

**GUIDE TO NEGOTIABILITY UNDER THE
FEDERAL SERVICE LABOR-MANAGEMENT
RELATIONS STATUTE**



(Updated June 17, 2013)

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FOREWORD

The [Federal Labor Relations Authority's](#) (FLRA's) three-Member, decisional component (the Authority) has prepared this Guide. The FLRA, an independent agency within the executive branch of the federal government, administers the labor-relations program under the [Federal Service Labor-Management Relations Statute](#) (the Statute)¹ for the federal sector.

A primary responsibility of the Authority under the Statute is to resolve "negotiability" appeals.² As discussed in further detail in this Guide, a union may file a negotiability appeal when: (1) an agency has claimed that the union's bargaining proposal is outside the statutory duty to bargain; or (2) an agency head has disapproved, as allegedly contrary to law, a contract that either an agency and a union have agreed to, or the [Federal Service Impasses Panel](#) (FSIP) has imposed.³

This Guide is designed to help parties understand the negotiability process and their rights and responsibilities in connection with that process. An understanding of the statutory and regulatory scheme will enhance the parties' ability to resolve their disputes as completely and expeditiously as possible.⁴ Given the broad range of substantive issues that can arise in the negotiability process, detailed discussions of specific subject matters of bargaining are beyond the scope of this Guide. Instead, this Guide is intended to provide parties with information concerning:

- the key terms and concepts involved in negotiability cases;
- the negotiability process;
- various bases for dismissing negotiability petitions;
- some complex, substantive issues that frequently arise in negotiability cases; and
- some of the most frequently cited Authority and U.S. Court of Appeals decisions.

This Guide is *not* an official interpretation of the Statute or the [FLRA's Regulations](#), and is not the Authority's official policy. It should not be considered as legal advice or as a substitute for adequate preparation and research by the party representatives. The case law in this area is constantly evolving. It is crucial that parties research court, Authority, and other administrative decisions that may apply to their particular cases. We encourage you to visit the FLRA's web site, www.flra.gov,

¹ [5 U.S.C. §§ 7101-7135](#).

² *Id.* §§ 7105(a)(2)(E) & 7117(c).

³ See [5 C.F.R. §§ 2424.2\(d\) & 2424.20-22](#).

⁴ [5 U.S.C. § 7117\(c\)\(6\)](#).

where you can: read the Statute and the FLRA's Regulations; download [forms](#) for union petitions for review, agency statements of position, union responses, and agency replies; file any of those documents using the FLRA's [electronic-filing \(eFiling\) system](#), which also may be accessed through the links from the emails that the FLRA's eFiling system automatically generates; and research [Authority decisions](#) in a variety of ways, including by using search terms. In addition, the FLRA's web site contains other information that may be useful to bargaining parties, such as: the Office of the General Counsel's [Unfair Labor Practice Case Law Outline](#), which includes additional information regarding the statutory duty to bargain; and information regarding the [FSIP process](#).

§ 1 TERMS AND CONCEPTS

1.1 Introduction

There are various terms and concepts that parties must be familiar with in order to understand the negotiability process and their responsibilities under that process. This section discusses some of the most significant of these terms and concepts.

1.2 Proposals

A proposal is any matter offered for bargaining that the parties have not yet agreed to.⁵ A proposal is the subject of a negotiability appeal when an agency has declared, during bargaining⁶ or FSIP proceedings,⁷ that the proposal is outside the duty to bargain.⁸

1.3 Provisions

A provision is contract language that an agency and a union have agreed to include in their collective-bargaining agreement,⁹ or that the FSIP has imposed as part of their agreement.¹⁰ A provision is the subject of a negotiability appeal when the agency head has disapproved the agreement as allegedly contrary to law during the process of “agency-head review” under [§ 7114\(c\) of the Statute](#) (which is discussed in [section 1.12](#) below).¹¹

1.4 How the Authority Determines the Meaning of Proposals and Provisions

Before the Authority can determine whether a proposal is within the duty to bargain, or whether a provision is consistent with law, the Authority must determine what the proposal or provision means. If the parties do not dispute the meaning of a proposal or provision, and that meaning is consistent with the proposal’s or provision’s wording, then the Authority bases its negotiability determination on the undisputed meaning.¹² In negotiability cases involving provisions, the Authority defers to the

⁵ [5 C.F.R. § 2424.2\(e\)](#).

⁶ *E.g.*, *NTEU*, [67 FLRA 24](#), 24 (2012) (*NTEU I*), *pet. for review filed sub nom. NTEU v. FLRA*, [No. 12-2574](#) (D.C. Cir. Dec. 26, 2012).

⁷ *See, e.g.*, *NFFE, Local 422*, [50 FLRA 121](#) (1995) (*Local 422*).

⁸ [5 C.F.R. § 2424.2\(c\)](#).

⁹ *E.g.*, *NTEU*, [65 FLRA 509](#), 514 (2011) (*NTEU II*) (Member Beck dissenting in part), *review denied sub nom., U.S. Dep’t of the Treasury, Bureau of the Public Debt, Wash., D.C. v. FLRA*, [670 F.3d 1315](#) (D.C. Cir. 2012).

¹⁰ *E.g.*, *POPA*, [59 FLRA 331](#), 332 (2003) (*POPA I*).

¹¹ [5 C.F.R. § 2424.2\(f\)](#).

¹² *E.g.*, *NTEU II*, [65 FLRA at 510](#).

meaning that the agency and union negotiators ascribe to it; the Authority does not defer to the agency head's interpretation of it.¹³

Where the parties dispute the meaning of a proposal or provision, the Authority looks to the proposal's or provision's plain wording and the union's explanation of the proposal's or provision's meaning.¹⁴ If the union's explanation is consistent with the plain wording, then the Authority adopts that explanation for the purpose of assessing the proposal's or the provision's negotiability.¹⁵ But when a union's explanation is inconsistent with the plain wording, the Authority does not adopt that explanation and, instead, bases the negotiability decision on the wording.¹⁶

The meaning that the Authority adopts in resolving a negotiability case applies "in other proceedings, unless modified by the parties through subsequent agreement."¹⁷

1.5 Mandatory Subjects of Bargaining

Mandatory subjects of bargaining are subjects that, upon request, a party must bargain over.¹⁸ These subjects include, among other things, procedures under [§ 7106\(b\)\(2\) of the Statute](#) and appropriate arrangements under [§ 7106\(b\)\(3\) of the Statute](#) (unless those procedures or appropriate arrangements are contrary to some other law).¹⁹

1.6 Prohibited Subjects of Bargaining

Prohibited subjects of bargaining are subjects that parties *cannot* agree to, even if they want to, because the law prohibits them from doing so.²⁰ For example, parties cannot agree to matters that affect a management right under [§ 7106\(a\) of the Statute](#) unless those matters fit within an exception to management's rights.²¹

¹³ See [id. at 514](#); *Int'l Bhd. of Elec. Workers, Local 350*, [55 FLRA 243](#), 244 (1999) (*Local 350*).

¹⁴ E.g., *NAGE, Local R-109*, [66 FLRA 278](#), 278 (2011) (*Local R-109*).

¹⁵ [Id.](#)

¹⁶ See, e.g., *IFPTE, Local 3*, [51 FLRA 451](#), 459 (1995).

¹⁷ *NATCA*, [64 FLRA 161](#), 161 n.2 (2009); see also *Ass'n of Civilian Technicians, Volunteer Chapter 103*, [55 FLRA 562](#), 564 n.9 (1999).

¹⁸ See, e.g., *AFGE, Local 32*, [51 FLRA 491](#), 497 n.11 (1995).

¹⁹ See, e.g., *NAIL, Local 5*, [67 FLRA 85](#), 89-92 (2012) (*Local 5*) (finding proposals to be appropriate arrangements and procedures, and directing bargaining over them); cf. *NTEU I*, [67 FLRA at 27 n.9](#) (proposal that is a procedure or appropriate arrangement is still outside the duty to bargain if it is contrary to law or government-wide regulation).

²⁰ See, e.g., *AFGE, Local 32*, [51 FLRA at 497 n.11](#).

²¹ See *NLRB Union, Local 21*, [36 FLRA 853](#), 857-60 (1990).

1.7 Permissive Subjects of Bargaining

Sometimes parties are *permitted* to bargain over matters even though they are not *required* to do so. These matters are called “permissive” subjects of bargaining.²² Some common examples are matters set forth in [§ 7106\(b\)\(1\) of the Statute](#),²³ supervisors’ and managers’ conditions of employment,²⁴ and agreements to bargain below the level of the agency at which bargaining between the agency and the union is required – also known as the “level of recognition.”²⁵

Agency heads cannot disapprove agreements concerning permissive subjects of bargaining.²⁶ That is, they cannot disapprove agreements merely because the agencies’ negotiators could have chosen not to bargain over the permissive subjects contained in those agreements.²⁷ So once an agency’s negotiators have chosen to reach an agreement concerning a permissive subject, the agency cannot later undo that choice for the duration of the agreement.²⁸

1.8 Negotiability Disputes

A negotiability dispute is a disagreement between a union and an agency “concerning the legality of a proposal or provision.”²⁹ Such a dispute exists when a union “disagrees with an agency contention that . . . a proposal is outside the duty to bargain, including disagreement with an agency contention that a proposal is bargainable only at [the agency’s] election.”³⁰ A negotiability dispute concerning a proposal may arise during bargaining,³¹ or when an agency claims, during FSIP proceedings, that the proposal is outside the duty to bargain.³² And negotiability disputes concerning provisions arise when a union “disagrees with an agency head’s disapproval of a provision as contrary to law.”³³

As discussed in [section 4.2](#) below, the Statute requires agencies to bargain only over “conditions of employment” of bargaining-unit employees,³⁴ so one type of negotiability dispute may involve a claim that a proposal does not concern such a

²² See, e.g., *AFGE, Local 32*, [51 FLRA at 497 n.11](#).

²³ [5 U.S.C. § 7106\(b\)\(1\)](#); see also [5 C.F.R. §§ 2424.25\(c\)\(1\)\(i\) & 2424.26\(c\)\(1\)\(i\)](#).

²⁴ E.g., *NAGE, Local R1-109*, [61 FLRA 588](#), 590-91 (2006).

²⁵ E.g., *NATCA, AFL-CIO*, [62 FLRA 174](#), 182 (2007) (*NATCA I*).

²⁶ E.g., *NTEU II*, [65 FLRA at 512](#).

²⁷ See *Ass’n of Civilian Technicians, Mont. Air Chapter No. 29 v. FLRA*, [22 F.3d 1150](#), 1155-56 (D.C. Cir. 1994).

²⁸ *Id.*

²⁹ [5 C.F.R. § 2424.2\(c\)](#).

³⁰ *Id.*

³¹ E.g., *NTEU I*, [67 FLRA at 24](#).

³² See, e.g., *Local 422*, [50 FLRA at 121-22](#).

³³ [5 C.F.R. § 2424.2\(c\)](#).

³⁴ [5 U.S.C. § 7103\(a\)\(12\)](#).

condition of employment. In addition, parties cannot reach agreements that are “inconsistent with any [f]ederal law or any [g]overnment-wide rule or regulation.”³⁵ Therefore, some examples of negotiability disputes include claims that proposals or provisions are inconsistent with: the Statute;³⁶ a federal statute other than the Statute;³⁷ an executive order;³⁸ or a government-wide regulation.³⁹ Further, as discussed in [section 4.5](#) below, agencies are not required to bargain over proposals that conflict with an agency rule or regulation for which there is a “compelling need,”⁴⁰ so a negotiability dispute may involve a claim that a proposal is inconsistent with such a rule or regulation.⁴¹

Agencies often rely on [§ 7106 of the Statute](#) to claim that a proposal or provision is nonnegotiable.⁴² Thus, some common examples of negotiability disputes include disagreements concerning whether a proposal or provision: (1) affects a management right under [§ 7106\(a\)](#); (2) involves a permissive subject under [§ 7106\(b\)\(1\)](#); (3) is a negotiable procedure under [§ 7106\(b\)\(2\)](#); or (4) is a negotiable, appropriate arrangement under [§ 7106\(b\)\(3\)](#).⁴³ This Guide discusses [§ 7106](#) in [section 4.3](#) below.

The Authority determines whether a negotiability dispute exists on a proposal-by-proposal or provision-by-provision basis: If some individual proposals or provisions in a negotiability appeal present negotiability disputes, but others do not, then the Authority will resolve the negotiability of only the proposals or provisions that present negotiability disputes.⁴⁴ For example, if an agency does not challenge a particular proposal’s legality, but declares it outside the duty to bargain only on the basis of a “bargaining-obligation dispute” (defined in [section 1.9](#) below) – such as a claim that the proposal is “covered by” the parties’ existing agreement (discussed in [section 4.7\(a\)](#) below) – then the Authority will not resolve whether that proposal is within the duty to bargain.⁴⁵ Instead, the Authority will “dismiss” the union’s petition as to that proposal.⁴⁶

³⁵ *Id.* [§ 7117\(a\)\(1\)](#).

³⁶ E.g., *AFGE, Local 1547*, [64 FLRA 813](#), 816-18 (2010).

³⁷ E.g., *NTEU*, [66 FLRA 809](#), 814 (2012) (*NTEU III*), *petition for rev. filed sub nom. Dep’t of the Treasury, IRS, Office of the Chief Counsel v. FLRA*, [No. 12-1456](#) (D.C. Cir. Nov. 20, 2012) (*IRS v. FLRA*) (proposal contrary to the Privacy Act).

³⁸ E.g., *NFFE, Local 1655*, [49 FLRA 874](#), 888-90 (1994).

³⁹ E.g., *AFGE, Local 1547*, [65 FLRA 911](#), 916-17 (2011) (*Local 1547*) (Member Beck dissenting in part), *review denied sub nom., U.S. Dep’t of the Air Force v. FLRA*, [680 F.3d 826](#) (D.C. Cir. 2012).

⁴⁰ [5 U.S.C. § 7117\(a\)\(2\)](#).

⁴¹ E.g., *NAGE, SEIU, Local R1-34*, [43 FLRA 1526](#), 1529-32 (1992).

⁴² See, e.g., *Local 5*, [67 FLRA at 86](#).

⁴³ See, e.g., *AFGE, Local 723*, [66 FLRA 639](#), 643-46 (2012) (*Local 723*).

⁴⁴ See *NATCA, Local ZHU*, [65 FLRA 738](#), 741 (2011) (*Local ZHU*).

⁴⁵ See *id.*

⁴⁶ See *id. at 745*.

1.9 Bargaining-Obligation Disputes

A bargaining-obligation dispute is a disagreement between a union and an agency concerning whether, in the specific circumstances of a particular case, the parties must bargain over a proposal that otherwise may be negotiable.⁴⁷ Bargaining-obligation disputes involve claims regarding whether the *Statute* requires bargaining – *not* claims regarding whether the parties’ *collective-bargaining agreement* requires bargaining.⁴⁸ Examples of bargaining-obligation disputes include agency claims that: (1) a proposal concerns a matter that is “covered by” a collective-bargaining agreement; (2) bargaining is not required over a change in bargaining-unit employees’ conditions of employment because the effect of the change is “de minimis”;⁴⁹ and (3) the union is attempting to bargain at the wrong level of the agency.⁵⁰ Those three examples are discussed in [sections 4.7\(a\), 4.7\(b\), and 4.7\(c\)](#) below.

