

***Responding to Changes in Working Conditions***

Responding to Changes in Working Conditions

by Mike McAuley  
National Counsel

One thing we can always count on as NTEU representatives, stewards or officers is that our workplace is constantly subject to change. The change can be generated by a national initiative or a local manager. The change can have been carefully thought out with NTEU and employee pre-decisional involvement or it could be completely off the mark, generated by some analyst who is totally clueless about what the change actually means to employees who are out there doing the work everyday. The change may not even require the agency to negotiate or the union to respond.

This Steward Update is designed to assist you in determining whether a workplace change triggers the union's right to negotiate and, if so, what might be some viable options as to how NTEU should respond.

Introduction

The Federal Service Labor-Management Relations Statute found at 5 U.S.C. 7101 – 7135 was passed in 1978 as part of the Civil Service Reform Act. This federal law granted labor unions the right to collectively bargain over matters affecting conditions of employment. 5 U.S.C. 7103 (a) (14). The law also excludes certain management rights from the obligation to substantively negotiate with the union. These management rights are found at 5 U.S.C. 7106 and include the following:

1. the right to determine the agency's mission, budget, organization, number of employees, and internal security practices;
2. the right to hire, assign, direct, lay off, retain, suspend, remove, reduce in grade or pay, or take disciplinary action against employees;
3. the right to assign work, make contracting out determinations, or determine the personnel by which the agency operations shall be conducted;
4. the right to make selections for appointments from properly ranked and certified candidates or promotions or from other appropriate sources; and,
5. the right to take whatever actions are necessary to carry out the agency mission during emergencies.

While the federal employer may not be obligated to negotiate over whether these rights will be exercised, i.e. the substance or whether the change should or should not be made, the agency is required to bargain with the union as to the procedures used to

implement the management right and appropriate arrangements for employees who will be adversely affected by a management right. See 5 U.S.C. 7103 (b) (2) and (3).

The negotiation of procedures and appropriate arrangements for employees adversely affected by the exercise of a management right is commonly referred to as Impact and Implementation or "I & I" bargaining. However, the "I & I" term is not actually used in the Federal Service Labor-Management Relations Statute and the more accurate way to describe the union's right to negotiate is "Procedures and Arrangements" or P and A. (Just what you need, a new acronym!)

### Identifying Workplace Changes

The Federal Labor Relations Authority has interpreted the statutory duty to negotiate in good faith with the union found at 5 U.S.C. 7116 (a) (1) and (5) as requiring the employer to provide unions with sufficient notice of proposed changes in order to permit the union to determine whether to request bargaining. See 53 FLRA 79, 41 FLRA 690, 31 FLRA 498, 16 FLRA 654.

Our contracts usually provide specific time frames for providing notice and requesting to bargain. If this occurs, we know we have a legal right and the only issue is how we exercise that right.

As hard as it may be for you to believe, many times agencies make changes in the workplace and fail to notify NTEU. As a union representative you may find out about the change from employees who are suffering adverse impact, do not like what is happening and want you to do something about it. If the agency has unilaterally implemented the change, it may very well be an unfair labor practice because the agency violated its duty to provide the union with notice and an opportunity to bargain.

What do you do when employees inform you of a change in working conditions triggering a possible obligation with the union? Before we put in a request to bargain, it is wise to do some homework to make sure that the change gives us a right to bargain.

This checklist will help you determine whether a workplace change gives NTEU the right to negotiate.

1. Does the change involve "personnel, policy, practice, and other matters affecting working conditions"? If so, the change involves a condition of employment defined at 5 U.S.C. 7103 (a) (14).

There are exceptions to this broad definition. The law specifically excludes from this definition any matters relating to:

- prohibited political activities (Hatch Act),
- the classification of any position, and
- matters specifically covered by federal statute (such as health insurance, retirement).

It is well settled that conditions of employment may be established through unwritten past practices. To be a past practice something must be consistently exercised over an extended period of time and followed by both parties or followed by one party and not challenged by another. 53 FLRA 1228, 38 FLRA 889. For example, use of a break room,

9 FLRA 240; providing bottled water for over a year, 38 FLRA 899; locations of telephones, 53 FLRA 1664; and, granting administrative time for athletic competitions, 56 FLRA 136, all were past practices affecting conditions of employment.

