

Expanded Scope of Bargaining With National Security Safeguards [34]

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:

This is a mission-centered labor relations system built on the foundation of the current system but tailored to recognize the unique national security aspect of the Department's mission concerning protection of the Homeland. It continues to recognize that collective bargaining is in the public interest. There would be a continuation of existing laws, agreements, recognitions and procedures in that all sections of Chapter 71 continue unless specifically modified or deleted.

Key Features:

Change and Expedite the bargaining process:

- Change the scope of bargaining by allowing bargaining over wages, hours of work, and other terms and conditions of employment, but provide no duty to bargain over conditions of employment set by statute or over the agency's unique mission.
- Negotiations between the parties would be at the level of exclusive recognition unless changes are proposed at a lower level that will impact only a portion of the unit in which case the parties could agree to bargain at the lower level.
- Require pre-decisional consultation over changes pertaining to permissive topics (numbers, types, and grades and methods and means) if the agency elects not to negotiate the substance. Retain pre-implementation procedure and appropriate arrangements bargaining over permissive topics.
- Require that term negotiations (including mediation) be completed within 180 days after proposals are submitted. Mid-term bargaining and mediation must be completed within 45 days after proposals are submitted. The parties could extend the time frames by mutual agreement. There would be no impasses permitted over ground rules and the parties would be required to meet at reasonable times, places and frequency to bargain. If negotiations are not completed within the time frames, disputes advance directly to the DHS Labor Relations Board or to a private arbitrator with the mutual consent of the parties, for decision. The failure of the parties to bargain in good faith, or delaying the process, e.g. by insisting on certain ground rules could be considered in making a decision. The parties would not need the Board's approval to select a private arbitrator. The Board would be required to act within 30 days of receiving a dispute, except that information disputes would have to be resolved within 5 business days from submission.

Improve the Impasses Procedure and Dispute Resolutions Processes

- Eliminate the current negotiability process; all issues concerning the duty to bargain would be resolved by the new DHS Labor Relations Board, except issues concerning the underlying duty to bargain, e.g. unilateral implementation, which could still be resolved through the ULP process with the FLRA, as well as the DHS Board.
- Impasses would be mediated by the FMCS, and the parties could, by mutual agreement, agree to bypass the FMCS and proceed directly to the next step of the impasse resolution procedure. If voluntary agreement is not reached after mediation (if any) then the parties would submit the impasse to the DHS Board or to a private arbitrator, and the parties would not need Board approval to use a private arbitrator. There would be no agency head review of agreements

Enhance dispute resolution:

- Mandate ADR procedures (mediation) at a low level of discipline/adverse actions grievances; if mediation does not result in settlement, the mediator would issue a recommendation. If the recommendation is accepted by the employee and the Union, the matter is resolved. If not, the matter may go forward. The deliberations would be confidential, and if the process was not successful, the employer would be barred from bringing another action on the same information and facts.
- Require a joint labor-management dispute resolution panel consider all grievances invoked to arbitration. The panel would be trained and empowered to mediate disputes, and issue recommendations. If the recommendation is accepted, the matter is resolved, if not, it goes forward.
- Create and establish a 3 member DHS Labor Relations Board and staff to resolve 1) negotiability disputes; 2) allegations of bad faith bargaining during the bargaining session; 3) compelling need determinations; 4) bargaining impasses; and 5) bargaining information requests/disputes. All bargaining-related issues (except information requests) are to be resolved at the same time an impasse is considered (a one-time one-stop forum for bargaining issues). Any "covered by" arguments to bargaining would be limited to specific contract provisions or specific contract proposals. Information disputes would be resolved on an expedited basis. The Board's powers would be comparable to those of the FSIP, except the Board would be empowered to make negotiability decisions and rule on bargaining-related ULPS. All other ULPs would continue to be decided by the FLRA.
- DHS Board members would be selected by having one designated by the Secretary, one member designated by the 3 largest DHS unions, and one jointly selected by the Secretary and the 3 unions. If the parties cannot agree on the third member, then the parties would request and strike names from a list of qualified candidates prepared and submitted by the FMCS. Members would be retained on an as-need per diem basis comparable to the GAO Board and the Foreign Service Board at the Department of State. They would serve 5 year terms.
- There would be judicial review of Board decisions, which would be an essential part of the process.
- The FLRA would retain its current functions that are not transferred to the new Board.
- ULP remedies would be required to include a *status quo ante* (make-whole) order.
- Employees would be required to be notified of their right to representation during an investigatory interview.
- The grievance procedure is expanded to include disputes over pay, examinations, certifications, appointments and position classification matters.
- Time limits in grievance processes would be adhered to strictly, subject to mutually-agreed extensions. Failure of the union to be timely results in the matter being null and void with prejudice; failure of the agency to be timely results in the remedy sought being implemented.
- Arbitrations of suspensions of 14 days or less would be subject to an expedited process. There would be no transcripts, post-hearing briefs, and the arbitrator would rule at the conclusion of the parties' presentations. A written decision would follow within 30 days. These decisions would not be subject to exceptions or appeals.