If a negotiability proceeding involves both a negotiability dispute and a bargaining-obligation dispute, then the Authority may resolve both types of disputes in the negotiability proceeding.⁵¹ If the Authority resolves the bargaining-obligation dispute, then its decision will include an order to bargain, but will not include remedies that could be obtained in an unfair-labor-practice (ULP) proceeding under [§ 7118\(a\)\(7\) of the Statute](#), such as a cease-and-desist order or an order to post a notice.⁵²

If a case involves *only* a bargaining-obligation dispute, then the Authority will *not* resolve that dispute in a negotiability proceeding.⁵³ Instead, the Authority will dismiss the petition, or the portion of the petition that presents only a bargaining-obligation dispute.⁵⁴ Any resolution of those disputes would need to occur in other proceedings, such as ULP or grievance proceedings.⁵⁵

1.10 Use of the Term “Nonnegotiable”

In the past, the Authority used the term “nonnegotiable” to refer to both prohibited and permissive subjects of bargaining.⁵⁶ In *AFGE, Local 32*, the Authority stated that, consistent with the wording of the Statute, it would begin to describe

⁴⁷ [5 C.F.R. § 2424.2\(a\)](#).

⁴⁸ *E.g.*, *NTEU, Chapter 82*, [59 FLRA 627](#), 629 (2004).

⁴⁹ *Id.*

⁵⁰ *Prof'l Airways Sys. Specialists*, [59 FLRA 485](#), 488 n.4 (2003) (*PASS I*).

⁵¹ [5 C.F.R. § 2424.30\(b\)\(2\)](#).

⁵² *Id.* [§ 2424.40\(a\)](#).

⁵³ *Id.* [§ 2424.2\(d\)](#).

⁵⁴ *Id.*; *see also Local ZHU*, [65 FLRA at 741](#).

⁵⁵ *Cf.* [5 C.F.R. § 2424.30\(b\)\(2\)](#) (where bargaining-obligation dispute exists, Authority will inform union of any opportunity to file a ULP charge or grievance).

⁵⁶ *See AFGE, Local 32*, [51 FLRA at 497](#).

bargaining proposals as either “within or outside the duty to bargain.”⁵⁷ This Guide often discusses proposals (which are within or outside the duty to bargain) and provisions (which are or are not contrary to law) together. For purposes of brevity, this Guide uses the term “nonnegotiable” to describe both proposals that are outside the duty to bargain and provisions that are contrary to law.

[1.11 Allegation of Nonnegotiability](#)

An allegation of nonnegotiability is an agency claim that a union’s proposal is not within the agency’s duty to bargain in good faith.⁵⁸ As discussed in [section 2.2\(a\)](#) below, an agency allegation must be in writing before it triggers the time limit for the union to file a petition for review involving a proposal.⁵⁹ However, neither the Statute nor the Authority’s Regulations requires that an allegation of nonnegotiability be made with any particular degree of specificity.⁶⁰

[1.12 Agency-Head Review/Disapproval](#)

If a union and an agency reach, or the FSIP imposes, a written agreement, then the parties must submit that agreement to the agency head.⁶¹ The agency head then determines whether, in his or her opinion, the agreement is consistent with law.⁶² If the agency head determines that one or more of the provisions in the agreement is contrary to law, then he or she will disapprove the entire agreement in writing. This is called the “agency-head disapproval.”⁶³ The agency head must issue this disapproval within thirty days of: the date on which the agency and the union executed the agreement;⁶⁴ or, in the case of agreements that the FSIP has imposed, “the date on which the FSIP decision was issued to, and served on, the parties.”⁶⁵ If the agency head fails to timely disapprove the agreement, then the agreement takes effect and becomes binding on the parties, subject to the provisions of the Statute and “any other applicable law, rule, or regulation.”⁶⁶

An agency head’s authority to disapprove an agreement is narrower than an agency bargaining representative’s authority to declare a proposal outside the duty to bargain.⁶⁷ Specifically, the agency head “shall approve” agreements that are consistent

⁵⁷ *Id.*

⁵⁸ See [5 C.F.R. § 2424.2\(i\)](#).

⁵⁹ See [id. § 2424.21\(a\)](#).

⁶⁰ *Prof'l Airways Sys. Specialists*, [61 FLRA 97](#), 98 (2005) (*PASS II*).

⁶¹ [5 U.S.C. § 7114\(c\)\(1\)](#).

⁶² [id. § 7114\(c\)\(2\)](#).

⁶³ *E.g.*, *NTEU II*, [65 FLRA at 513](#).

⁶⁴ [5 U.S.C. § 7114\(c\)](#).

⁶⁵ *AFGE, Nat'l Veterans Affairs Council*, [39 FLRA 1055](#), 1057, *reconsid. denied*, [40 FLRA 195](#) (1991).

⁶⁶ [id. § 7114\(c\)\(3\)](#).

⁶⁷ *E.g.*, *NTEU II*, [65 FLRA at 512](#).

with the Statute “and any other applicable law, rule, or regulation.”⁶⁸ Thus, the agency head cannot disapprove an agreement merely because it concerns a permissive subject.⁶⁹ And, as discussed in [section 4.3\(c\)5.ii.](#) below, in *NTEU*,⁷⁰ the Authority held that agency heads cannot disapprove arrangements negotiated under [§ 7106\(b\)\(3\) of the Statute](#) unless those arrangements “abrogate” a management right.⁷¹ (Please note that, as of the date on the front of this Guide, this issue is on appeal to the United States Court of Appeals for the District of Columbia Circuit.⁷²)

1.13 Union’s Petition for Review

A petition for review is an appeal that a union files with the Authority to request resolution of a negotiability dispute.⁷³ As discussed in [section 2.1](#) below, the union’s petition for review initiates the negotiability process before the Authority.⁷⁴ The contents of, and procedural requirements involving, union petitions for review are discussed in [sections 2.2](#) and [2.4](#) below.

1.14 Post-Petition Conference

After the union files its petition for review, the Authority schedules a “post-petition conference” – normally, a telephone conference – with the union and agency representatives in the case.⁷⁵ Parties must: participate in these conferences (or designate someone to participate on their behalf); be knowledgeable about the dispute; and have the authority to discuss and resolve matters.⁷⁶ Post-petition conferences are discussed in [section 2.5](#) below.

1.15 Collaboration and Alternative Dispute Resolution Office (CADRO)

CADRO, an office within the Authority, “assists parties in reaching agreements to resolve disputes.”⁷⁷ CADRO engages in interest-based mediation and facilitation to help parties resolve cases outside of the formal, litigative process. Participation is fully voluntary: Parties are not required to use CADRO’s services.⁷⁸ However, CADRO is often successful at helping parties resolve or at least narrow their disputes, so the

⁶⁸ [5 U.S.C. § 7114\(c\)\(2\).](#)

⁶⁹ *E.g.*, *NTEU II*, [65 FLRA at 512.](#)

⁷⁰ *Id.*

⁷¹ *E.g.*, *id.* at 511-15 (Member Beck dissenting).

⁷² *IRS v. FLRA*, [No. 12-1456](#) (D.C. Cir. Nov. 20, 2012).

⁷³ [5 C.F.R. § 2424.2\(d\).](#)

⁷⁴ *Id.* [§ 2424.22\(a\).](#)

⁷⁵ *Id.* [§ 2424.23.](#)

⁷⁶ *Id.* [§ 2424.23\(b\).](#)

⁷⁷ *Id.* [§ 2424.2\(b\).](#)

⁷⁸ See *id.* [§ 2424.10](#) (noting that CADRO will assist the parties “as agreed upon by the parties”).

Authority encourages parties to consider using CADRO's services. CADRO's role in the negotiability process is discussed in [section 2.5](#) below.

1.16 Agency's Statement of Position

The agency's statement of position is a document that the agency files after the union files its petition.⁷⁹ It is typically due after the post-petition conference. The statement of position is where the agency must explain why it believes a proposal is outside the duty to bargain or why a provision is contrary to law.⁸⁰ The contents of, and procedural requirements involving, agency statements of position are discussed in [section 2.6](#) below.

1.17 Union's Response

The union's response is a document that the union may file after the agency files its statement of position.⁸¹ The response is where the union must set forth any disagreements that it has with claims in the agency's statement of position.⁸² The contents of, and procedural requirements involving, union responses are discussed in [section 2.7](#) below.

1.18 Agency's Reply

The agency's reply is a document that the agency may file after the union files its response.⁸³ Although [§ 7117\(c\) of the Statute](#) does not expressly provide for the agency's reply,⁸⁴ the Authority created this additional filing by regulation because the Authority recognized that a union may raise certain arguments for the first time in its response.⁸⁵ Thus, the reply is limited to responding to the arguments raised for the first time in the union's response; it cannot raise new bases for alleging that a proposal or provision is nonnegotiable if the agency could have raised those claims in its statement of position.⁸⁶ The contents of, and procedural requirements involving, agency replies are discussed in [section 2.8](#) below.

⁷⁹ [Id. § 2424.24.](#)

⁸⁰ [Id. § 2424.24\(a\).](#)

⁸¹ [Id. § 2424.25\(b\).](#)

⁸² [Id. §§ 2424.25\(a\) & 2424.25\(c\).](#)

⁸³ [Id. § 2424.26.](#)

⁸⁴ See [5 U.S.C. § 7117\(c\).](#)

⁸⁵ *NTEU*, [66 FLRA 892](#), 899 (2012) (*NTEU IV*), *pet. for review filed sub nom. U.S. DHS, U.S. CBP v. FLRA*, [No. 12-1457](#) (D.C. Cir. Nov. 19, 2012).

⁸⁶ [5 C.F.R. § 2424.26\(a\)](#); see also [id. § 2424.26\(c\)](#) (an agency "must limit" its reply to matters that the union raised for the "first time" in its response); *NTEU IV*, [66 FLRA at 899](#).

1.19 Parties' Burdens (and Failure to Meet Burdens)

Each party in a negotiability case is responsible for creating a record and supporting its arguments.⁸⁷ The union has the burden of raising and supporting arguments that: (1) a proposal is within the duty to bargain (or negotiable at the agency's election, if it is making such a claim), or a provision is not contrary to law; and (2) if the union is requesting "severance" (discussed in [section 1.20](#) below), why severance is appropriate.⁸⁸ The agency has the burden of raising and supporting arguments that: (1) the proposal is outside the duty to bargain, or the provision is contrary to law; and (2) where applicable, why severance is not appropriate.⁸⁹

Where appropriate, the Authority will consider a party's failure to raise and support an argument to be a waiver of that argument.⁹⁰ And, where appropriate, if one party fails to respond to another party's argument or assertion, then the Authority will treat that failure to respond as a concession of that agreement or assertion.⁹¹ Further, if a party makes an argument but fails to support it, then the Authority may reject that argument as a "bare assertion."⁹²

Absent good cause, if a union could have made, but did not make, an argument in its petition for review or its response, then the union cannot make that argument at any other stage of the negotiability proceeding, or in "any other proceeding."⁹³ Similarly, absent good cause, if an agency could have made, but did not make, an argument in its statement of position or its reply, then the agency cannot make that argument at any other stage of the negotiability proceeding, or in "any other proceeding."⁹⁴

1.20 Severance

Sometimes a union may want to know – in the event that the Authority finds the union's proposal or provision nonnegotiable *as a whole* – whether particular *portions* of its proposal or provision are nonetheless negotiable.⁹⁵ In that situation, the union

⁸⁷ See, e.g., *NTEU IV*, [66 FLRA at 898-99](#); *AFGE, AFL-CIO, Local 53*, [42 FLRA 938](#), 958-59 (1991).

⁸⁸ [5 C.F.R. § 2424.32\(a\)](#).

⁸⁹ [Id. § 2424.32\(b\)](#).

⁹⁰ [Id. § 2424.32\(c\)\(1\)](#); see also *AFGE, Local 1938*, [66 FLRA 1038](#), 1040 (2012); *AFGE, Council of Prison Locals 33, Local 506*, [66 FLRA 929](#), 940-41 (2012) (*Local 506*).

⁹¹ [5 C.F.R. § 2424.32\(c\)\(2\)](#); see also *NATCA*, [66 FLRA 213](#), 216 (2011) (*NATCA II*) (union's failure to dispute agency claim that proposal affected management right was a concession that the proposal had the alleged effect).

⁹² E.g., *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, [66 FLRA 124](#), 128 (2011) (*Local 1998*).

⁹³ [5 C.F.R. § 2424.32\(c\)\(1\)\(i\)](#).

⁹⁴ [Id. § 2424.32\(c\)\(1\)\(ii\)](#).

⁹⁵ Cf. *AFGE, Local 1164*, [65 FLRA 836](#), 840 n.3 (2011) (finding it unnecessary to resolve union's severance request because proposal as a whole was within the duty to bargain).

should request “severance” of the proposal or provision. [Section 2424.2\(h\) of the Authority’s Regulations](#)⁹⁶ defines “severance” as

the division of a proposal or provision into separate parts having independent meaning, for the purpose of determining whether any of the separate parts is within the duty to bargain or is contrary to law. In effect, severance results in the creation of separate proposals or provisions. Severance applies when some parts of the proposal or provision are determined to be outside the duty to bargain or contrary to law.

A union may request severance in either its petition for review or its response.⁹⁷ If it does so, then it must explain how each severed portion of the proposal or provision may stand alone and operate.⁹⁸ The union must also meet the requirements for specific information set forth in [§ 2424.22\(b\)](#) (for requests made in petitions),⁹⁹ and [§ 2424.25\(c\)](#) (for requests made in responses),¹⁰⁰ of the Authority’s Regulations.

If a union has requested severance, and the agency opposes the union’s request, then the agency must explain with specificity why it believes that severance is not appropriate.¹⁰¹ If the agency’s statement of position opposes severance, then the union’s response must respond to the agency’s arguments.¹⁰²

1.21 Hearing Requests and Other Factfinding Procedures

Under [§ 2424.31 of the Authority’s Regulations](#), the Authority may engage in various factfinding procedures in a negotiability case, including: directing the parties to provide specific documents;¹⁰³ directing the parties to provide answers to specific factual questions;¹⁰⁴ referring the matter to a hearing;¹⁰⁵ or taking “any other

⁹⁶ [5 C.F.R. § 2424.2\(h\)](#).

⁹⁷ [Id.](#) §§ [2424.22\(c\)](#) & [2424.25\(d\)](#).

⁹⁸ [Id.](#)

⁹⁹ [Id.](#) § [2424.22\(c\)](#).

¹⁰⁰ [Id.](#) § [2424.25\(d\)](#).

¹⁰¹ [Id.](#) §§ [2424.24\(d\)](#) & [2424.26\(d\)](#).

¹⁰² [Id.](#) § [2424.25\(d\)](#).

¹⁰³ [Id.](#) § [2424.31\(a\)](#).

¹⁰⁴ [Id.](#) § [2424.31\(b\)](#).

appropriate action.”¹⁰⁶ Either party may request a hearing, but the requesting party must give the reasons for its request.¹⁰⁷ And the standard for granting a hearing request is high: The Authority will do so “[w]hen *necessary* to resolve *disputed* issues of *material* fact.”¹⁰⁸ Absent a hearing or other factfinding procedure, the Authority bases its decision on the documents in the record.

1.22 Other Avenues for Resolving Negotiability Issues

Section 7105(a)(2)(E) of the Statute authorizes the Authority to “resolve issues relating to the duty to bargain in good faith under [§] 7117(c)” of the Statute.¹⁰⁹ The Authority has held that, consistent with § 7105(a)(2)(E), only the Authority may resolve negotiability disputes that arise under § 7117(c).¹¹⁰

Consistent with these principles, the FSIP and interest arbitrators cannot make negotiability determinations to resolve questions concerning the duty to bargain, unless the Authority previously has resolved “substantively identical” duty-to-bargain issues.¹¹¹ By contrast, grievance arbitrators and the FLRA’s administrative law judges may resolve negotiability issues in the course of resolving duty-to-bargain questions.¹¹² But their decisions must be consistent with the Statute and Authority precedent.¹¹³

¹⁰⁵ Id. § 2424.31(c).

