

Legal Authorities - Chapter 6

A Union Representative needs to be aware of the Legal Authorities involved in representing bargaining unit employees. It is important to understand how the various authorities relate to each other, and how they enable or restrict the Union Representative's actions. This chapter will cover the following authorities:

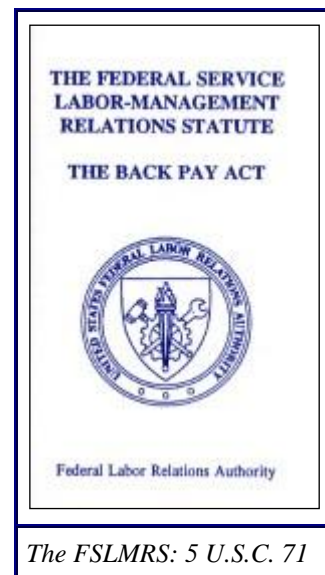
- Federal Laws
 - The Federal Service Labor Management Relations Statute (FSLMRS) - 5 U.S.C. Chapter 71
 - Other Federal Laws
- Federal Regulations
 - The Code of Federal Regulations (CFR)
 - The Foreign Affairs Manual (FAM)
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Federal Laws

The Federal Service Labor Management Relations Statute (FSLMRS)

The primary legal reference for federal union matters is the Federal Service Labor-Management Relations Statute (FSLMRS), codified at 5 U.S.C. § 71 (Title 5, United States Code, Chapter 71). It is sometimes referred to as simply, "the Statute". The FSLMRS is the statutory basis for the Federal Labor Relations Authority (FLRA) and the Federal Service Impasses Panel. It includes such topics as Management Rights, Representation Rights, the duty to bargain in good faith, and standards of conduct for labor organizations.

The FSLMRS has a number of requirements that affect the collective bargaining agreement (CBA) between Passport Services and NFFE Local 1998 (see below). Indeed, the CBA itself is a requirement of the FSLMRS (see 5 U.S.C. § 7103 and § 7116). The



negotiated grievance procedure found in Article 20 of the CBA is a requirement of 5 U.S.C. § 7121. Official time for Union representatives, found in Article 7 of the CBA, comes from 5 U.S.C. § 7131. The right of the Union to obtain information to file grievances and bargain (see Articles 12 and 20) comes from 5 U.S.C. § 7114. The deduction of Union dues detailed in Article 9 has its statutory basis in 5 U.S.C. § 7115.

Actions that can be taken under the FSLMRS include: an Unfair Labor Practice Charge (ULP), an Exception to an Arbitrator's Award, a Negotiability Appeal, and a Request for Information. The Union's collective bargaining agreement ("contract") with Management and the negotiated grievance procedure originate from requirements in the FSLMRS.

Other Federal Laws

As a Union Steward, it is necessary to be familiar with other laws that affect the federal workplace. The United States Code is the body of laws passed by Congress that govern our nation: United States Code. Many of the laws relating to federal employees are found in *Title 5 – Government Organization and Employees* (such as the FSLMRS, listed above), but there are other important laws in other titles. For example, *Title 29 – Labor* includes the Fair Labor Standards Act (FLSA). Some of the laws you will need to be familiar with include the following:

- The Back Pay Act – 5 U.S.C. § 5596 – governs the payment of wages in cases where an employee was "affected by an unjustified or unwarranted personnel action", including "the omission or failure to take an action or confer a benefit". Under the back pay act, an employee can recover back pay, interest, and attorney's fees in cases such as retroactive promotions and overturned suspensions.
- The Work Schedules Act of 1982 – 5 U.S.C. § 6120 - § 6133 – governs flexible and compressed work schedules. One key point about this law is that the work schedules it authorizes are fully negotiable – meaning there is a legal obligation on the part of Management to negotiate over them – regardless of the Management Rights provisions in the FSLMRS.
- The Federal Employees Family Friendly Leave Act (PL103-388, as amended) – amended 5 U.S.C. 6307 – allows employees up to 13 days of sick leave each year to: provide care for a family member with a serious medical or mental condition, to attend to a family member receiving medical, dental, or optical examination or treatment; or to make arrangements or attend the funeral of a family member.
- Family & Medical Leave Act – 5 U.S.C. 6382 – allows employees to use 12 administrative workweeks of leave during any 12-month period for: the

birth of a child; adoption or foster care; care of an employee's spouse, child, or parent with a serious health condition; or the employee's own serious health condition.