Establish Mandatory Collaborative Committees

- Presidents of the 3 largest DHS unions and the Secretary or his designees serve on a national collaborative committee, to meet quarterly, or more frequently by agreement, to discuss mission-related issues. Regional and local DHS committees would also be required. By mutual agreement, discussions of negotiable conditions of employment could take place at committee meetings. Parties would be bound by any agreement reached concerning conditions of employment and no further bargaining would be required. Conditions of employment discussed by the parties but over which there is no agreement, would be subject to an expedited bargaining process if either party still wanted to pursue issues.

National Security:

- Insert the following definition of national security into the regulations for the purpose of administering labor relations: National Security means those sensitive activities of the DHS that are directly related to the protection and preservation of the military, economic and productive strength of the United States, including the security of the government in domestic and foreign affairs, against and from espionage, sabotage, subversion, foreign aggression, and any other illegal acts which adversely affect the national defense. Threats that only have a general impact on the general welfare of the United States and are not related to internal subversion or foreign aggression are not related to national security as it relates to labor relations.

Expedited Ability to Act.

- DHS may, without pre-implementation bargaining, implement changes to conditions of employment not covered by a collective bargaining agreement when 1) changes are necessary to protect national security; and 2) there is a clear conflict between bargaining and national security. In these instances, pre-implementation notice and consultation would be required, along with post-implementation bargaining upon the request of the union. The DHS would be required to take all practicable steps to lessen the impact of the changes on employees and use procedures that ensure a reasonable degree of fairness. An *alternative* would be to substitute an expedited bargaining schedule (10 days or less) for the agency's right to implement without pre-implementation bargaining. The time could be extended only by mutual agreement.
- DHS may re-open bargaining over portions of a collective bargaining agreement when 1) changes are necessary to protect national security, and 2) there is a clear conflict between the agreement and national security. If no agreement is reached within 10 days of the re-opener (or even a shorter time if warranted by exigent circumstances) DHS may implement changes to the agreement prior to the completion of bargaining.
- If the national security situation lasts more than 30 days, the agency would have the burden of showing why impact and implementation proposals should not be implemented or provisions of an agreement should not be reinstated. There would be a mandatory *status quo ante* remedy if an arbitrator or DHS Board finds through the ULP process that the situation did not qualify for this special bargaining approach because there was no national security matter or because there was no conflict between bargaining and national security or between an existing agreement and national security. If the information involving any threat is sensitive and cannot be in the public domain, the DHS Board or an arbitrator could review the information *in camera* in order to make a determination.
- The Secretary would be the official to make the national security declarations of emergency.

Suspension of Bargaining :

- The Secretary may issue an order temporarily suspending collective bargaining (including existing agreements) and take action necessary because of threats to national security. The action must be bargained no later than 30 days following the action taken, unless the threat to national security is continuing. In that case, bargaining would occur not later than 30 days following the cessation of the national security threat. Note: this equates to the DHS current ability to act during an emergency.

