

DoD Labor Relations Guidance
National Emergency
October 9, 2001

Background:

On September 14, 2001, President Bush issued Proclamation 7463, Declaration of National Emergency by Reason of Certain Terrorists Attacks. This proclamation states that “a national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States.” The President declared that the national emergency has existed since September 11, 2001, and has exercised authorities under various statutes.

Questions have been raised concerning what impact Proclamation 7463 has on our statutory obligations under 5 USC Chapter 71, the Federal Service Labor-Management Relations Statute (Statute). This guidance is intended to address the most commonly encountered questions on this matter.

Questions and Answers:

- 1) Does Proclamation 7463 override the requirements of the Federal Service Labor-Management Relations Statute?

No. Proclamation 7463 **does not** override your statutory obligations under the Statute. While the Proclamation is intended to provide the President certain flexibilities and authorities, it does not relieve you of any obligations you have under the Statute. The Statute continues to apply to the Department of Defense during this national emergency.

- 2) Since there is a national emergency and management has the right under 5 USC 7106(a)(2)(D) to take whatever actions may be necessary to carry out the agency mission during emergencies, what are our obligations concerning changes to conditions of employment?

As a general rule, the Authority has held that prior to implementing a change in conditions of employment of bargaining unit employees, an agency is required to provide the exclusive representative with notice and an opportunity to bargain over those aspects of the change that are within the duty to bargain. See 55 FLRA 848, 852.

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In the case of emergencies under 5 USC 7106(a)(2)(D), the Authority has recognized that there may be instances where the agency may implement a change due to an emergency situation and bargain with the union on a post-implementation basis. See 29 FLRA 307, 325. With this in mind, there may be an emergency that requires an immediate response from the agency and the response will affect conditions of employment of bargaining unit members. In this case, you would advise the union of the immediate changes being made and offer to conduct post-implementation bargaining with the union over these changes to the extent that conditions of employment are affected. Any agreement you reach with your union under these circumstances should be applied retroactively, if practical.

However, you must *be careful* when considering making unilateral changes under these conditions. We anticipate that these circumstances will be rare and we note that it is rare that the Authority has accepted this defense from an agency when making unilateral changes. Also, the mere fact that the President has declared a national emergency is **NOT** in itself a basis for asserting that any or all unilateral changes to conditions of employment are now necessary due to an emergency within the meaning of 5 USC 7106(a)(2)(D). In each instance, you should determine whether the change being considered concerns an emergency that necessitates immediate action. If an unfair labor practice charge is filed against you for making unilateral changes due to an emergency, you should be prepared to establish that an “overriding exigency” existed that required an immediate response.

In 43 FLRA 1565, the Authority rejected the agency’s contention that Desert Shield constituted an emergency situation that would allow it to unilaterally implement a restriction on leave usage without giving notice to the exclusive representative and giving it an opportunity to bargain. In this decision, the Authority stated that it previously ruled that an agency, to avoid a bargaining obligation, must do more than make a bare claim that certain actions cannot be taken because of a military operation.

The more likely situations during an emergency are those situations where there is an exigency that does not require an immediate response from the agency, but does require a response from the agency in the near future that will affect conditions of employment. Under these circumstances, there should be adequate time to notify the union about the impending change in conditions of employment and an opportunity to bargain. However, there may not be adequate

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time to complete the bargaining process before it is necessary to implement the change. In this situation, the agency determines that a unilateral change, before the bargaining process is completed, is necessary for the functioning of the agency.

A party asserting this defense must establish, with evidence, that its actions were in fact consistent with the necessary functioning of the agency, such that a delay in implementation would have impeded the agency's ability to effectively and efficiently carry out its mission. See 55 FLRA 892. A similar argument could be made when immediate changes are being made (as previously discussed) due to an "overriding exigency. The Authority uses the terms "overriding exigency" and "necessary functioning of the agency" interchangeably. See 55 FLRA 892 (where ALJ notes that for an agency to establish a change is for the necessary functioning of the agency, it requires "evidence that an overriding exigency existed which required immediate attention). See also 29 FLRA 734, 740-741.

Again, even when you implement the change for the necessary functioning of the agency, this does not relieve you entirely of your statutory obligations. You are still obligated to bargain with your union on a post-implementation basis. See 29 FLRA 307, 325. Any agreement you reach with your union under these circumstances should be applied retroactively, if practical.

- 3) In order to meet our mission requirements during this national emergency, we believe it may be necessary to terminate flexible and compressed work schedules. On what basis may we terminate such schedules for bargaining unit employees?