¹⁰⁶ Id. § 2424.31(d).

¹⁰⁷ Id. §§ 2424.22(b)(4) & 2424.24(c)(4).

¹⁰⁸ Id. § 2424.31 (emphases added); see also, e.g., *NAIL, Local 7*, 64 FLRA 1194, 1194 (2010); *AFGE, Local 2280, Iron Mountain, Mich.*, 57 FLRA 742, 742 n.1 (2002).

¹⁰⁹ 5 U.S.C. § 7105(a)(2)(E).

¹¹⁰ E.g., *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, New Cumberland, Pa.*, 58 FLRA 750, 755 (2003).

¹¹¹ E.g., *AFGE, AFL-CIO, Dep’t of Educ. Council of AFGE Locals*, 42 FLRA 1351, 1353-55 (1991) (*AFGE Locals*); *Commander, Carswell Air Force Base, Tex.*, 31 FLRA 620, 624 (1988).

¹¹² See *NTEU*, 64 FLRA 443, 446-47 (2010) (*NTEU V*) (involving alleged ULPs); *GSA*, 54 FLRA 1582, 1587-89 (1998) (involving alleged contractual-bargaining obligation).

¹¹³ E.g., *AFGE Locals*, 42 FLRA at 1353; *Louis A. Johnson Veterans Admin. Med. Ctr., Clarksburg, W. Va.*, 15 FLRA 347, 351 (1984).

§ 2 THE NEGOTIABILITY PROCESS

2.1 Union Files Petition for Review

A union's petition for review initiates the negotiability process with the Authority.¹¹⁴ Only a union representative – not an agency representative or any other individual – may file a petition.¹¹⁵

2.2 Time Limit for Filing Petition

The time limit for filing a petition depends on: (1) whether the petition involves proposal(s) or provision(s); and (2) what prompts the filing.

(a) Proposals

As explained in [sections 2.2\(a\)1.](#), [2.2\(a\)2.](#), and [2.2\(a\)3.](#) below, there are several events that can prompt the filing of a negotiability appeal of disputed proposals. But please note, at the outset, that in cases involving proposals, [§ 7117\(c\)\(2\) of the Statute](#) requires the union to file its petition with the Authority “on or before the [fifteenth] day after the date on which the agency first makes the allegation” of nonnegotiability,¹¹⁶ and the Authority may not extend or waive this time limit.¹¹⁷ So if a petition is filed too late, then the Authority will dismiss it with prejudice – in other words, the union will *not* be able to refile it.¹¹⁸

1. Union requests, in writing, a written allegation of nonnegotiability, and agency responds

If a union asks an agency, *in writing*, to provide the union with a *written* allegation of nonnegotiability,¹¹⁹ and the agency provides such a *written* allegation,¹²⁰ then the union *must* file its petition with the Authority within fifteen days after the date on which the agency served the union with the written allegation.¹²¹

¹¹⁴ [5 C.F.R. § 2424.22\(a\)](#).

¹¹⁵ [Id. § 2424.20](#).

¹¹⁶ [5 U.S.C. § 7117\(c\)\(2\)](#).

¹¹⁷ [5 C.F.R. § 2429.23\(d\)](#); *AFGE, Local 3407*, [41 FLRA 265](#), 270 (1991).

¹¹⁸ *AFGE, Local 3529*, [58 FLRA 151](#), 151-52 (2002) (*AFGE 3529*) (denying reconsideration of Authority order dismissing petition as untimely where it was filed more than fifteen days after union received agency's written allegation of nonnegotiability).

¹¹⁹ [5 C.F.R. § 2424.11\(a\)](#).

¹²⁰ [Id. § 2424.11\(b\)](#).

¹²¹ [Id. § 2424.21\(a\)](#); *see also* [63 Fed. Reg. 66,405-07](#) (1998) (stating Authority's intention, in revising its negotiability Regulations, to retain procedure of both requesting and providing allegations of nonnegotiability in writing).

In cases where a union requests a written allegation and the agency provides one, the union must include with its petition: (1) a copy of the agency's written allegation; and (2) a copy of the union's written request, if the agency's allegation does not indicate the date of the union's request.

2. [Union requests, in writing, a written allegation of nonnegotiability, and agency does not respond](#)

If a union asks an agency, *in writing*, to provide the union with a *written* allegation of nonnegotiability,¹²² and the agency *does not respond* in writing, then the union may file a petition *at any time*.¹²³ But the union must give the agency ten days to respond to the union's written request.

If the union chooses to file a petition in a situation where the agency provides no written allegation of nonnegotiability, then the union must include with its petition evidence that it requested such a written allegation (for example, a copy of the union's written request) and allowed ten days for the agency to respond. If the union doesn't do this, then any union petition filed during that period will be considered premature. In that situation, the Authority will issue an order to show cause why the petition should not be dismissed without prejudice to the union's right to refile at a later, appropriate time.

3. [Agency provides a written, unrequested allegation of nonnegotiability](#)

Where the union has not asked the agency to provide it with a written allegation of nonnegotiability, but the agency does so anyway, this is called an unrequested allegation of nonnegotiability.¹²⁴ In this case, the union has two options.

The union's first option is to file its petition.¹²⁵ If it chooses this option, then it must file its petition (including a copy of the agency's written allegation) within fifteen days of receiving the allegation. If it fails to file within fifteen days, then the Authority will dismiss the petition, with prejudice, as untimely.¹²⁶ (See [section 2.14](#) below for further discussion of what happens when parties fail to comply with the Authority's procedural and other requirements.)

The union's second option is to ignore the unrequested allegation, continue bargaining with the agency (if it so chooses), and later request, in writing, a written

¹²² [5 C.F.R. § 2424.11\(a\)](#).

¹²³ [Id. § 2424.21\(b\)](#).

¹²⁴ [Id. § 2424.11\(c\)](#).

¹²⁵ [Id.](#); *AFGE, Local 3928*, [66 FLRA 175](#), 175 (2011) (*Local 3928*).

¹²⁶ [5 C.F.R. §§ 2424.11\(c\) & 2424.21\(a\)](#); *Local 3928*, [66 FLRA at 175](#).

allegation of nonnegotiability from the agency.¹²⁷ If the union chooses this option, then the time limit for filing its petition depends on what the agency does. If the agency provides the union with a written allegation of nonnegotiability, then the union *must* file its petition (including a copy of the agency's written allegation) within fifteen days of receiving that allegation.¹²⁸ But if the agency does not provide a written allegation, then the union may file its petition *at any time* after the ten-day period expires.¹²⁹

Moreover, if an agency serves a union with an unrequested allegation of nonnegotiability while the parties are before the FSIP, then the union has the same two options: (1) respond to the unrequested allegation of nonnegotiability and timely file a petition (including a copy of the agency's written allegation) with the Authority; or (2) ignore the unrequested allegation of nonnegotiability made before the FSIP, later make a written request for a written allegation of nonnegotiability from the agency, and timely file its petition with the Authority.¹³⁰ Please note that, as discussed in [section 1.22](#) above, the FSIP may resolve certain negotiability disputes. So if the union chooses not to file a petition in response to an agency's unrequested allegation of nonnegotiability, then the union runs the risk that the FSIP or an FSIP-directed arbitrator may resolve the dispute. More information regarding the FSIP can be found on the [FLRA's web site](#).

4. *Allegations of nonnegotiability, and requests for such allegations, must be in writing*

If the agency claims only orally, and not in writing, that a proposal is outside the duty to bargain, then the union cannot file a petition. But a union may trigger its ability to file a petition by asking the agency, in writing, for a written allegation of nonnegotiability. And if, after ten days, the agency has not provided a written allegation, the union may file its petition with the Authority.

Union requests for agency allegations also must be in writing. If a union files a petition but provides no evidence that it made a written request for an agency allegation, then the Authority may find the union's petition premature.

(b) *Provisions*

As discussed in [section 1.12](#) above, if a union and an agency reach a written agreement, or the FSIP imposes one on them, then the agency head must review that

¹²⁷ [5 C.F.R. § 2424.11\(c\)](#); *Local 3928*, [66 FLRA at 175](#).

¹²⁸ [5 C.F.R. § 2424.21\(a\)](#).

¹²⁹ *Id.* [§ 2424.21\(b\)](#).

¹³⁰ See, e.g., *Local 422*, [50 FLRA at 121-22](#); *AFGE, Nat'l Border Patrol Council & Nat'l INS Council*, [40 FLRA 521](#), 523-24 (1991), *rev'd on other grounds sub nom.*, U.S. DOJ, *INS v. FLRA*, [975 F.2d 218](#) (5th Cir. 1992).

agreement.¹³¹ If the agency head timely disapproves the agreement (within thirty days of the agreement's execution),¹³² then the union *must* file its petition for review with the Authority within fifteen days of service of the disapproval.¹³³ Please note that if a union files a petition for review in response to an untimely agency-head disapproval, then the Authority will dismiss the petition. This is because, without a timely agency-head disapproval, the agreement automatically goes into effect on the thirty-first day after its execution,¹³⁴ and there is no negotiability dispute that the Authority may address under [§ 7117 of the Statute](#).¹³⁵

(c) Date of service of allegation of nonnegotiability or agency-head disapproval

As discussed above, a union's petition must be filed within fifteen days of either: service of the agency's allegation of nonnegotiability on the union (in proposal cases),¹³⁶ or service of an agency head's disapproval (in provision cases).¹³⁷ The date of service of the agency's allegation or disapproval is the date on which the allegation or disapproval is: deposited in the U.S. mail; delivered in person; deposited with a commercial-delivery service that will provide a record showing the date on which the document was given to the delivery service; or transmitted by email (where the receiving party has agreed to be served by email).¹³⁸ If the allegation or disapproval is served by mail or commercial delivery, then five days are added to the period for filing the petition (unless the allegation or disapproval also has been served on the same or previous day by a non-mail or non-commercial delivery method such as email).¹³⁹ The Authority may not extend or waive the time limit for filing a petition for review.¹⁴⁰

¹³¹ [5 U.S.C. § 7114\(c\)\(1\)](#).

¹³² See *id.*

¹³³ [5 C.F.R. § 2424.21\(a\)\(2\)](#).

¹³⁴ [5 U.S.C. § 7114\(c\)\(3\)](#).

¹³⁵ See, e.g., *AFGE, Local 1770*, [64 FLRA 953](#), 953 (2010); *AFGE, Local 1301*, [51 FLRA 1294](#), 1297 (1996).

¹³⁶ [5 C.F.R. § 2424.21\(a\)\(1\)](#).

¹³⁷ *Id.* [§ 2424.21\(a\)\(2\)](#).

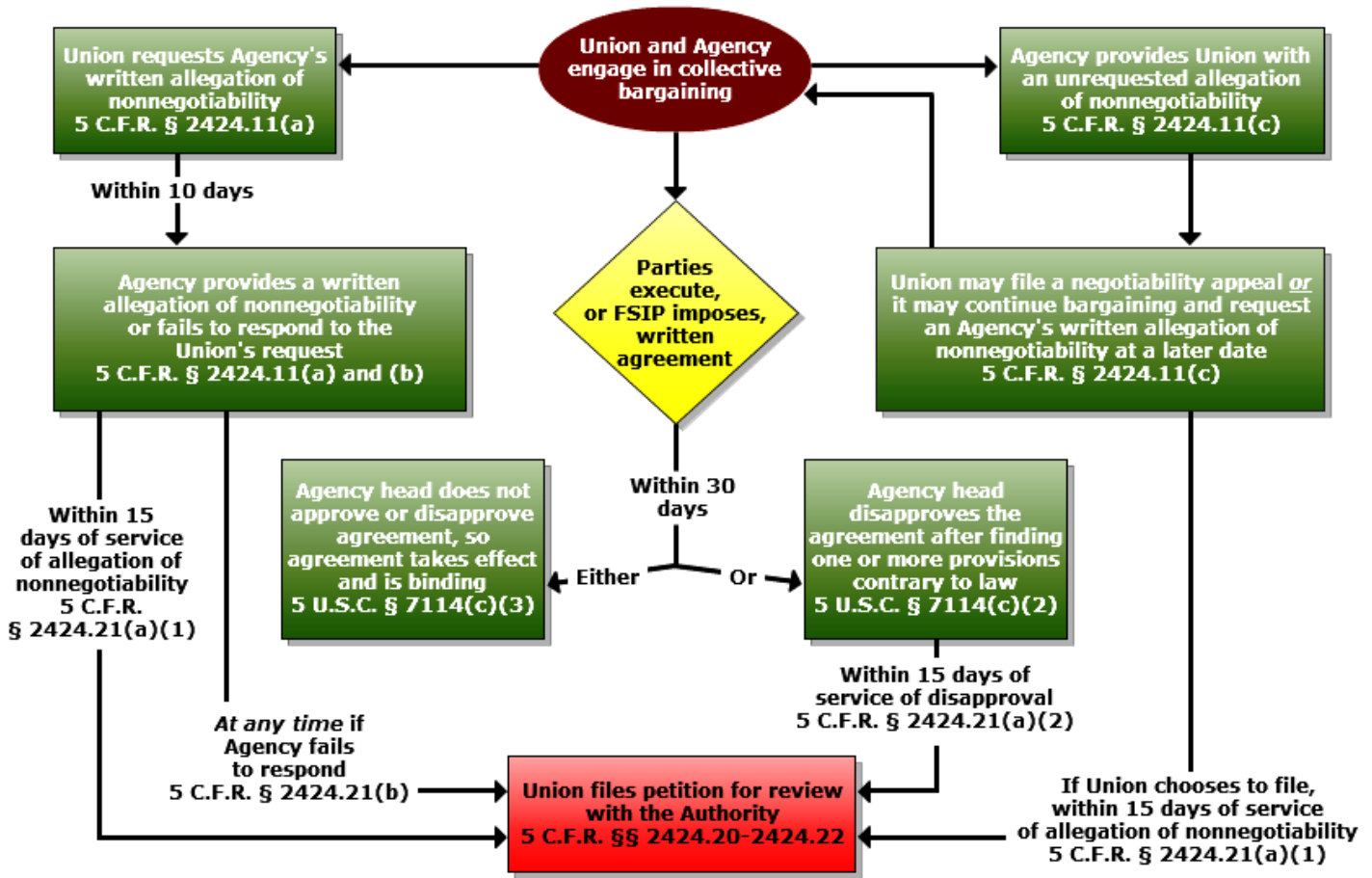
¹³⁸ *Id.* [§ 2429.27\(d\)](#).

¹³⁹ *Id.* [§ 2429.22](#).

¹⁴⁰ *Id.* [§ 2429.23\(d\)](#).

2.3 Diagram Summarizing Pre-Petition Process

The following diagram summarizes the various scenarios that may lead to a union filing a petition for review:



2.4 Format and Content of the Petition

A union may file its petition by using either: (1) an Authority form, available at www.flra.gov/authority_forms (or through the FLRA's [eFiling system](#)); or (2) plain paper, and providing the same information that the Authority form requests. Although unions are not required to use the Authority form, the Authority encourages them to do so because the form is a useful guide and reminds them to provide all of the required information. If a union fails to provide all of the required information, then the Authority may dismiss the petition.