Executive Order Action:

- The President of the United States shall retain the authority to use an Executive Order to exclude positions or groups from collective bargaining on the basis of national security. In view of the right to suspend bargaining and collective bargaining agreements, there should be no need to continue the use of blanket bargaining unit exclusions for intelligence, counter-intelligence, investigative or security work which directly affects national security, unless: the position presents a conflict of interest, such as an

Expanded Scope of Bargaining With National Security Safeguards [34]

investigator who does background investigations of employees, or an internal affairs agent who does investigations involving allegations of employee wrongdoing and could not be in a bargaining unit and bargain at arms length, or the position or information concerning the position cannot be in the public domain.

Sub-Options:

Bargaining:

- Bargaining would be required over wages, hours and other terms and conditions of employment; but no duty to bargain over conditions of employment set by statute; agency mission; numbers of employees; actions necessary to carry out the mission in an emergency. Pre-decisional consultation would be required over decisions that relate to non-negotiable matters, and procedures and appropriate arrangements bargaining.
- Bargaining would be required over currently negotiable topics and additionally pay and classification matters.

Selection of DHS Board members:

- Boards would be created under the process outlined in the main option for each Bureau of the Department.
- DHS Board members would be appointed by the President, confirmed by the Senate with no more than 2 members from the same political party.

Mandatory Collaborative Committees :

- In addition to, or as an alternative to the above departmental committees, bureau-specific collaborative committees could be established. These committees would provide the means for ongoing pre-decisional input.

Relation to Other Options:

- The options present a system that coordinates with the PPC options by providing a means of appeal and accountability for those who administer the systems and to whom the systems apply.
- The options would allow for collective bargaining within the new pay and performance management systems.

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

- Recognizes and supports the mission of the DHS and the need to be able to react and move quickly in situations involving the national security.
- Could enhance the flexibility of the DHS in administration of the agency and its mission.
- Could allow DHS to respond and implement decisions on a timely basis.

Expanded Scope of Bargaining With National Security Safeguards [34]

- Allows for the continuation of meaningful collective bargaining.
- Could provide flexibility in bargaining by allowing the parties to agree to bargain at levels below that of exclusive recognition.
- Clarifies union and management rights in the new agency.
- Could expedite labor relations processes that were seen as slow and confusing.
- Should provide for a cooperative, give-and-take environment.
- Should provide a means to hold those accountable who are responsible for administering the system, through challenges to their actions by employees.
- Might maintain objectivity of the review process by use of neutral arbitrators or joint selections to the DHS Board.
- Should eliminate disputes over definitions of national security as it relates to labor relations.
- The continuation of existing laws, agreements, recognitions and procedures provides stability and trust to the work environment.

Possible Problems/Challenges

- Might have an adverse impact on management flexibility.
- National security should be defined either in statute or a regulation pertaining to national security but not in a labor relations policy; the standard used in this option could inadvertently expose the Department to security weaknesses that cannot be anticipated in advance.
- Requiring pay bargaining in an agency the size of DHS presents enormous challenges and complexities and represents a dramatic departure from current labor relations program.
- Pay bargaining raises concerns regarding the possibility that it might result in significantly higher salaries.
- Collective bargaining might result in very complex pay systems; the complexity will be magnified if multiple systems are created.
- Expanding collective bargaining coverage and scope might require a redirection of operational resources from the field.
- To the extent this option would provide collective bargaining rights for employees of the United States Secret Service, it could result in an adverse impact on national security; labor relations obligations could require disclosure to unions of information that is either classified or law enforcement sensitive, which could result in operational security concerns.
- Including panel members selected by the 3 major DHS unions might pose a conflict of interest if the panel were required to review appeals of non-union employees or managers.
- Requiring pre-decisional consultation when management elects not to negotiate over permissive topics might delay actions and undermine operational flexibility.
- Use of multiple adjudicators -- the Labor Relations Board, FLRA, private arbitrators -- for different disputes could be even more complex than the current system; there could be overlapping disputes and forum shopping.
- Elimination of agency head review diminishes the Secretary's authority to reject illegal contract provisions.
- Expansion of negotiated grievance procedure to cover pay, examinations, classification, etc. opens traditional management areas to 3rd party review.
- Mandating that the employee prevail in any grievance where management fails to respond in time could result in outcomes contrary to contractual precedent, public policy, or law.