## 2. Is the impact of the change more than de minimis?

The FLRA developed the so-called de minimis standard as a recognition that requiring the agency to bargain over every minimal change is impractical. 54 FLRA 531, 24 FLRA 403. Thus, in determining whether a change is de minimis in terms of its impact on bargaining unit employees, the FLRA considers the following factors:

- The nature and extent of the change. 25 FLRA 787, 25 FLRA 843;
- The duration and frequency of the change. If the change is for a short duration, the FLRA will be less inclined to find a bargaining obligation than if the change is permanent. 52 FLRA 1107;
- The number of employees affected. A change that has a major impact on just one employee will not automatically be considered de minimis. 47 FLRA 419;
- The extent of bargaining over similar changes.

It is well settled that permanent changes in office space, work location and work environment “are matters at the very heart of the traditional meaning of conditions of employment.” *Library of Congress v. FLRA*, 669 F2d 1280 (D.C. Cir. 1983)

## 3. Is the change “covered by” the existing national contract or other mid-term agreements with the union?

This is a very popular defense with the agencies. The thrust of the defense is that the agency has no obligation to negotiate the change because it was already bargained with the union. If the agency alleges the change (for example, a geographic reassignment or movement of employees within a particular office) is covered by the Reassignment article of the national agreement, the FLRA first looks to the express language of the contract. If the change is not expressly covered by the contract language then the contract provision is further analyzed to see if the change is inseparably bound up with or an aspect of the contract language. The FLRA can also look at the parties’ intent when negotiating the provision in question. See 57 FLRA 126, 56 FLRA 393, 47 FLRA 1004. Another example of a covered-by situation might be a proposal to fire an employee. While this certainly significantly affects conditions of employment, this would be covered by the Adverse Action provision of the contract.

## 4. Does the proposed change involve bargaining unit work or bargaining unit positions?

NTEU is statutorily entitled to bargain on behalf of the bargaining unit employees we represent. The working conditions of supervisors or managers, according to the FLRA, do not concern conditions of employment of bargaining unit employees even though they may have an indirect impact. There is no duty to bargain, for example, reassignments of managers. The agency is obligated to bargain, however, if the union submits a proposal that “vitally affects” the interests of bargaining unit employees. 51 FLRA 491. There is no obligation to bargain if the change primarily affects employees in other bargaining units or supervisors.

It's a change. We have the right to negotiate. Now what?

#### A. Request to Bargain

Once we have determined that the agency has changed working conditions, it is important to ensure we preserve our legal rights. In the classic example where the agency made the change without giving NTEU notice and an opportunity to bargain, this would be called a unilateral implementation. As such, the agency has already committed an unfair labor practice (ULP). However, in order to perfect a possible ULP and also to bargain procedures or appropriate arrangements, we need to submit a request to negotiate. A typical request to negotiate looks like the letter on the previous page.

#### B. File a Grievance

If the agency has unilaterally implemented the change we may wish to file a grievance over this violation of 5 U.S.C. 7116 (a) (1) and (5). This should be discussed with your chapter president, chief steward and/or field representative. As a remedy we would request, along with all other appropriate remedies allowable under the law:

1. A rollback of the change and a return to the status quo.
2. An agreement to bargain over the change.
3. Retroactive effect to any agreement reached.
4. The posting of a cease and desist order.
5. Any personal relief possible to adversely affected employees.

#### C. Get a Briefing

In order to prepare for any briefing or grievance meeting over a change, get as much information as you can from the affected employees. Hold a meeting with employees at lunch. Request volunteers to join you for the briefing. Develop questions for the agency such as:

1. Why are you doing this?
2. What is the need for it or the problem behind it?
3. What are you attempting to accomplish?
4. Is this the only option you considered?
5. Have other offices or parts of the organization agreed to this?
6. Does this apply to the whole office or just parts of the agency?
7. Did the agency cost this out?

## 8. What will outside stakeholders think of this?

It is extremely helpful to communicate with the agency to find out what is driving the change. It is even more important to keep the lines of communication open with members of the bargaining unit.

### Negotiation Goals

When determining what you hope to achieve from negotiations, consider these interests:

1. To improve employee rights and create enforceable rights.
2. To protect employees from adverse management decisions.
3. To build the steward system.
4. To increase employee participation in workplace discussions.
5. To build membership.
6. To pressure and expose bad managers.
7. To respond to employee problems.
8. To build NTEU as a union.
9. To monitor and evaluate marginal or new programs.
10. To build relationships.

A very important piece of collective bargaining is communication with employees in the bargaining unit. Include them as much as possible in the discussions. Find out what the real concerns are. Identify members and non-members and use the negotiations as an opportunity to get members involved and as an opportunity for NTEU to demonstrate what we can do.