As noted previously, in a case involving a proposal, a union must include with its petition: (1) a copy of the agency's written allegation of nonnegotiability, if the

agency has provided one; or (2) evidence that the union requested such an allegation, if the agency has not provided one. In a case involving a provision, the union must include a copy of the agency-head disapproval. And in both types of cases, the petition must also contain the following:

- The exact wording of the proposal(s) or provision(s) that has been declared nonnegotiable, and an explanation of the proposal's or the provision's meaning.¹⁴¹ If there are any special terms that would not be familiar to people who don't work at the agency where the union represents employees, then the union must explain what those terms mean.¹⁴² The union also must explain how the proposal or provision works and what impact it would have.¹⁴³
- Citations to any laws, regulations, or decisions that support the union's arguments.¹⁴⁴ Although the union is not required to provide actual copies of cited materials that are easily available to the Authority (such as provisions of the U.S. Code or Authority decisions), it should provide copies of materials that may not be easily available to the Authority (such as internal agency regulations, orders, or directives).¹⁴⁵
- A statement as to whether the disputed wording is also involved in a ULP proceeding, a grievance, an impasse procedure, or another negotiability petition.¹⁴⁶
- A statement as to whether the union is requesting a hearing before the Authority, and the reasons supporting that request.¹⁴⁷
- A statement as to whether the union is requesting severance of any proposal or provision, and, if so, a statement of the wording, meaning, and operation of the severed portions¹⁴⁸ (although, as noted previously, the union may wait until its response to request severance¹⁴⁹).

¹⁴¹ [Id. § 2424.22\(b\)\(1\)](#).

¹⁴² [Id.](#)

¹⁴³ [Id.](#)

¹⁴⁴ [Id. § 2424.22\(b\)\(2\)](#).

¹⁴⁵ [Id.](#)

¹⁴⁶ [Id. § 2424.22\(b\)\(3\)](#).

¹⁴⁷ [Id. § 2424.22\(b\)\(4\)](#).

¹⁴⁸ [Id. § 2424.22\(c\)](#).

¹⁴⁹ [Id. § 2424.25\(d\)](#).

- The names, addresses, telephone numbers, and fax numbers of the union and agency representatives – both the agency’s principal bargaining representative and the agency head (or his or her designee).¹⁵⁰
- A statement of service indicating that the union has served the petition, and all attachments to the petition, on the agency’s principal bargaining representative *and* the agency head (or his or her designee).¹⁵¹
See [section 2.13](#) below for further discussion of the statement-of-service requirement.

2.5 CADRO and the Post-Petition Conference

Generally, after the union files its petition – and corrects any procedural deficiencies in the petition – a representative of the Authority’s CADRO will contact the parties to determine whether they are interested in resolving their dispute using interest-based mediation and facilitation. But parties also may call CADRO at (202) 218-7933, or email CADRO at CADRO@flra.gov. The CADRO process is voluntary for both parties.¹⁵² If both parties agree to use it, then the Authority will hold the negotiability process “in abeyance,” and will suspend any deadlines for filing additional documents in the formal negotiability process.¹⁵³ If the parties do not successfully resolve their dispute during the CADRO process (or resolve only part of it), then the negotiability process resumes.¹⁵⁴

In addition, almost immediately after the Authority receives the petition – assuming that there are no procedural deficiencies in the petition – the Authority schedules the post-petition conference, which is described in [section 1.14](#) above. The Authority will fax and mail to the parties a notice of the conference, which will set forth a specific date and time for the conference – usually within ten days after the Authority receives the union’s petition.¹⁵⁵ Post-petition conferences are normally held by telephone, so the notice of the post-petition conference typically includes a toll-free number and instructions on how to make the call. If the parties agree to use CADRO before the conference, then the Authority will cancel the conference.

¹⁵⁰ See [Petition for Review of Negotiability Issues – Proposals](#); [Petition for Review of Negotiability Issues – Provisions](#).

¹⁵¹ [5 C.F.R. §§ 2424.2\(g\)](#) (requiring service of all documents filed with the Authority on the other party’s principal bargaining representative, and, for unions, also on the agency head (or his or her designee)); [2424.22\(d\)](#) (requiring service consistent with [§ 2424.2\(g\)](#)) & [2429.27](#) (describing methods of service and requiring submission of a statement of service).

¹⁵² [Id.](#) [§ 2424.10](#).

¹⁵³ *AFGE, Council of Prison Locals 33*, [65 FLRA 142](#), 142 (2010) (*Locals 33*).

¹⁵⁴ See, e.g., *id.* (resolving remaining dispute that parties had not resolved through CADRO process).

¹⁵⁵ [5 C.F.R. § 2424.23](#).

If the parties do not agree to use CADRO, or the case is not otherwise resolved, before the conference, then the parties *must* participate in the conference.¹⁵⁶ If a union fails to participate, then the Authority may, in its discretion, dismiss the union's petition.¹⁵⁷ And, if an agency doesn't participate, then the Authority may, in its discretion, order the agency to bargain over the disputed proposal(s) or withdraw its disapproval of the disputed provision(s).¹⁵⁸

If the designated union or agency representative is not available, then the union or agency should designate another person to participate in the conference. The Authority will reschedule conferences only on very rare occasions. In those unusual circumstances where a party needs to reschedule, the requesting party must submit a written request to the Authority's Office of Case Intake and Publication at least five calendar days before the scheduled conference, and the request must state the other party's position on whether to reschedule the conference.¹⁵⁹ The party may fax the request to (202) 482-6657.¹⁶⁰ Absent extraordinary circumstances, the Authority will not consider requests to reschedule that the Authority receives fewer than five calendar days before the scheduled conference.¹⁶¹ If the union and the agency agree to a postponement, then the written request should set forth alternate dates and times on which both parties are available. But even if the parties agree to a postponement, the Authority may deny the request if there is not a good reason to postpone.¹⁶²

The purpose of the conference is to: (1) ensure that the parties have a common understanding of the meaning and impact of the proposal(s) or provision(s) at issue; (2) determine whether there are factual disputes concerning the proposal or provision; and (3) discuss other relevant matters.¹⁶³ To those ends, the parties' representatives to the conference must be prepared to discuss, clarify, and resolve matters including:

- The meaning of the proposal(s) or provision(s) in dispute;
- Any disputed factual issues;
- Negotiability and bargaining-obligation claims regarding the proposal(s) or provision(s); and

¹⁵⁶ [Id. § 2424.32\(d\)](#).

¹⁵⁷ [Id.](#)

¹⁵⁸ [Id.](#) *But see Fed. Educ. Ass'n, Stateside Region*, [56 FLRA 473](#), 473-74 (2000) (finding that, in the circumstances of the case, union's failure to participate in post-petition conference was not "so egregious as to warrant dismissal of the petition for review").

¹⁵⁹ [5 C.F.R. § 2429.23](#).

¹⁶⁰ [Id. § 2429.24\(g\)\(1\)](#).

¹⁶¹ [Id. § 2429.23](#).

¹⁶² [Id.](#)

¹⁶³ [Id. § 2424.23\(b\)](#).

- Whether the proposal(s) or provision(s) is, or has been, the subject of: (1) a ULP charge under part 2423 of the Authority’s Regulations; (2) a grievance under the parties’ negotiated grievance procedure; or (3) an impasse procedure under part 2470 of the Authority’s Regulations.¹⁶⁴

The Authority representative’s primary role during the conference is to obtain facts regarding all of the above matters. The representative will also discuss whether the parties wish to receive assistance from the Authority’s CADRO. (Even if CADRO already has contacted the parties, and the parties have declined CADRO’s services, the Authority representative will ask them again. And even if the parties agree, during the conference, to use CADRO, the Authority representative will continue to conduct the conference.) In addition, the Authority representative will facilitate the discussion between the parties and seek out areas of possible agreement – including determining whether the wording of proposals or provisions may be modified to remove the agency’s objections.¹⁶⁵ And although the Authority representative will discuss the agency’s objections to the proposal or provision, the agency is not bound by – and the written record of the conference will not contain – the objections that the agency raises during the conference. Instead, as discussed in [section 2.6](#) below, the agency must raise, in its statement of position, all of its objections to the proposal or provision.¹⁶⁶

The Authority representative conducting the conference may grant extensions of time for future filings but may not waive time limits that have already expired. A party requesting a waiver of an expired time limit must make its request in writing to the Authority, and the request must: (1) demonstrate “extraordinary circumstances” for the waiver; and (2) state the position of the other party or parties with respect to the waiver request.¹⁶⁷

After the conference, the Authority representative will prepare a written record of the conference, which the Authority will serve on the parties by fax and certified mail.¹⁶⁸ This becomes a part of the official record in the case.

[2.6 Agency’s Statement of Position](#)

In most cases, the agency’s statement of position is due after the post-petition conference has been held.¹⁶⁹ An agency may file its statement of position by using either: (1) an Authority form, available at www.flra.gov/authority_forms (or through the FLRA’s [eFiling system](#)); or (2) plain paper, and providing the same information that

¹⁶⁴ *Id.*

¹⁶⁵ See, e.g., *Local 3928*, [66 FLRA at 176](#).

¹⁶⁶ [5 C.F.R. § 2424.24\(a\)](#).

¹⁶⁷ *Id.* [§ 2429.23\(b\)](#).

¹⁶⁸ *Id.* [§ 2424.23\(c\)](#).

¹⁶⁹ *Id.* [§ 2424.24](#).

the Authority form requests. The agency must file its statement with the Authority within thirty days from when the agency head receives the union's petition for review, unless the Authority or its representative grants a request for an extension of time.¹⁷⁰

In the statement, the agency must make all of its arguments as to why a proposal is outside the duty to bargain or why a provision is contrary to law.¹⁷¹ In addressing a proposal's or a provision's negotiability, the Authority generally will address only the arguments that the agency makes in its statement of position – not the claims that it made in its allegation of nonnegotiability¹⁷² or the arguments that it made during the post-petition conference. In addition, if the agency disagrees with the union's statements as to the meaning or impact of a proposal or provision, then the agency must state its views regarding the meaning or impact of the contract language.¹⁷³ Further, if the agency disagrees with the union's request for severance, then it should explain all the reasons for its position.¹⁷⁴ If the agency fails in its statement to respond to any of the claims in the union's petition, then the Authority may find that the agency has conceded those claims.¹⁷⁵

Although agencies are not required to use the Authority form, the Authority encourages them to do so because the form is a useful guide and reminds them to provide all of the required information.

2.7 Union's Response

If the union wants to dispute any of the claims in the agency's statement of position, then the union must file a response within fifteen days of receiving the agency's statement.¹⁷⁶ The union may file its response by using either: (1) an Authority form, available at www.flra.gov/authority_forms (or through the FLRA's eFiling system); or (2) plain paper, and providing the same information that the Authority form requests.¹⁷⁷ If the union fails to respond to claims in the agency's statement, then the Authority may find that the union has conceded the agency's claims.¹⁷⁸ For example, if the agency has argued that a proposal or provision affects a management right under [§ 7106\(a\)](#) or [§ 7106\(b\)\(1\) of the Statute](#), then the union must provide any arguments that the proposal or provision does not affect the cited rights, is a negotiable procedure under [§ 7106\(b\)\(2\)](#), is an appropriate arrangement under [§ 7106\(b\)\(3\)](#),¹⁷⁹ or (for

¹⁷⁰ *Id.* § 2424.24(b).

¹⁷¹ *Id.* § 2424.24(a).

¹⁷² *Cf. PASS II*, [61 FLRA at 98](#) (agency required to make claims in statement of position).

¹⁷³ [5 C.F.R. § 2424.24\(c\)\(2\)](#).

¹⁷⁴ *Id.* § 2424.24(d).

¹⁷⁵ *Id.* § 2424.32(c)(2); *Local 5*, [67 FLRA at 89](#).

¹⁷⁶ [5 C.F.R. § 2424.25](#).

¹⁷⁷ *Id.* § 2424.25(c).

¹⁷⁸ *Id.* § 2424.32(c)(2); *see also AFGE, Local 1938*, [66 FLRA at 1040](#).

¹⁷⁹ *E.g.*, [5 C.F.R. § 2424.32\(c\)\(2\)](#).

management rights under [§ 7106\(a\)\(2\)](#)) enforces an applicable law. If the union fails to provide any of these arguments, then the Authority may find that the union has conceded that the proposal or provision is nonnegotiable on management-rights grounds.¹⁸⁰ Further, if the union has not already requested severance in its petition, or wishes to modify an existing severance request, then it may do so in its response.¹⁸¹

Although unions are not required to use the Authority form, the Authority encourages them to do so because the form is a useful guide and reminds them to provide all of the required information.

2.8 Agency's Reply

The agency may file a reply to the union's response within fifteen days after the agency receives a copy of the response.¹⁸² As noted in [section 1.18](#) above, although [§ 7117\(c\) of the Statute](#) does not expressly provide for an agency's reply, the Authority created this additional filing by regulation because the Authority recognized that a union may raise certain arguments "for the first time" in its response.¹⁸³ So the agency must limit its reply to "any facts or arguments made for the first time" in the union's response.¹⁸⁴ For example, if the union argues in its response that a proposal or provision is negotiable under [§ 7106\(b\)\(2\)](#) or [§ 7106\(b\)\(3\) of the Statute](#), then the agency may reply to the union's argument.¹⁸⁵ Or if the union requests severance for the first time in its response, or modifies a severance request from its petition, and the agency opposes the request, then the agency must explain with specificity why severance is not appropriate.¹⁸⁶ But an agency cannot raise new bases for alleging that a proposal or provision is nonnegotiable if the agency could have raised those claims in its statement of position.¹⁸⁷

The agency may file its reply by using either: (1) an Authority form, available at www.flra.gov/authority_forms (or through the FLRA's [eFiling system](#)); or (2) plain paper, and providing the same information that the Authority form requests. Although agencies are not required to use the Authority form, the Authority encourages them to do so because the form is a useful guide and reminds them to provide all of the required information.

¹⁸⁰ E.g., *id.*

¹⁸¹ *Id.* [§ 2424.25\(d\)](#).

¹⁸² *Id.* [§ 2424.26](#).

¹⁸³ *NTEU IV*, [66 FLRA at 899](#).

¹⁸⁴ [5 C.F.R. § 2424.26\(a\)](#); see also *id.* [§ 2424.26\(c\)](#) (an agency "must limit" its reply to matters that the union raised for the "first time" in its response).