Other Implications

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

Expanded Scope of Bargaining With National Security Safeguards [34]

Cost

- There could be a cost in setting up a new Board, but the cost should be outweighed by the expedited processes available with a new system.

Transition & Implementation:

- During the transition to a new DHS Board, all cases previously filed with other third party panels or boards will continue to be processed by these groups to conclusion. All cases or matters raised after the effective date of the creation of a new board or panel would go to it.
- Likewise any bargaining that has commenced prior to an effective date, will continue under the procedures in effect at the commencement of bargaining.

Expanded Scope of Bargaining With National Security Safeguards [34]

Detailed Description
By System Component and System Element

L		Labor Relations System
System elements:		Summary description:
1	Administration	<ul style="list-style-type: none"> • Will retain the FLRA for certain matters, and have a DHS board for others. • FLRA will continue its traditional functions and jurisdiction and the DHS Board will handle all bargaining issues. • All bargaining issues will be submitted and resolved at the time impasses are presented, except information request which are done on an expedited basis. • Appointments to the Board would be made jointly by the parties or alternatively appointed by the President with the approval of the Senate and with no more than 2 members from any one political party. • Judicial review would be an essential part of any process.
2	Employee rights	<ul style="list-style-type: none"> • Employees would continue to have the right to form, join and assist labor organizations. • Blanket exclusions based on national security would not be used. • National security would have a definition for the purposes of labor relations. • Collective bargaining is in the public interest and is compatible with national security.
3	Union rights & obligations	<ul style="list-style-type: none"> • Scope of bargaining is changed. • Pre-decisional input and collaboration is mandated. • ADR would be required.
4	Management rights	<ul style="list-style-type: none"> • 7106 would continue in its present form except add: Nothing in this section shall preclude any bureau or subdivision from agreeing to consult on a pre-decisional basis with respect to numbers, types and grades of employees or positions assigned to any organization, work project or tour of duty, or on the methods and means of performing the work.
5	Bargaining unit	<ul style="list-style-type: none"> • Unit determinations continue to be made by the FLRA on the basis of an appropriate unit and using the criteria of community of interest, effective dealings and efficiency of agency operations. • Agency management shall remain neutral in any petition to consolidate bargaining units.
6	Negotiations	<ul style="list-style-type: none"> • Bargaining is expedited. • Bargaining has finite time limits. • Bargaining is at the level of recognition unless agreed otherwise. • There would be no ground rules bargaining impasses. • The administration of bargaining disputes is centralized. • Bargaining dispute resolutions are dealt with at the conclusion of bargaining. • Bargaining information requests are handled as they arise during bargaining and on an expedited basis.

Expanded Scope of Bargaining With National Security Safeguards [34]

L Labor Relations System		
System elements:		Summary description:
7	Unfair labor practices	<ul style="list-style-type: none"> • ULPs continue to be the jurisdiction of the FLRA, except for those that deal with the duty to bargain where there would be concurrent jurisdiction with the DHS Board.
8	Grievance/ arbitration	<ul style="list-style-type: none"> • Section 7121 would remain. • The definition of grievance would be that set out in Section 7102. • Arbitration would be required as a final step for unresolved cases. • The Arbitration process would be defined in the appropriate collective bargaining agreements. • Arbitration procedures for discipline of 14 days or less would be on an expedited basis with no transcripts, and no briefs. • There would be bench decisions at the conclusion of the parties' presentations with written decisions to follow within 30 days. • There would be no exceptions or appeals filed to decisions involving discipline of 14 days or less.
9	Dues allotments	<ul style="list-style-type: none"> • Section 7115 is modified that in any case where the agency acts at its risk and does not process an allotment, the remedy shall be that the agency reimburses the union, and may not recover the money from the employee. • Dues allotments would be good for a period of one year, or the length of the collective bargaining agreement, whichever is greater.
10	Official time	<ul style="list-style-type: none"> • Section 7131 is modified so that the minimum official time allowed is "reasonable time" and the actual limits would be set out in the collective bargaining agreements.
11	Evaluation	<ul style="list-style-type: none"> • Required on a periodic basis with mandatory union participation. • Results are reported as appropriate.