v. FLRA, 179 F3d 946 (D.C. Cir. 1999), the DC Circuit upheld the FLRA's finding that EO 12871 (which instructed agencies to bargain over (b)(1) matters) was not a binding election to bargain because the EO merely instructed agencies to bargain over such matters. It was not an election to bargain itself. In addition, EO 12871 included the same verbiage as this EO, that it creates no enforceable rights. At most, the Court reasoned, agency heads were answerable to the President for insubordination. The same would seem to apply here. Agencies may legally elect to bargain over permissive subjects, but as a practicable matter, it's unlikely that they will following this EO.

Sec. 7. Efficient Bargaining over Procedures and Appropriate Arrangements. (a) Before beginning negotiations during a term CBA over matters addressed by sections 7106(b)(2) or 7106(b)(3) of title 5, United States Code, agencies shall evaluate whether or not such matters are already covered by the term CBA and therefore are not subject to the duty to bargain. If such matters are already covered by a term CBA, the agency shall not bargain over such matters.

This appears to be a restatement of the "covered by" doctrine provided for in current law.

(b) Consistent with section 1 of this order, agencies that engage in bargaining over procedures pursuant to section 7106(b)(2) of title 5, United States Code, shall, consistent with their obligation to negotiate in good faith, bargain over only those items that constitute procedures associated with the exercise of management rights, which do not include measures that excessively interfere with the exercise of such rights. Likewise, consistent with section 1 of this order, agencies that engage in bargaining over appropriate arrangements pursuant to section 7106(b)(3) of title 5, United States Code, shall, consistent with their obligation to negotiate in good faith, bargain over only those items that constitute appropriate arrangements for employees adversely affected by the exercise of management rights. In such negotiations, agencies shall ensure that a resulting appropriate arrangement does not excessively interfere with the exercise of management rights.

Another restatement of negotiability principles in current law.

Sec. 8. Public Accessibility. (a) Each agency subject to chapter 71 of title 5, United States Code, that engages in any negotiation with a collective bargaining representative, as defined therein, shall submit to the OPM Director each term CBA currently in effect and its expiration date. Such agency shall also submit any new term CBA and its expiration date to the OPM Director within 30 days of its effective date, and submit new arbitral awards to the OPM Director within 10 business days of receipt. The OPM Director shall make each term CBA publicly accessible on the Internet as soon as practicable.

(b) Within 90 days of the date of this order, the OPM Director shall prescribe a reporting format for submissions required by subsection (a) of this section. Within 30 days of the OPM Director's having prescribed the reporting format, agencies shall use this reporting format and make the submissions required under subsection (a) of this section.

When publishing collective bargaining agreements for public inspection, will OPM also point out what cannot be bargained in most agencies: pay, benefits, matters covered by statute and gov't wide regulations, and the broad, substantive areas reserved to agencies' exclusive determinations under Section 7106?

Sec. 9. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the OMB Director relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) Nothing in this order shall abrogate any CBA in effect on the date of this order.

(d) The failure to produce a report for the agency head prior to the termination or renewal of a CBA under section 4(a) of this order shall not prevent an agency from opening a CBA for renegotiation.

(e) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,
May 25, 2018.