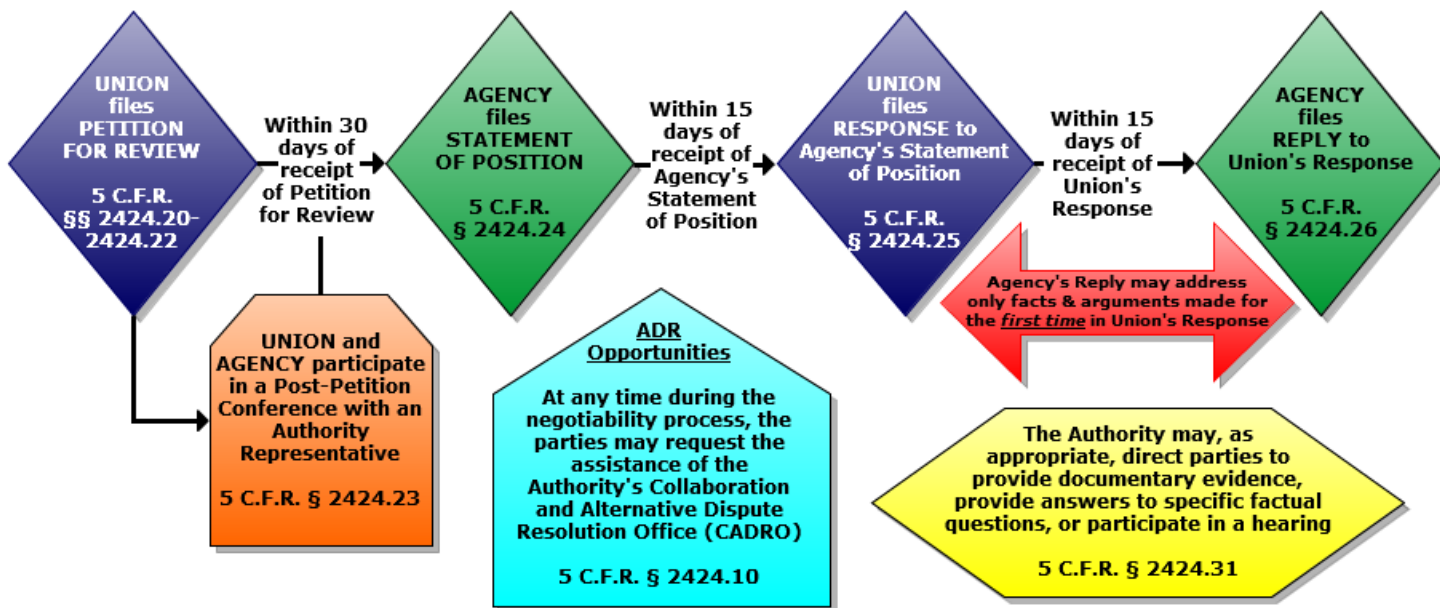
¹⁸⁵ *Id.* [§ 2424.26\(c\)\(1\)\(ii\)-\(iii\)](#).

¹⁸⁶ *Id.* [§ 2424.26\(d\)](#).

¹⁸⁷ *Id.* [§ 2424.26\(a\)](#); see also *id.* [§ 2424.26\(c\)](#); *NTEU IV*, [66 FLRA at 899](#).

2.9 Diagram Summarizing Parties' Filings With the Authority

The following diagram summarizes the parties' standard filings with the Authority in a negotiability case:



2.10 Other Filings and Amicus Curiae Petitions

The four submissions described above – the union’s petition for review, the agency’s statement of position, the union’s response, and the agency’s reply – are the only submissions that the parties to negotiability cases are specifically authorized to file under the Authority’s Regulations. But if either party makes a written request and shows “extraordinary circumstances” for filing a supplemental document other than those four filings, then the Authority may consider it.¹⁸⁸ Parties are encouraged to submit, along with their request, the supplemental document that they want the Authority to consider.

In addition, non-parties who are “interested person[s]” may petition the Authority for permission to present written or oral arguments as “amicus curiae.”¹⁸⁹ The Authority may grant the petition if the Authority deems it “appropriate” to do so.¹⁹⁰

¹⁸⁸ [5 C.F.R. § 2424.27](#).

¹⁸⁹ [Id. § 2429.9](#).

¹⁹⁰ [Id.](#)

2.11 Where and How to File

Parties may file all of the documents discussed above: in person;¹⁹¹ by commercial delivery;¹⁹² by first-class mail;¹⁹³ by certified mail;¹⁹⁴ or (for union petitions, agency statements of position, union responses, and agency replies) electronically through the FLRA's [eFiling system](#), which may be accessed at www.flra.gov/eFiling or through the links from the emails that the eFiling system automatically generates.¹⁹⁵

With the exception of documents that are eFiled, all documents filed with the Authority should be submitted to the Chief, Case Intake and Publication (CIP), Federal Labor Relations Authority, Docket Room, Suite 200, 1400 K Street NW, Washington, DC 20424-0001.¹⁹⁶ CIP's telephone number is (202) 218-7740, and it is open between 9 a.m. and 5 p.m. Eastern Time (E.T.), Monday through Friday (except federal holidays).

If you file documents by hand delivery, then you must present those documents in the Docket Room no later than 5 p.m. E.T., if you want the Authority to accept those documents for filing on that day.¹⁹⁷ And if you want CIP to date-stamp a copy of your filing for your own records, then you must bring with you an extra copy of the filing for that purpose.

If you eFile documents, then you may file those documents on any calendar day – including Saturdays, Sundays, and federal holidays.¹⁹⁸ The Authority will consider those documents filed on a particular day if you file them at any time up until midnight E.T. on that day.¹⁹⁹ Please note that even though you *may* eFile documents on Saturdays, Sundays, and federal holidays, you are *not required* to do so.²⁰⁰

You *cannot file any documents with the Authority by email.*²⁰¹ And you *cannot file petitions for review, statements of position, responses, and replies with the Authority by fax.*²⁰²

¹⁹¹ [Id. § 2429.24\(e\)](#).

¹⁹² [Id.](#)

¹⁹³ [Id.](#)

¹⁹⁴ [Id.](#)

¹⁹⁵ [Id. § 2429.24\(f\)](#).

¹⁹⁶ [Id. § 2429.24\(a\)](#).

¹⁹⁷ [Id.](#)

¹⁹⁸ [Id.](#)

¹⁹⁹ [Id.](#)

²⁰⁰ [Id.](#)

²⁰¹ [Id.](#)

²⁰² [Id. § 2429.24\(g\)](#).

2.12 “Service” Required

If parties file anything with the Authority, then they must provide – or “serve” – each other’s principal bargaining representatives with a copy of everything they file.²⁰³ In addition, unions also must serve the agency head (or his or her designee).²⁰⁴ Failure to meet these requirements will result in the Authority issuing deficiency orders, which will slow down the processing of the case. As discussed in [section 2.14](#) below, failure to comply with deficiency orders may also result in dismissal of the union’s petition or rejection of other documents.

Acceptable methods for “serving” documents on the other party are: certified mail; first-class mail; commercial delivery; in-person delivery; or email, but only if the other party has consented to email service.²⁰⁵ Fax is *not* an acceptable method of service for petitions, statements of position, responses, or replies.²⁰⁶ But it is an acceptable method of service for motions (for example, motions for extensions of time, requests to reschedule post-petition conferences), where fax equipment is available.²⁰⁷ See [section 2.13](#) below for further discussion of the service requirement (and the requirement that parties provide a statement of service).

2.13 Additional Procedural Requirements

In addition to the requirements discussed above, when you file a petition for review, statement of position, response, or reply, you must:

- Submit one original plus four copies of anything that you file, with certain exceptions, such as eFiled and faxed documents;²⁰⁸
- Submit a table of contents if your document exceeds ten double-spaced pages, with the exception of fillable forms in the eFiling system;²⁰⁹ and
- Serve all counsel of record and submit a signed statement of service or, for eFiled documents, certify in the FLRA’s eFiling system that you have completed such service. Please note, in this regard, that if you file your document through the FLRA’s eFiling system, then you will be asked to certify that you have served the other party(ies), the manner in which you served them, and the date on which you served them *before* you will be able to “file” your document in the eFiling

²⁰³ [Id.](#) §§ 2424.2(g), 2424.22(d), 2424.24(e), 2424.25(e), 2424.26(e) & 2429.27.

²⁰⁴ [Id.](#) § 2424.2(g); see also [id.](#) §§ 2424.22(d) & 2424.25(e).

²⁰⁵ [Id.](#) § 2429.27(b).

²⁰⁶ [Id.](#)

²⁰⁷ [Id.](#) §§ 2429.24(g) & 2429.27(b)(5).

²⁰⁸ [Id.](#) § 2429.25.

²⁰⁹ [Id.](#) § 2429.29.

system.²¹⁰ This allows the eFiling system to generate a statement of service for you. Also please note that, even if you eFile, you still must actually serve all counsel of record; the certification in the eFiling system is not sufficient by itself.²¹¹

2.14 Noncompliance with Procedural and Other Requirements

If a party does not comply with the Authority's Regulations or requirements, and that noncompliance is minor or technical, then the Authority may issue a deficiency order that allows the party to correct the mistake. Some examples are: failure to serve the agency head or agency head's designee; serving the opposing representative at an incorrect address; failure to set forth the exact wording of the disputed proposals or provisions; failure to indicate whether the disputed wording is directly related to another proceeding; and failure to provide a statement of service. If a party fails to comply with a deficiency order, then the Authority will issue an order to show cause why a case should not be dismissed.

In addition to situations where a party fails to comply with a deficiency order, the Authority may issue an order to show cause why a case should not be dismissed when, for example, it appears that the union's petition: is untimely; was filed by someone other than a union representative; is premature because the union filed it before the agency had ten days to respond to the union's written request for an allegation of nonnegotiability; does not present a negotiability dispute because the agency's written allegation raises only a bargaining-obligation dispute; or is directly related to a pending ULP proceeding or grievance involving a ULP, as discussed in [section 3.6](#) below. With respect to the last example, the Authority also may issue an order to show cause if the union claims that the petition is directly related to a pending ULP or grievance involving a ULP, but the Authority is unable to determine whether that is actually the case because the union did not provide a copy of the ULP charge or the grievance.

As discussed in [section 2.2\(a\)](#) above, if a union's petition is untimely, then the Authority will dismiss the petition with prejudice.²¹² And a union's or an agency's failure to respond to, and comply with, an Authority order may adversely affect the union or the agency.²¹³ In this regard, if a union doesn't respond or comply, then the Authority may dismiss its petition; if an agency doesn't respond or comply, then the Authority may order it to bargain over a disputed proposal or withdraw its disapproval of a disputed provision.²¹⁴

²¹⁰ [Id.](#) § 2429.27(c).

²¹¹ [Id.](#) § 2429.27.

²¹² E.g., *AFGE 3529*, [58 FLRA at 151-52](#).

²¹³ [5 C.F.R. § 2424.32\(d\)](#).

²¹⁴ [Id.](#)

2.15 Authority's Decision and Order

The Authority will issue a written decision that explains the specific reasons for its conclusions.²¹⁵ The decision will also include an order that varies depending on whether the case concerns proposals or provisions.²¹⁶

In cases involving proposals, if the Authority finds that a proposal is within the duty to bargain, then it will order the agency to bargain with the union upon request.²¹⁷ In doing so, the Authority makes no judgment as to the proposal's merit²¹⁸ – in other words, the Authority will not decide whether the parties should actually agree to the proposal. If the Authority finds that a proposal is bargainable only at an agency's election under [§ 7106\(b\)\(1\) of the Statute](#), then it will issue an order stating that the proposal is only electively negotiable.²¹⁹ If the Authority finds that there is no duty to bargain over a proposal, then it will dismiss the petition for review as to that proposal.²²⁰

In cases involving provisions, if the Authority finds either that a provision is not contrary to law or that it is bargainable at an agency's election under [§ 7106\(b\)\(1\) of the Statute](#), then it will order the agency head to rescind his or her disapproval of the provision.²²¹ In doing so, the Authority makes no judgment as to the provision's merit.²²² If the Authority determines that a provision is contrary to law, then it will dismiss the petition for review as to that provision.²²³

2.16 After the Authority's Decision and Order

Several different situations could occur after the Authority issues its decision and order.

First, the parties could comply with the Authority's order. If they do, then the negotiability process is over.

Second, a party could move for reconsideration of the Authority's order within ten days after service of that order.²²⁴

²¹⁵ [Id. § 2424.40\(a\)](#).

²¹⁶ [Id.](#)

²¹⁷ [Id. § 2424.40\(b\)](#).

²¹⁸ *E.g., Local 5, 67 FLRA at 92 n.11.*

²¹⁹ [5 C.F.R. § 2424.40\(b\)](#).

²²⁰ *Local 5, 67 FLRA at 92 n.11.*

²²¹ [5 C.F.R. § 2424.40\(c\)](#).

²²² *E.g., NTEU III, 66 FLRA at 813 n.11.*

²²³ [5 C.F.R. § 2424.40\(c\)](#).

²²⁴ [Id. § 2429.17](#).

Third, a party could appeal the Authority's order (or an order resolving a motion for reconsideration) to a U.S. Court of Appeals.²²⁵ A party has sixty days to file such an appeal, beginning on the date on which the Authority issued its order.²²⁶ But please note that "[n]o objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."²²⁷

Fourth, an agency could refuse to comply with the Authority's order. In that event, the union may report that failure to the appropriate FLRA Regional Director.²²⁸ The union must report such failure within a reasonable period of time after the sixty-day appeal period (discussed above) expires.²²⁹ If, on referral from the Regional Director, the Authority finds a failure to comply with its order, then the Authority will take whatever action it deems necessary to secure compliance with its order, including seeking enforcement by petitioning any appropriate U.S. Court of Appeals.²³⁰

²²⁵ [5 U.S.C. § 7123\(a\)\(1\)](#).

²²⁶ *Id.*

²²⁷ *Id.* § 7123(c).

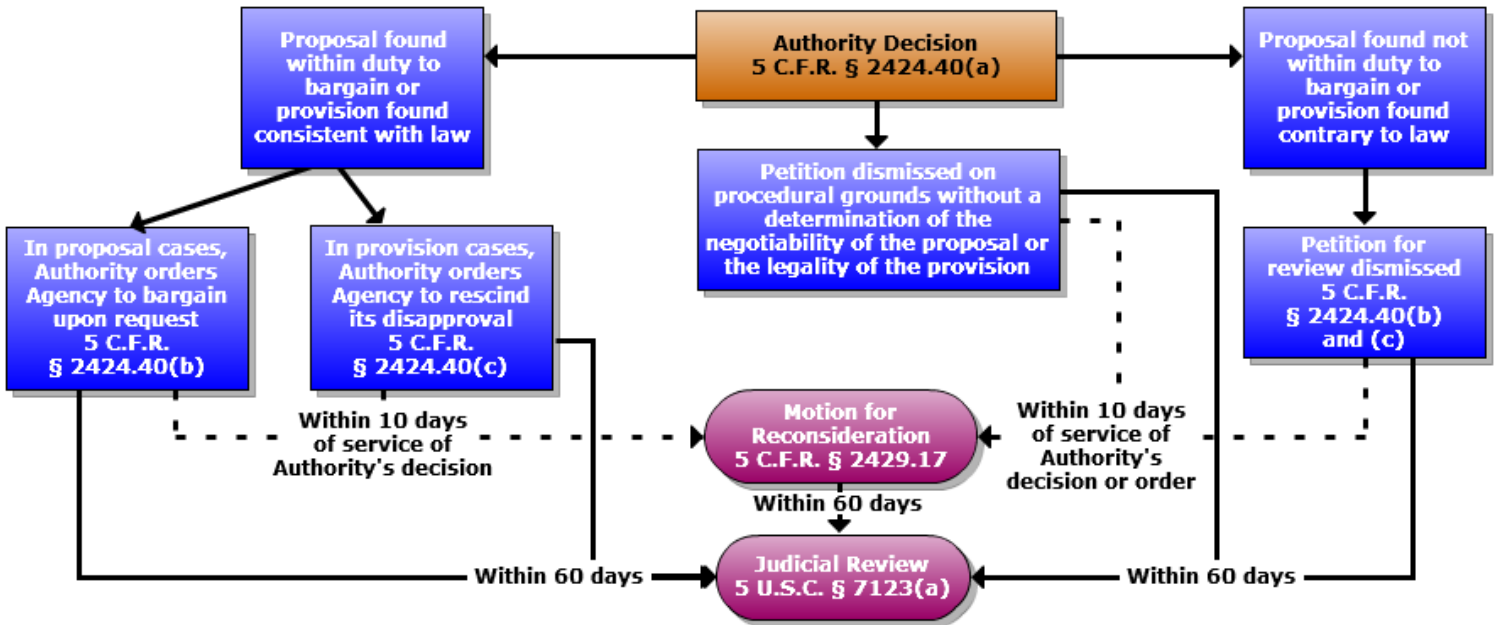
²²⁸ [5 C.F.R. § 2424.41](#).