Federal Regulations

The Code of Federal Regulations (CFR)

The Code of Federal Regulations are the implementing rules promulgated by Federal agencies in order to execute laws. The Administrative Procedures Act (APA) governs the manner in which Federal agencies enact rules through the CFR. Generally speaking, the APA requires that agencies first publish a notice of a proposed rule in the Federal Register in order to give the public and interested parties the opportunity to comment.

The Foreign Affairs Manual (FAM)

The Foreign Affairs Manual contains the regulations that implement the policies and procedures at the Department of State. Passport Services employees are familiar with the 7 FAM as that contains passport and citizenship policies, but there are a lot of other FAM provisions that relate to employees. Personnel rules are found in the 3 FAM. The 12 FAM has security clearance rules.

One important concept to keep in mind is that where this is a conflict between the FAM and the Master Agreement, the language in the Master Agreement rules. According to Article 12, Section 3 of the Master Agreement:

LEGAL AND CONTRACTUAL AUTHORITY:

- a. To the extent that provisions of the Foreign Affairs Manual (FAM) are in conflict with this Master Agreement, the provisions of this Master Agreement prevail for this bargaining unit....

Legal Rulings

Court Decisions

Disputes between labor and Management sometimes have to be settled by the courts. Only federal courts (District Courts, Appeals Courts, and the Supreme Court) have jurisdiction over these matters. Disagreements reach the courts either through lawsuits or through appeals of final decisions issued by the

Federal Labor Relations Authority (FLRA). For example, in 1999 the U.S. Supreme Court ruled in *National Federation of Federal Employees v. United States Dep't of the Interior*, 526 U.S. 86 (1999), reviewing *United States Dep't of the Interior v. FLRA*, 132 F.3d 157 (4th Cir. 1997), on a case involving mid-term bargaining. According to the FLRA's website:

The Supreme Court remanded the Fourth Circuit's decision in which the Fourth Circuit held that the Agency had no obligation to bargain endterm over a collective bargaining agreement provision to permit negotiations over Union-initiated midterm proposals. Regarding the issue of midterm bargaining, the Supreme Court concluded that the Authority's interpretation of the Statute is entitled to deference and vacated the Fourth Circuit's decision in *United States Dep't of the Interior v. FLRA*, 132 F.3d 157 (4th Cir. 1997), that an agency is not obligated to bargain over a proposal, offered during term negotiations, that would require it to engage in union-initiated midterm bargaining. The Court rejected the Fourth Circuit's premise that the Statute imposes no obligation on Federal agencies to bargain midterm and held that the Statute was "sufficiently ambiguous" as to require deference to the Authority's interpretation. The Court stated that it was up to the Authority to determine "whether, when, where, and what sort of midterm bargaining is required." The Court remanded the case to the Fourth Circuit, which, in turn, remanded the case to the Authority for proceedings consistent with the opinion of the Supreme Court.

FLRA Rulings

Most legal disputes between the Union and Management do not reach the courts; instead they are settled by the Federal Labor Relations Authority (FLRA). The FLRA has 5 responsibilities:



- 1) resolving Unfair Labor Practice (ULP) charges – a charge that either an Agency or occasionally a Union has violated 5 U.S.C. 7116;
- 2) determining appropriate units of bargaining unit employees (including determining whether a position that Management says is outside the unit should be included or excluded from the unit);
- 3) deciding appeals – called “exceptions” – of decisions/awards issued by arbitrators;
- 4) deciding negotiability appeals – whether there is a legal obligation to bargain over an issue; and
- 5) resolving bargaining impasses – making a final decision when a Union and an Agency cannot reach agreement through negotiations.