The Federal Employees Flexible and Compressed Work Schedules Act of 1982 (Work Schedules Act) intends the establishment and termination of alternative work schedules to be fully negotiable, subject only to the provisions of the Work Schedules Act itself. See 52 FLRA 1265, 1293. Thus, management cannot assert a management right under the Statute as a basis for terminating an alternative work schedule.

The criteria for terminating an alternative work schedule is found at 5 USC 6131. Specifically, 5 USC 6131(a) states that "if the head of an agency finds that a particular flexible or compressed work schedule under this subchapter has had or would have an adverse agency impact, the agency shall promptly determine not to (1) establish such schedule; or (2) continue such schedule, if the schedule has already been established." 5 USC 6131(b) defines "adverse agency impact" to

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mean “(1) a reduction of the productivity of the agency; (2) a diminished level of services furnished to the public by the agency; or (3) an increase in the cost of agency operations (other than a reasonable administrative cost relating to the process of establishing a flexible or compressed schedule).”

If you have an agreement with your union concerning alternative work schedules and wish to terminate the schedule, 5 USC 6131(c)(3)(A) requires you to reopen the agreement with your union to seek termination of the schedule involved. However, you should check your existing collective bargaining agreement to see whether it already gives management sufficient leeway to make adjustments required to accomplish the mission. If not, then you are required to negotiate with the union. If you reach impasse in bargaining with respect to terminating such schedules, the impasse shall be presented to the Federal Service Impasses Panel for resolution.

Under 5 USC 6131(c)(3), the Panel is required to take final action in favor of the agency determination if there is evidence that an alternative work schedule has caused adverse agency impact. The Panel has indicated that for an agency to establish adverse agency impact, it will be looking for certain information. The Panel encourages the agency to present information on the methodology used to collect the evidence to support its determination there is adverse agency impact. It is also expected, that the agency would rely on evidence from the time period where there is adverse agency impact, rather than on evidence collected after the fact. When productivity accomplishments of two time periods are being compared, to the greatest extent possible, such evidence should be presented in like units that permit a fair comparison. Finally, if cost is a factor being raised, the actual costs should be presented and the connection between the cost and the work schedule explained. See 97 FSIP 107.

- 4) We understand the requirements for terminating an alternative work schedule, but what if we are unable to complete this bargaining before it is necessary to terminate the alternative work schedule?

In these instances, you must establish that the delay caused by lengthy negotiations is impeding the agency’s ability to effectively and efficiently carry out its mission. As a result, you would be terminating the alternative work schedules for the necessary functioning of the agency before bargaining is completed. Although bargaining is not completed before you terminate the schedule, you should continue negotiations. Any agreement you reach with

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your union under these circumstances should be applied retroactively, if practical.

In one case, a union filed an unfair labor practice charge against the agency when it unilaterally terminated a compressed work schedule without bargaining. The agency argued that because the compressed work schedule was causing “substantial adverse effects on work at the Headquarters office, [which at the same time] was facing an increased workload, change of mission with the onset of Desert Shield, and a shortage of staff, there was an urgent and compelling need to correct this situation.” The Authority ruled that the agency failed to establish that the unilateral change was consistent with the necessary functioning of the agency. The agency was found to have committed an unfair labor practice and ordered to reestablish the previous compressed work schedule. See 44 FLRA 599.

The Panel has also noted that in cases where the Employer has already implemented its decision to terminate an alternative work schedule and the Panel determines the agency finding is not supported by the evidence, it will order the Employer to restore the affected employees to their prior schedules. See 97 FSIP 107.

- 5) If we anticipate that we may need to make changes in working conditions due to an overriding exigency or for the necessary functioning of the agency, would you recommend that we inform our union that we may be unable to complete bargaining on certain future changes in working conditions arising from this emergency or handle this on a case-by-case basis?

It depends. While informing the union of this possibility in advance keeps the lines of communication open with your union, you also do not want to give the impression that you do not expect to meet bargaining obligations in all cases. We recommend that you make a determination on a case-by-case basis whether to make such changes due to overriding exigencies or for the necessary functioning of the agency. Establishing this very tough standard before the Federal Labor Relations Authority will be challenging for individual cases of unilateral changes. It is very unlikely that we could successfully defend before the Authority a “blanket” determination that all unilateral changes in the near future are due to overriding exigencies or for the necessary functioning of the agency. In any case, we recommend that you always contact your union to make them aware of any changes you intend to make before you make such changes.

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You should advise them of the change to be made, how it is connected to operations resulting from the national emergency, when you will conduct post-implementation bargaining, and that any agreement you reach will be applied retroactively, if practical.

The bottom line is our labor unions have been cooperative during past emergencies. We expect this to continue, especially if management keeps the lines of communication open with its unions. We encourage you to keep these lines of communication open during this national emergency. We also encourage you to use informal methods of cooperation and communication during this time, such as partnership.