²²⁹ [5 U.S.C. § 7123\(a\)](#).

²³⁰ [5 C.F.R. § 2424.41](#); *see also* [5 U.S.C. § 7123\(b\)](#).

2.17 Diagram Summarizing Possible Conclusions of Authority Decisions and the Post-Decision Process

The following diagram summarizes the various conclusions that the Authority may reach in its decisions, as well as the various scenarios that may occur after the Authority issues that decision and order:



§ 3 BASES FOR DISMISSING PETITIONS

3.1 Introduction

This section discusses the most common bases for dismissing negotiability petitions.

3.2 Proposal or Provision Nonnegotiable

If the Authority finds that all of the proposals or provisions in a union's petition are nonnegotiable, then the Authority dismisses the petition.²³¹ Similarly, if the Authority finds that *some* of the proposals or provisions in a union's petition are nonnegotiable, then the Authority dismisses the petition in part.²³²

3.3 Failure to Comply with Certain Procedural and Other Requirements

[Section 2.14](#) above discusses the potential consequences for failures to comply with certain procedural and other requirements. As discussed in that section, certain failures to comply may result in dismissal of the union's petition.

3.4 No Negotiability Dispute

Where a proposal or provision in a union's petition involves a negotiability dispute, but not a bargaining-obligation dispute, the Authority will resolve the proposal's or provision's negotiability.²³³ And where a proposal or provision raises both a bargaining-obligation dispute and a negotiability dispute, the Authority may resolve both disputes.²³⁴ But where a proposal or provision involves *only* a bargaining-obligation dispute, that dispute *may not be resolved* in a negotiability proceeding.²³⁵ Please note that, as discussed in [section 1.8](#) above, the Authority assesses whether a negotiability dispute exists on a proposal-by-proposal, or provision-by-provision, basis: If some proposals or provisions in a petition present negotiability disputes but others do not, then the Authority will dismiss the petition as to the proposals or provisions that do not present negotiability disputes, and will resolve the negotiability of only the proposals or provisions that *do* present negotiability disputes.²³⁶

²³¹ [5 C.F.R. § 2424.40\(b\)](#).

²³² See, e.g., *AFGE, Council of Prison Locals 33, Local 506*, [66 FLRA 819](#), 834 (2012) (*Prison Locals 33*), *pet. for review filed sub nom. U.S. DOJ v. FLRA*, [No. 12-1383](#) (D.C. Cir. Sept. 20, 2012).

²³³ [5 C.F.R. § 2424.30\(b\)\(1\)](#).

²³⁴ *Id.* [§ 2424.30\(b\)\(2\)](#).

²³⁵ *Id.* [§ 2424.2\(d\)](#).

²³⁶ E.g., *Local ZHU*, [65 FLRA at 740-41](#).

3.5 Mootness

[Section 2429.10 of the Authority's Regulations](#) states that the Authority will not issue advisory opinions.²³⁷ Thus, where the issues that led to the filing of a negotiability petition have been resolved, or where there is no longer a dispute between the parties, the Authority will dismiss the petition as "moot."²³⁸ The Authority has found petitions to be moot where, for example: proposals required some action to occur by a date that had already passed, and there was no explanation in the record to show how the proposals could be implemented prospectively;²³⁹ or the parties had reached a valid, binding agreement about the subject matter of the proposals within the petition.²⁴⁰

In contrast, the Authority has found petitions *not* to be moot where, for example: a proposal did not refer to any particular event, or require any action to occur by a date that had already passed;²⁴¹ or the parties continued to have a "legally cognizable interest" in the outcome of the negotiability appeal because the proposal at issue could benefit employees prospectively.²⁴²

Mootness is a threshold issue regarding the Authority's jurisdiction.²⁴³ The burden of demonstrating mootness is heavy and falls on the party urging mootness.²⁴⁴

3.6 Petition is "Directly Related" to ULP or Grievance

With the exception of cases where an agency has made a compelling-need claim under [§ 7117\(a\)\(2\) of the Statute](#) (discussed in [section 4.5](#) below), if a union files a ULP charge or a grievance alleging a ULP under the parties' negotiated grievance procedure, and the charge or grievance concerns issues "directly related" to the petition for review, then the Authority will dismiss the negotiability petition.²⁴⁵ The dismissal will be without prejudice to the union's right to refile the petition after the ULP charge or grievance has been "resolved administratively,"²⁴⁶ which can happen when, for example: the union withdraws, or the Authority resolves, the directly related ULP claim;²⁴⁷ or an arbitrator resolves the ULP claim in an award that has become final and binding.²⁴⁸ The union may refile the petition no later than thirty days after the date on

²³⁷ [5 C.F.R. § 2429.10](#).

²³⁸ E.g., *AFGE, Local 3937*, [66 FLRA 393](#), 393 (2011).

²³⁹ E.g., *NTEU, Chapter 207*, [58 FLRA 409](#), 410 (2003).

²⁴⁰ E.g., *Int'l Org. of Masters, Mates & Pilots, Marine Div., Pan. Canal Pilots Branch*, [52 FLRA 251](#), 254 (1996).

²⁴¹ E.g., *Local 3928*, [66 FLRA at 176](#).

²⁴² E.g., *NAGE, Local R1-109*, [64 FLRA 132](#), 133 (2009) (*Local R1-109*).

²⁴³ See *AFGE, Council 238*, [64 FLRA 223](#), 225 (2009) (*Council 238*).

²⁴⁴ *Id.*

²⁴⁵ [5 C.F.R. § 2424.30\(a\)](#).

²⁴⁶ *Id.*

²⁴⁷ *Local 5*, [67 FLRA at 86](#).

²⁴⁸ [5 C.F.R. § 2424.30\(a\)](#).

which the ULP charge or grievance is resolved administratively, and the Authority will determine whether resolution of the petition is still required.²⁴⁹

For examples of Authority decisions addressing the “directly related” issue, see *AFGE, Local 1938*²⁵⁰ and *NAGE, Local R5-168*.²⁵¹

3.7 Previously Filed Petition Bars Proposal or Provision

Where a negotiability petition involves a proposal or provision that has not “substantively changed” from a proposal or provision that was in a negotiability petition that the union previously filed – and with the exception of cases where the Authority dismissed the previous petition “without prejudice” to the union’s right to refile²⁵² – “the effect of the [new] petition is to seek review of the previous allegation.”²⁵³ In that situation, the Authority will dismiss the new petition.²⁵⁴ By contrast, if the union has “substantively revised” the proposal or provision that was in the original petition and has submitted the revised proposal or provision in a new petition, then (assuming that all of the other filing requirements are met) the Authority will consider the new petition.²⁵⁵

²⁴⁹ *Id.*; see also, e.g., *Council 238*, [64 FLRA at 224-26](#) (untimely petition for review dismissed with prejudice).

²⁵⁰ [66 FLRA at 1038-39](#) (grievance not directly related to petition for review).

²⁵¹ [56 FLRA 796](#), 797 (2000) (grievance concerned issue directly related to petition for review).

²⁵² [5 C.F.R. § 2424.30\(a\)](#).

²⁵³ *NFFE, Local 422*, [50 FLRA 541](#), 542 (1995).

²⁵⁴ *Id.*

²⁵⁵ *Ass’n of Civilian Technicians, Inc., Heartland Chapter*, [56 FLRA 236](#), 237-38 (2000).

§ 4 SUBSTANTIVE ISSUES

4.1 Introduction

As discussed in the [Foreword](#) to this Guide, negotiability disputes can present a wide range of substantive issues, and agencies may also raise bargaining-obligation disputes as bases for declining to bargain over particular proposals. Given the breadth of possible substantive issues that may arise in negotiability cases, a discussion of all of those possible issues is beyond the scope of this Guide. But we discuss, below, some of the issues that are more frequent or complex.

4.2 Conditions of Employment

Under the Statute, agencies are required to bargain only over bargaining-unit employees' "conditions of employment."²⁵⁶ So an agency is not required to bargain over a matter unless that matter "directly affects" the conditions of employment of bargaining-unit employees.²⁵⁷ [Section 7103\(a\)\(14\) of the Statute](#) defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions."²⁵⁸ However, that section provides that the following matters are not "conditions of employment": (1) matters relating to political activities prohibited under the Hatch Act,²⁵⁹ (2) matters relating to classification;²⁶⁰ and (3) matters that are "specifically provided for by [f]ederal statute."²⁶¹ With respect to the third exception, the Authority has held, for example, that a proposal "requiring employees to be paid at the [General Schedule (GS)]-7 level" concerned a matter "specifically provided for by statute."²⁶² Because the agency had no discretion to bargain over wage rates established by law, the Authority found that wage rates were excluded from the definition of conditions of employment.²⁶³ Conversely, where a law provided an agency with discretion concerning its optical and dental plan, the Authority held that Congress had preserved the agency's right and obligation to negotiate over this matter, and it was not excluded from the definition of "conditions of employment."²⁶⁴

In deciding whether a proposal involves a condition of employment of bargaining-unit employees, the Authority considers two basic factors: (1) whether the

²⁵⁶ [5 U.S.C. § 7103\(a\)\(12\)](#).

²⁵⁷ *Antilles Consol. Educ. Ass'n*, [22 FLRA 235](#), 236 (1986) (*Antilles*).

²⁵⁸ [5 U.S.C. § 7103\(a\)\(14\)](#).

²⁵⁹ *Id.* §§ 7321-7326.

²⁶⁰ *Id.* § 7103(a)(14)(B).

²⁶¹ *Id.* § 7103(a)(14)(C).

²⁶² *Fraternal Order of Police, Lodge #1F*, [57 FLRA 373](#), 383 (2001).

²⁶³ *Id.*

²⁶⁴ *Antilles Consol. Educ. Ass'n*, [56 FLRA 664](#), 665-66 (2000).

matter pertains to bargaining-unit employees; and (2) whether there is a direct connection between the proposal and the work situation or employment relationship of those employees.²⁶⁵ As to the first factor, as discussed further below, a proposal that focuses principally on non-bargaining-unit positions or employees does not directly affect bargaining-unit employees' work situations or employment relationships.²⁶⁶ As to the second factor, the record must establish a direct connection between the proposal and the bargaining-unit employees' work situations or employment relationships.²⁶⁷ For example, the Authority found that a proposal concerning the off-duty activities of employees did not concern bargaining-unit employees' work situations or employment relationships.²⁶⁸

Moreover, Authority and judicial precedent differentiate among proposals concerning the working conditions of four groups of non-unit individuals: (1) employees in other bargaining units; (2) supervisory personnel; (3) non-supervisory employees not in any bargaining unit; and (4) non-employees.²⁶⁹

Regarding the first group, a proposal that *directly determines* conditions of employment of employees in other bargaining units is outside the duty to bargain.²⁷⁰ This is because permitting an agency to negotiate with one union over the conditions of employment for employees represented by another union would violate "the principle of exclusive representation."²⁷¹ For example, the Authority has held that a union's proposal requiring an agency to assign employees from a unit represented by another union to a particular facility was outside the duty to bargain.²⁷² But proposals that only *indirectly* affect the conditions of employment of employees in other bargaining units are not outside the duty to bargain solely because they affect those employees.²⁷³

²⁶⁵ *Antilles*, [22 FLRA at 236-37](#).

²⁶⁶ *Id.* at 237.

²⁶⁷ *Id.* at 238.

²⁶⁸ *Int'l Ass'n of Fire Fighters, AFL-CIO, CLC, Local F-116*, [7 FLRA 123](#), 123-25 (1981).

²⁶⁹ *U.S. Dep't of the Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA*, [952 F.2d 1434](#), 1442 (D.C. Cir. 1992) (*Cherry Point*); *AFGE, Local 2879, AFL-CIO*, [49 FLRA 1074](#), 1087 (1994) (*Local 2879*); *AFGE, Local 1923*, [44 FLRA 1405](#), 1416-17 (1992) (*Local 1923*).

²⁷⁰ *See, e.g., Local 5*, [67 FLRA at 92](#); *NAGE, Local R1-109*, [61 FLRA 593](#), 597 (2006) (*NAGE*); *Local 2879*, [49 FLRA at 1089](#); *see also Cherry Point*, [952 F.2d at 1442-43](#).

²⁷¹ *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, [65 FLRA 1052](#), 1054 (2010) (*Newport News*).

²⁷² *NAGE*, [61 FLRA at 597](#).

²⁷³ *See AFGE, Local 32 v. FLRA*, [110 F.3d 810](#), 814-15 (D.C. Cir. 1997); *Cherry Point*, [952 F.2d at 1441 & n.8](#). Compare *Newport News*, [65 FLRA at 1055](#) (unlawful provision "directly define[d]" the parking privileges of employees in another bargaining unit), with *AFSCME, Local 2910*, [53 FLRA 1334](#), 1338-39 (1998) (proposal requiring agency to grant unit members certain percentage of parking spaces negotiable because it "would not directly determine the allocation of parking spaces to non-unit employees").

Concerning the second group, proposals that directly determine the conditions of employment of supervisors are outside the duty to bargain.²⁷⁴ However, as stated in [section 1.7](#) of this Guide, matters pertaining to managers' and supervisors' conditions of employment are permissive subjects of bargaining.²⁷⁵ Thus, an agency may bargain over, and agree to, contract proposals that directly implicate its supervisors' and managers' working conditions.²⁷⁶ As with other permissive subjects, if an agency and a union reach such an agreement, and the agreement is otherwise consistent with law, then the agency head cannot disapprove it,²⁷⁷ and it is enforceable in arbitration.²⁷⁸ And proposals that relate principally to unit employees' conditions of employment are not removed from the mandatory scope of bargaining simply because they indirectly affect supervisors.²⁷⁹

As to the third and fourth groups, a proposal that directly affects the conditions of employment of either non-employees or employees who are not in any bargaining unit is outside the duty to bargain unless the proposal addresses matters that "vitally affect" bargaining-unit employees' conditions of employment.²⁸⁰ "In determining whether or not a proposal vitally affects bargaining[-]unit employees, the Authority looks to whether 'the effect of that proposal upon unit employees' conditions of employment is significant and material, as opposed to indirect or incidental.'"²⁸¹ For example, the Authority has held that a proposal prohibiting discrimination in the hiring process – which would directly affect non-employee applicants – was within the duty to bargain because it "relate[d] to unit employees' significant and material interest in eliminating discrimination in the unit," and, thus "vitally affect[ed] the conditions of employment of unit employees."²⁸²

²⁷⁴ See, e.g., *AFGE, Local 32*, [51 FLRA at 513](#); *Local 2879*, [49 FLRA at 1088](#).

²⁷⁵ *NATCA, Rochester Local*, [56 FLRA 288](#), 291 (2000) (*Rochester Local*) (citing *AFGE, Local 3302*, [52 FLRA 677](#), 682 (1996) (*AFGE*)).

²⁷⁶ *AFGE*, [52 FLRA at 681-82](#).

²⁷⁷ E.g., *NATCA*, [61 FLRA 336](#), 339 (2005).

²⁷⁸ E.g., *AFGE*, [52 FLRA at 682](#).

²⁷⁹ See, e.g., *NATCA*, [66 FLRA 658](#), 660-61 (2012).