The last type of case – **bargaining impasses** – is handled by the Federal

Service Impasses Panel (FSIP) and involves a decision on the merits of a proposal, not legal matters, and decisions are not considered universally precedent-setting.

Decisions on **negotiability appeals** are legal rulings on whether Management has an obligation to bargain over a Union's proposal on a subject, and often revolve around whether or not the proposal infringes on Management Rights under 5 U.S.C. 7106. These cases are decided by a 3-member panel simply called, "The Authority". NFFE Local 1998 has only filed two Negotiability Appeals. One involved Management's unilateral termination of some compressed work schedules; the other concerned the Union's right to make proposals relating to renovations of office space. In both cases, the Authority ruled for the Union and ordered Management to bargain over the Union's proposals, in the first case, ordering Management to "maintain the status quo".

Unfair Labor Practice charges are filed at one of the seven regional offices of the FLRA and they are decided, after an investigation, by that particular FLRA Regional Director. NFFE Local 1998 has filed ULP's on: failure to timely deduct Union dues, changes in performance standards, discrimination based on protected Union activity, Management bypassing the Union to survey employees over working conditions, refusing to negotiate, and changes in working conditions for which there was no notice or opportunity to bargain.

When a union files a grievance, and that grievance is not settled via the negotiated grievance procedure, the case can be brought to an arbitrator who is an independent decision maker and judge who decides the merits of the case. When either side disagrees with the legal basis for the decision, an **Exception to an Arbitrator's Award** can be filed with the FLRA. In 1994, when NFFE Local 1998 won an arbitration case on the very first use of contractors (non-government workers) at the National Passport Center (NPC), Management filed an exception to that award with the FLRA and eventually prevailed.

The FLRA is also charged with determining what groups of employees are properly organized into one bargaining unit – for the purposes of being represented by a labor organization – and also determining which employees may, and which may not, be considered "bargaining unit employees" (i.e., eligible for union membership and union representation). NFFE Local 1998 had its initial **Certificate of Representation** issued by the FLRA on October 19, 1981 and also had to subsequent certificates issued to clarify the bargaining unit.

Whenever Management claims that a staff member cannot be considered a bargaining unit employee, the Union can file a **Clarification of Unit** with the FLRA. The FLRA has the sole authority to answer this question, and it is not subject to either a grievance or to negotiations. When Management declared that certain positions (Systems Administrator, Operations Officer, Regional

Training Coordinator, etc.) were not part of the bargaining unit, the Union filed a Clarification of Unit with the FLRA. After a number of discussions with the FLRA official, on February 27, 2009 the Union and Management agreed that the Union would withdraw the petition and Management would recognize that the Operations Officers in the various Passport Agencies/Centers were indeed part of the bargaining unit. Employees of PPT/L/LE contacted the OIG to request a desk audit of their work, which resulted in the agency agreeing to classify them as bargaining unit employees.

Collective Bargaining Agreement (CBA) – the “Master Agreement”

The Collective Bargaining Agreement

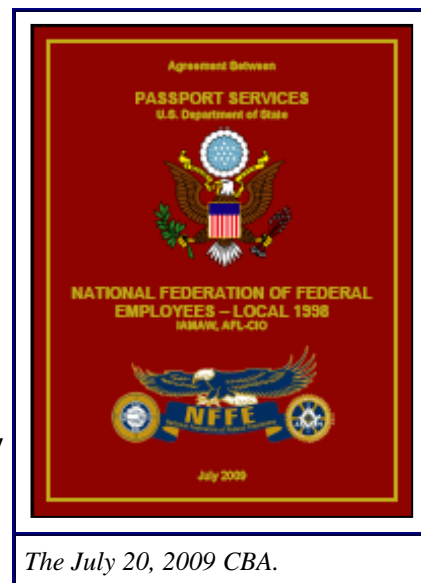
The FSLMRS calls for Management and the Union to collectively bargain over workplace issues and to produce a collective bargaining agreement. This is also called the “Master Agreement”, “contract”, “CBA”, “Union Agreement”, or simply the “Agreement”. Violations of the contract can be grieved through the negotiated grievance procedure, which is part of the contract itself.