²⁸⁰ *Cherry Point*, [952 F.2d at 1442-43](#); *Local R-109*, [66 FLRA at 279, 281](#); *AFGE, Local 32*, [51 FLRA at 502](#); *Local 2879*, [49 FLRA at 1087](#); *Local 1923*, [44 FLRA at 1417](#).

²⁸¹ *NTEU, Chapter 83*, [64 FLRA 723](#), 727 (2010) (*Chapter 83*) (quoting *AFGE, Local 1827*, [58 FLRA 344](#), 348 (2003) (*Local 1827*)).

²⁸² *Local 1923*, [44 FLRA at 1420](#).

4.3 Management Rights

(a) Introduction and General Principles

Agencies often argue that proposals are outside the duty to bargain, or provisions are contrary to law, because they are inconsistent with management rights under [§ 7106 of the Statute](#). [Section 7106](#)²⁸³ provides:

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency –

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws –

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary actions against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from –

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating –

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

²⁸³ [5 U.S.C. § 7106](#).

A proposal or provision may affect more than one management right, but the Authority will address only the management right(s) that a party raises.²⁸⁴ For example, if an agency claims that a proposal or provision affects management's right to assign work, and the Authority finds no effect on that right, then that does not preclude an agency in a future case from arguing that a similar proposal or provision affects a different management right, such as the right to determine the agency's organization.

There are management rights contained in both [§ 7106\(a\)](#) and [§ 7106\(b\)\(1\) of the Statute](#).²⁸⁵ This Guide discusses those rights separately below.

(b) [Section 7106\(a\)](#)

Consistent with the principles regarding concession discussed in [section 1.19](#) above, if a union does not dispute an agency's claim that a proposal or provision affects a management right under [§ 7106\(a\)](#), then the Authority finds that the union has conceded that the right is affected.²⁸⁶ If the union does dispute the agency's claim, and the agency fails to support its claim with an explanation of how management's rights are affected, then the Authority finds no effect on management's rights under [§ 7106\(a\)](#).²⁸⁷

There are nineteen management rights contained in [§ 7106\(a\)](#) – five in [§ 7106\(a\)\(1\)](#) and fourteen in [§ 7106\(a\)\(2\)](#). The rights under [§ 7106\(a\)\(1\)](#) and the rights under [§ 7106\(a\)\(2\)](#) are different in a significant way: While the rights under [§ 7106\(a\)\(2\)](#) must be exercised in accordance with “applicable laws,”²⁸⁸ the rights under [§ 7106\(a\)\(1\)](#) do not contain that limitation.²⁸⁹ The meaning of “applicable laws” is discussed in [section 4.3\(d\)](#) below.

For all management rights, agencies retain not only the right to exercise them, but also the right *not* to exercise them.²⁹⁰ And for all of these rights, there are exceptions, which are discussed in [sections 4.3\(c\)](#) and [4.3\(d\)](#) below (although the rights discussed in [section 4.3\(d\)](#) apply to only some of the management rights). So a proposal or provision that affects a management right is not necessarily nonnegotiable; if it fits within an exception to a management right, then it is negotiable despite that effect.²⁹¹

²⁸⁴ See, e.g., *Nat'l Ass'n of Agric. Emps., Branch 11*, [57 FLRA 424](#), 425-26 (2001) (*Branch 11*) (in finding that proposal affected right to assign work, Authority distinguished *AFGE, Local 1940*, [37 FLRA 1058](#) (1990), which had addressed a different management right).

²⁸⁵ See, e.g., *Chapter 83*, [64 FLRA at 725-26](#).

²⁸⁶ E.g., *NATCA II*, [66 FLRA at 216](#); *Nat'l Weather Serv. Emps. Org.*, [63 FLRA 450](#), 452 (2009) (*Weather Serv.*).

²⁸⁷ E.g., *AFGE, Local 997*, [66 FLRA 499](#), 502 (2012).

²⁸⁸ E.g., *Weather Serv.*, [63 FLRA at 452](#).

²⁸⁹ E.g., *Local 723*, [66 FLRA at 644](#).

²⁹⁰ See *Prison Locals 33*, [66 FLRA at 822](#).

²⁹¹ E.g., *id.* at [822-23](#).

The [§ 7106\(a\)](#) rights are as follows.

1. [Mission](#)

Management has the right “to determine the mission . . . of the agency.”²⁹² This involves the right to determine what the agency’s mission will or will not include.²⁹³ It generally does not involve the right to determine how the agency’s mission will be carried out.²⁹⁴ But where, for example, part of an agency’s mission is to provide services to the public, a proposal or provision establishing the hours that certain agency offices would be open to the public affects this right.²⁹⁵

2. [Budget](#)

Management has the right “to determine the . . . budget . . . of the agency.”²⁹⁶ “[A]n assertion that a proposal [or provision] would increase an agency’s costs does not, by itself, establish” that the proposal or provision affects this right.²⁹⁷ Rather, a proposal or provision affects this right only if: (1) the proposal or provision prescribes either the particular programs to be included in the agency’s budget, or the amount to be allocated in the budget; or (2) the agency “makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits.”²⁹⁸ In conducting the second inquiry, the Authority looks at the proposal or provision relative to the budget of the organizational level to which the proposal or provision applies.²⁹⁹

3. [Organization](#)

Management has the right “to determine the . . . organization . . . of the agency.”³⁰⁰ This right involves management’s authority to determine the agency’s administrative and functional structure, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties.³⁰¹ For example, it includes the rights to determine: how the agency will be divided into organizational entities such as sections;³⁰² the agency’s grade-level

²⁹² [5 U.S.C. § 7106\(a\)\(1\)](#).

²⁹³ E.g., *U.S. Dep’t of Energy, Rocky Flat Field Office, Golden, Colo.*, [59 FLRA 159](#), 163 (2003).

²⁹⁴ *Id.*

²⁹⁵ E.g., *U.S. DOD, Fort Bragg Dependents Sch., Fort Bragg, N.C.*, [49 FLRA 333](#), 349 (1994); *AFGE, Local 3231*, [22 FLRA 868](#), 869-70 (1986).

²⁹⁶ [5 U.S.C. § 7106\(a\)\(1\)](#).

²⁹⁷ *Local 1998*, [66 FLRA at 125](#).

²⁹⁸ *U.S. DHS, U.S. CBP*, [61 FLRA 113](#), 116 (2005).

²⁹⁹ *Nat’l Weather Serv. Emps. Org.*, [44 FLRA 18](#), 30 (1992).

³⁰⁰ [5 U.S.C. § 7106\(a\)\(1\)](#).

³⁰¹ E.g., *U.S. Dep’t of Transp., FAA*, [63 FLRA 530](#), 532 (2009).

³⁰² *U.S. Dep’t of Transp., FAA*, [58 FLRA 175](#), 178 (2002).

structure;³⁰³ and where, geographically, the agency will provide services or otherwise conduct its operations.³⁰⁴ Although it includes the right to determine where duty stations of positions will be maintained,³⁰⁵ that an agency labels an employee's work location an "official duty station" is not, by itself, sufficient to demonstrate that this labeling involves an exercise of the right to determine the agency's organization.³⁰⁶ Instead, the agency must establish that the asserted duty station has "a direct and substantive relationship to the [a]gency's administrative or functional structure, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties."³⁰⁷

4. [Number of Employees of the Agency](#)

Management has the right to determine the "number of employees . . . of the agency."³⁰⁸ This relates to "the number of employees actually employed by an agency."³⁰⁹ So a proposal or provision that "operates within the total employee complement that has been established by" an agency – for example, by requiring an employee's reassignment within the agency – does not affect this right.³¹⁰ Thus, this right is distinct from the right to determine the number of employees assigned to any *organizational subdivision* under [§ 7106\(b\)\(1\)](#), which is discussed in [section 4.3\(c\)2](#) below.³¹¹

5. [Internal-Security Practices](#)

Management has the right to determine the "internal[-]security practices of the agency."³¹² This right involves the authority to determine the policies and practices that are part of the agency's plan to secure or safeguard its personnel, physical property, or operations against internal and external risks.³¹³

To demonstrate that a proposal or provision affects this right, an agency must show: (1) a link, or reasonable connection, between its security objective and an agency policy or practice designed to implement that objective; and (2) that the proposal or provision conflicts with the policy or practice.³¹⁴

³⁰³ E.g., U.S. DOD, *Marine Corps Logistics Base, Albany, Ga.*, [57 FLRA 275](#), 278 (2001).

³⁰⁴ E.g., *Ass'n of Civilian Technicians, N.Y. State Council*, [56 FLRA 444](#), 449 (2000).

³⁰⁵ See *Local 3928*, [66 FLRA at 179](#).

³⁰⁶ See *U.S. Dep't of Educ., Wash., D.C.*, [61 FLRA 307](#), 310 (2005).

³⁰⁷ *Id.*

³⁰⁸ [5 U.S.C. § 7106\(a\)\(1\)](#).

³⁰⁹ *U.S. DOD, Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, [46 FLRA 298](#), 316 (1992) (*DMA St. Louis*).

³¹⁰ *Id.*

³¹¹ See *id. at 316-17*; *NFFE, Local 2148*, [53 FLRA 427](#), 431 (1997).

³¹² [5 U.S.C. § 7106\(a\)\(1\)](#).

³¹³ See *Local 506*, [66 FLRA at 931](#).

³¹⁴ See *id.*

With respect to the first requirement, as long as the agency shows the required link or reasonable connection, the Authority will not review the merits of the agency's plan in the course of resolving a negotiability dispute.³¹⁵ Thus, the Authority will not examine the extent to which the plan will actually facilitate the accomplishment of the agency's security objectives.³¹⁶

With respect to the second requirement, it is not necessary to show that the proposal or provision conflicts with or "defeat[s] the purpose" for which the agency adopted the internal-security measure; a proposal or provision that "deviates from or modifies" the agency's policy affects the right.³¹⁷

The Authority has found that agencies demonstrated an effect on the right to determine internal-security practices in cases involving, for example (but not limited to), proposals or provisions that concerned: the investigative techniques that agencies would employ to attain their internal-security objectives;³¹⁸ the implementation of agencies' drug-testing programs;³¹⁹ locked doors in the workplace;³²⁰ and the actions that management would take to ensure the security of their computer systems.³²¹

6. Hire Employees

Management has the right to "hire . . . employees in the agency."³²² The Authority has not specifically defined the right to hire,³²³ but has found that it includes the right to decide whether to fill positions.³²⁴ So proposals or provisions requiring agencies to fill vacancies affect this right.³²⁵

7. Assign Employees

Management has the right to "assign . . . employees in the agency."³²⁶ This right concerns the right to assign employees to positions.³²⁷ It involves not only the initial

³¹⁵ See *id.*

³¹⁶ See *AFGE, Local 1712*, [62 FLRA 15](#), 17 (2007) (*Local 1712*).

³¹⁷ *NTEU*, [62 FLRA 267](#), 270 (2007) (Chairman Cabaniss dissenting in part) (internal citations omitted), *review granted in part on other grounds sub nom., NTEU v. FLRA*, [550 F.3d 1148](#) (D.C. Cir. 2008).

³¹⁸ *AFGE, Nat'l Border Patrol Council*, [66 FLRA 96](#), 99 (2011).

³¹⁹ *Local 723*, [66 FLRA at 643-44](#).

³²⁰ *AFGE, Local 2145*, [64 FLRA 231](#), 234 (2009).

³²¹ *Local 1712*, [62 FLRA at 17](#).

³²² [5 U.S.C. § 7106\(a\)\(2\)\(A\)](#).

³²³ *NAGE, Local R5-184*, [52 FLRA 1024](#), 1026 n.5 (1997) (*Local R5-184*).

³²⁴ E.g., *AFGE, Local 2755*, [62 FLRA 93](#), 94-95 (2007).

³²⁵ E.g., *AFGE, Local 3354*, [54 FLRA 807](#), 812-13 (1998) (*Local 3354*).

³²⁶ [5 U.S.C. § 7106\(a\)\(2\)\(A\)](#).

³²⁷ E.g., *U.S. Dep't of VA, St. Cloud VA Med. Ctr., St. Cloud, Minn.*, [62 FLRA 508](#), 510 (2008) (*VAMC St. Cloud*).

hiring of an individual and assignment to a position, but also post-hiring situations,³²⁸ such as reassignment of employees to different positions, and temporary assignments or details.³²⁹ It also includes the right to decide when an assignment should begin and end.³³⁰ In addition, it includes the rights to establish the qualifications and skills needed for positions and to judge whether particular employees possess those qualifications and skills.³³¹ But (unlike the right to determine the agency's organization) it does not include the right to decide the geographical location where employees or organizational units will conduct agency operations.³³²

8. Direct Employees

Management has the right to “direct . . . employees in the agency.”³³³ This involves the rights to supervise employees and to determine the quantity, quality, and timeliness of their work.³³⁴ Thus, this right includes, among other things, the rights to establish performance standards,³³⁵ to evaluate employees and hold them accountable under those standards,³³⁶ to select particular methods for supervising employees (such as by unannounced visits and spot-checking of their work),³³⁷ and to require employees to account for their duty time.³³⁸ But this right does *not* include the right to decide whether to reward performance that already has been evaluated.³³⁹

9. Layoff Employees

Management has the right to “layoff . . . employees in the agency.”³⁴⁰ This right includes, for example, the rights to conduct a reduction in force and to exercise discretion in determining which positions will be abolished and which will be retained.³⁴¹

³²⁸ E.g., U.S. DOJ, *Fed. BOP, Fed. Corr. Inst., Marianna, Fla.*, [56 FLRA 467](#), 469 (2000).

³²⁹ E.g., *Local 1547*, [65 FLRA at 913](#).

³³⁰ E.g., AFGE, *Local 12*, [61 FLRA 209](#), 218 (2005) (*Local 12*).

³³¹ E.g., VAMC St. Cloud, [62 FLRA at 510](#).

³³² See AFGE, *Local 3584, Council of Prison Locals C-33*, [64 FLRA 316](#), 317 (2009).

³³³ [5 U.S.C. § 7106\(a\)\(2\)\(A\)](#).

³³⁴ See *NTEU II*, [65 FLRA at 511](#).

³³⁵ E.g., *Weather Serv.*, [63 FLRA at 453](#).

³³⁶ *NTEU II*, [65 FLRA at 511](#).

³³⁷ E.g., *Local 1712*, [62 FLRA at 17](#).

³³⁸ E.g., AFGE, *Council 224*, [60 FLRA 278](#), 279 (2004).

³³⁹ See U.S. DHS, U.S. CBP, [63 FLRA 505](#), 508 (2009) (CBP); NAGE, *Local R1-203*, [55 FLRA 1081](#), 1083 (1999) (*Local R1-203*).

³⁴⁰ [5 U.S.C. § 7106\(a\)\(2\)\(A\)](#).

³⁴¹ E.g., *Local 1547*, [65 FLRA at 913](#); *Local 1827*, [58 FLRA at 345](#).