The current contract between NFFE Local 1998 and Passport Services went into effect on July 20, 2009.

Amendments and Supplements

The Master Agreement (CBA) can be amended by mutual agreement of both parties at the national level. According to Article 12, Section 3b:

The Master Agreement is controlling and neither the Union nor Management at any level may make proposals in conflict with this Master Agreement. Only the national Parties may reopen/amend the Master Agreement during its term and only upon mutual agreement (see Article 38). The national Parties may supplement this Master Agreement in accordance with the provisions of this Article.



The July 20, 2009 CBA.

An amendment is a change to the wording of the current CBA. A supplement is an addition to the CBA covering a topic not already addressed by the CBA.

The current collective bargaining agreement has not been amended, although

bargaining took place on a proposed transfer amendment.

The Union considers the August 25, 2009 revisions to the July 20, 2009 CBA to be a mega-amendment. There were over one hundred changes, mostly minor, spread out over dozens of articles. This happened because the head of the agency objected to some provisions that Management had negotiated.

Local Agreements

Local office Management and the Senior Steward and Steward(s) for each office may negotiate local agreements on a number of issues, under the authority of either Article 12 or Article 4 of the Master Agreement. These include work schedules, food and drink policies, desk arrangements, headphone policies, dress code, and other issues. Violations of these local agreements are subject to grievances just like violations of the contract itself. Article 12, Section 16 of the Master Agreement has a list of topics that can be negotiated at the local level. However, that list is not all-inclusive. It is just a list of examples. Here is the list:

- i. Dress code
- ii. Food and drink policy
- iii. Leave scheduling
- iv. Headphones
- v. Employee recognition
- vi. Work schedules (work hours, work week, and the availability of Alternate Work Schedules)
- vii. Emergency plans and supplies
- viii. Parking spaces
- ix. Desk sharing
- x. Office moves/changes affecting more than one bargaining unit employee.
- xi. Desk assignments and arrangements

Other topics mentioned in the CBA that may be negotiated at the local level:

- Additional Union bulletin boards (Article 8, Section 5)
- Duty Officer schedule (Article 30, Section 2)

Unilateral changes by Management to local agreements are subject to either grievances or Unfair Labor Practice charges. This is spelled out in Article 12, Section 7:

PROHIBITION ON UNILATERAL CHANGES: The Employer agrees that it will not unilaterally implement changes in personnel policies or practices or other general conditions of employment, including those originating from terms of dispute settlement agreements, unless Management is

taking an action due to an emergency in accordance with 5 U.S.C. 7106(a)(2)(D) or the date of implementation is required by law. In these situations, post-implementation issue resolution or negotiations may be appropriate.

Past Practice

Past practices are in essence unwritten rules or arrangements regarding working conditions that have been developed and used over time. Per federal labor law rulings and the negotiated agreement, these practices are considered to be part of the negotiated agreement even though they are not specifically included. An example would be the use of headphones to listen to music while working. If this practice has been going on with the knowledge and (implicit) permission of Management, then Management cannot unilaterally terminate or change this policy. A violation of a past practice can be grieved, and changing a past practice must be done through means identical to changing a negotiated agreement (e.g., collective bargaining).

According to Article 12, Section 6 of the Master Agreement:

PAST PRACTICES: Where established working conditions or past practices relating to conditions of employment exist that are not in conflict with this Master Agreement or its amendments, the conditions or practices may be continued until either party pursues and accomplishes changes through procedures that conform to legal and regulatory requirements. Unique past practices developed in one location/office are only considered past practices in that office. Past practices that are nationwide apply to all bargaining unit employees.

Revised April 10, 2012