10. Retain Employees

Management has the right to “retain employees in the agency.”³⁴² This is the right to establish policies or practices that encourage or discourage employees from remaining employed by an agency.³⁴³ The Authority has found that proposals and provisions affected this right where, for example, they required agencies to offer voluntary-separation-incentive pay,³⁴⁴ or required agencies to provide compensation that will encourage “special[-]rate” employees to remain employed with the agency.³⁴⁵

11. Suspend

Management has the right to “suspend . . . employees.”³⁴⁶ The Authority has found that a proposal affected this right when the proposal gave employees the option of canceling their own previously imposed suspensions.³⁴⁷

12. Remove

Management has the right to “remove . . . employees.”³⁴⁸ The Authority has found that proposals and provisions affected this right where, for example, they: required agencies to separate particular groups of employees before they separated other groups of employees;³⁴⁹ required an agency to vacate certain positions and make them available to certain categories of employees;³⁵⁰ or precluded management from taking actions against an employee for a particular “offense,” including unacceptable performance.³⁵¹

13. Reduce in Grade or Pay

Management has the right to “reduce in grade or pay . . . employees.”³⁵² The Authority has found that proposals and provisions affected this right where, for example, they: precluded management from taking actions against an employee for a

³⁴² [5 U.S.C. § 7106\(a\)\(2\)\(A\)](#).

³⁴³ *Local 1827*, [58 FLRA at 346](#).

³⁴⁴ *Local 5*, [67 FLRA at 87](#).

³⁴⁵ *U.S. Dep’t of Commerce, PTO*, [60 FLRA 839](#), 841-42 (2005).

³⁴⁶ [5 U.S.C. § 7106\(a\)\(2\)\(A\)](#).

³⁴⁷ *See NTEU & NTEU Chapter 91*, [19 FLRA 647](#), 650 (1985).

³⁴⁸ *Id.*

³⁴⁹ *Fed. Union of Scientists & Eng’rs, NAGE, Local R1-144*, [23 FLRA 804](#), 805-06 (1986); *AFGE, Local 2612, AFL-CIO*, [19 FLRA 1012](#), 1014 (1985); *AFGE, AFL-CIO, Local 1603*, [3 FLRA 4](#), 5-6 (1980).

³⁵⁰ *Ass’n of Civilian Technicians, N.Y. State Council*, [11 FLRA 475](#), 482 (1983).

³⁵¹ *NTEU*, [53 FLRA 539](#), 579 (1997) (*NTEU VI*); *see also NFFE, Local 1214*, [40 FLRA 1181](#), 1200-01 (1991) (*Local 1214*).

³⁵² [5 U.S.C. § 7106\(a\)\(2\)\(A\)](#).

particular offense;³⁵³ and restricted management's right to reduce in grade or pay employees who have demonstrated an inability or unwillingness to perform the duties of their positions.³⁵⁴

14. Discipline

In addition to having the rights to suspend, remove, and reduce in grade or pay, management has the right to "take other disciplinary action against . . . employees."³⁵⁵ This includes the rights to: discipline employees for both performance-related and nonperformance-related conduct;³⁵⁶ investigate and determine appropriate investigative techniques in connection with deciding whether discipline is justified;³⁵⁷ decide which evidence or information (including prior offenses) to use to take, or support, disciplinary actions;³⁵⁸ and determine what disciplinary penalty to impose.³⁵⁹

15. Assign Work

Management has the right to "assign work."³⁶⁰ This encompasses the rights to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.³⁶¹ It also includes the rights to establish the qualifications and skills needed for positions and duties, and to judge whether particular employees meet those qualifications and skills.³⁶² Additionally, it includes the rights to: establish job requirements for various levels of performance;³⁶³ determine the content of performance standards and elements;³⁶⁴ supervise employees and determine the quantity, quality, and timeliness of their work;³⁶⁵ determine the particular measures of supervising employees' work (for example, through unannounced spot checks);³⁶⁶ enforce established performance standards;³⁶⁷ and evaluate employees and hold them accountable for their work.³⁶⁸ (Please note that, in some respects, the right to assign work involves similar rights as the rights to assign and direct employees, discussed below in [sections 4.3\(b\)7](#) and [4.3\(b\)8](#), respectively.)

³⁵³ E.g., *NTEU VI*, [53 FLRA at 579](#).

³⁵⁴ *Local 1214*, [40 FLRA at 1200-01](#).

³⁵⁵ [5 U.S.C. § 7106\(a\)\(2\)\(A\)](#).

³⁵⁶ E.g., *Locals 33*, [65 FLRA at 145](#).

³⁵⁷ E.g., *AFSCME, Local 2830*, [60 FLRA 124](#), 127 (2004).

³⁵⁸ E.g., *NATCA*, [61 FLRA 341](#), 346 (2005); *NTEU, Chapter 243*, [49 FLRA 176](#), 202-03 (1994).

³⁵⁹ E.g., *POPA*, [53 FLRA 625](#), 679 (1997).

³⁶⁰ [5 U.S.C. § 7106\(a\)\(2\)\(B\)](#).

³⁶¹ E.g., *Prison Locals 33*, [66 FLRA at 823](#).

³⁶² E.g., *PASS II*, [61 FLRA at 99](#).

³⁶³ E.g., *AFGE, Local 225*, [56 FLRA 686](#), 687 (2000) (*Local 225*).

³⁶⁴ E.g., *Weather Serv.*, [63 FLRA at 453](#).

³⁶⁵ E.g., *NTEU II*, [65 FLRA at 511](#).

³⁶⁶ E.g., *Local 1712*, [62 FLRA at 17](#).

³⁶⁷ E.g., *NTEU II*, [65 FLRA at 511](#).

³⁶⁸ E.g., *id.*

A proposal or provision does not affect the right to assign work merely because it requires the agency to take some action.³⁶⁹ And a proposal or provision requiring management to use seniority to select employees for assignments does not affect the right, as long as management retains the right to determine that the eligible employees are equally qualified for the assignments.³⁷⁰ In addition, the right to assign work does not include the right to determine whether to reward performance,³⁷¹ including, for example, decisions as to whether to grant performance awards,³⁷² or to determine eligibility for “incentive[-]pay bonus[es].”³⁷³

16. Contract Out

Management has the right to “make determinations with respect to contracting out.”³⁷⁴ The Authority has found that proposals or provisions affected this right where, for example, they: precluded an agency from contracting out one of its functions for a specified period;³⁷⁵ required an agency to delay contracting-out decisions;³⁷⁶ or required an agency to conduct a cost study before contracting out.³⁷⁷

17. Determine Personnel

Management has the right to “determine the personnel by which agency operations shall be conducted.”³⁷⁸ This includes the right to determine the particular employees to whom work will be assigned.³⁷⁹ So proposals and provisions that require an agency to assign particular duties to a particular individual affect this right.³⁸⁰

18. Make Selections to Fill Positions

Management has the right, “with respect to filling positions, to make selections for appointments from— (i) among properly ranked and certified candidates for promotion; or (ii) any other appropriate source”³⁸¹

³⁶⁹ *NTEU V*, [64 FLRA at 447](#).

³⁷⁰ *AFGE, Local 1164*, [60 FLRA 785](#), 787 (2005).

³⁷¹ *See CBP*, [63 FLRA at 508](#).

³⁷² *Local R1-203*, [55 FLRA at 1083](#).

³⁷³ *FDIC*, [64 FLRA 79](#), 81 (2009).

³⁷⁴ [5 U.S.C. § 7106\(a\)\(2\)\(B\)](#).

³⁷⁵ *E.g., Local 12*, [61 FLRA at 210](#).

³⁷⁶ *E.g., U.S. Dep’t of the Army, Corps of Eng’rs, Nw. Div. & Portland Dist.*, [60 FLRA 595](#), 597 (2005).

³⁷⁷ *AFGE, Local 1345*, [48 FLRA 168](#), 204 (1993).

³⁷⁸ [5 U.S.C. § 7106\(a\)\(2\)\(B\)](#).

³⁷⁹ *U.S. Dep’t of VA, Med. Ctr., Detroit, Mich.*, [61 FLRA 371](#), 373 (2005).

³⁸⁰ *E.g., id.* at 373-74.

³⁸¹ [5 U.S.C. § 7106\(a\)\(2\)\(C\)](#).

This “right to select” includes the rights to determine the qualifications, skills, and abilities needed to do the work of a position and to determine whether applicants possess those qualifications, skills, and abilities.³⁸²

The right to select also includes the right to fill positions by selecting candidates from any appropriate source without restriction.³⁸³ So proposals and provisions that limit the sources from which management can select affect this right.³⁸⁴ But a requirement that expands, rather than limits, an agency’s selection options does not affect this right.³⁸⁵

19. Carry Out Mission in Emergencies

Management has the right to “take whatever actions may be necessary to carry out the agency mission during emergencies.”³⁸⁶ This includes the rights to: (1) independently assess whether an emergency exists, and (2) decide what actions are needed to address the emergency.³⁸⁷ Proposals and provisions that define what constitutes an “emergency” affect this right, without regard to the content of the definition.³⁸⁸ So do proposals and provisions that preclude management from acting until a particular individual declares an emergency.³⁸⁹

(c) Section 7106(b)

All of the rights set forth in [§ 7106\(a\)](#) are “[s]ubject to” [§ 7106\(b\) of the Statute](#).³⁹⁰ [Section 7106\(b\)](#) provides that “[n]othing in [\[§ 7106\]](#) shall preclude any agency and any labor organization from negotiating” several types of matters.³⁹¹ Those types of matters are set forth in [§ 7106\(b\)\(1\), \(2\), and \(3\)](#), and are discussed separately below.

³⁸² See NTEU, [61 FLRA 618](#), 622 (2006).

³⁸³ *Ass’n of Civilian Technicians, Pa. State Council*, [54 FLRA 552](#), 558 (1998).

³⁸⁴ E.g., *Ass’n of Civilian Technicians, Treasure State Chapter #57*, [56 FLRA 1046](#), 1048 (2001) (requiring use of competitive procedures to fill vacant positions, except in certain circumstances); *NAGE, Local R4-45*, [54 FLRA 218](#), 225 (1998) (discussing proposals requiring management to fill vacancies from a single source).

³⁸⁵ See *U.S. Dep’t of the Treasury, IRS, Wash., D.C.*, [61 FLRA 226](#), 229 (2005).

³⁸⁶ [5 U.S.C. § 7106\(a\)\(2\)\(D\)](#).

³⁸⁷ See *U.S. Dep’t of VA, VA Reg’l Office, St. Petersburg, Fla.*, [58 FLRA 549](#), 551 (2003).

³⁸⁸ See *Local 350*, [55 FLRA at 245](#).

³⁸⁹ E.g., *Tidewater Va. Fed. Emps. Metal Trades Council, AFL-CIO*, [31 FLRA 131](#), 132 (1988).

³⁹⁰ [5 U.S.C. § 7106\(a\)](#).

³⁹¹ *Id.* [§ 7106\(b\)](#).

1. Section 7106(b)(1) - Generally

Section 7106(b)(1) of the Statute provides that certain matters are negotiable “at the election of the agency.”³⁹² In other words, those matters are permissive subjects of bargaining: Agencies may, but are not legally required to, bargain over them.³⁹³ Thus, as with other permissive subjects, agency heads cannot disapprove agreements concerning these matters unless they are otherwise unlawful,³⁹⁴ and agreements regarding § 7106(b)(1) matters are enforceable in arbitration.³⁹⁵ In this connection, § 7106(b)(1) is an exception to § 7106(a), so a proposal or provision that might be unlawful under § 7106(a) becomes lawful if it also concerns a § 7106(b)(1) matter.³⁹⁶ And even if a proposal concerns a permissive subject of bargaining under § 7106(b)(1), it becomes a mandatory subject of bargaining if it also concerns a § 7106(b)(2) or § 7106(b)(3) matter.³⁹⁷ A discussion of the individual portions of § 7106(b)(1) follows.

2. Section 7106(b)(1) - Numbers, Types, and Grades of Employees or Positions Assigned to Any Organizational Subdivision, Work Project, or Tour of Duty

Section 7106(b)(1) provides that an agency may elect to negotiate on the “numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty.”³⁹⁸ In determining whether a proposal or provision is within the scope of this portion of § 7106(b)(1), the Authority assesses whether the proposal or provision concerns: (1) the numbers, types, and grades; (2) of employees or positions; (3) assigned to any organizational subdivision, work project, or tour of duty.³⁹⁹ This portion of § 7106(b)(1) applies to the establishment of agency staffing patterns, or the allocation of staff, for the purpose of an agency’s organization and the accomplishment of its work.⁴⁰⁰ We discuss the various terms below.

Numbers. The Authority has found that a proposal or provision that would increase, decrease, or maintain the number of employees or positions that an agency has assigned, or plans to assign, concerns the “numbers” of employees or positions within the meaning of § 7106(b)(1).⁴⁰¹ As noted in section 4.3(b)4 above, the § 7106(b)(1) right to determine the number of employees assigned to a particular organizational subdivision, work project, or tour of duty is different from the § 7106(a)(1) right to

³⁹² Id. § 7106(b)(1).

³⁹³ *E.g.*, U.S. Dep’t of Transp., FAA, Alaskan Region, 62 FLRA 90, 92 (2007) (FAA Alaska).

³⁹⁴ *E.g.*, NTEU II, 65 FLRA at 512.

³⁹⁵ *E.g.*, FAA Alaska, 62 FLRA at 92.

³⁹⁶ *E.g.*, id.

³⁹⁷ *E.g.*, U.S. GSA, 62 FLRA 341, 343 (2008).

³⁹⁸ 5 U.S.C. § 7106(b)(1).

³⁹⁹ *See Local 723*, 66 FLRA at 645.

⁴⁰⁰ Id.; *see also Local R5-184*, 52 FLRA at 1030-31.

⁴⁰¹ *Branch 11*, 57 FLRA at 426.

determine the “number of employees . . . of the agency,” which refers to the *total* number of employees in the agency.⁴⁰²

Types. “Types” are distinguishable classes, kinds, groups, or categories of employees or positions that are relevant to the establishment of staffing patterns.⁴⁰³ For example, the Authority has held that dental hygienists – who were in a separate classification series and were differentiated as a group or category based on a specialized line of work and qualifications requirements – were a type of employee or position.⁴⁰⁴ And the Authority has found that where temporary employees were hired for a limited time to meet temporary employment needs, they were a type of employee because the characteristic of “limited tenure” identified them as a distinguishable class, kind, group, or category.⁴⁰⁵ The party claiming that a proposal or provision concerns “types” bears the burden of establishing a relationship between the claimed “type” and staffing patterns.⁴⁰⁶

Grades. The Authority has found that proposals and provisions concerned the grades of employees or positions when they involved the grade levels of employees or positions within the GS classification system,⁴⁰⁷ or when they concerned “entry[-]level” positions.⁴⁰⁸ Where proposals or provisions did not involve the grade level of employees assigned to do particular work, the Authority has declined to find that they involved the grades of employees within the meaning of [§ 7106\(b\)\(1\)](#).⁴⁰⁹

Organizational subdivision. The Authority has found that proposals and provisions that involve which sections of an agency will perform specific agency functions, and where employees performing those functions will be assigned, concern assignments to organizational subdivisions under [§ 7106\(b\)\(1\)](#).⁴¹⁰ Although proposals or provisions that merely *establish* organizational subdivisions do not affect management’s rights under [§ 7106\(b\)\(1\)](#), proposals or provisions that prescribe the *staffing* of such organizational subdivisions do affect that right.⁴¹¹

⁴⁰² See *DMA St. Louis*, [46 FLRA at 316-17](#).

⁴⁰³ See *Local 723*, [66 FLRA at 645](#); *Local R5-184*, [52 FLRA at 1031](#).

⁴⁰⁴ *Local R5-184*, [52 FLRA at 1031-32](#).

⁴⁰⁵ *Id.* at 1034.

⁴⁰⁶ E.g., *Local 723*, [66 FLRA at 645](#); *Local R5-184*, [52 FLRA at 1031](#).

⁴⁰⁷ E.g., *Local R5-184*, [52 FLRA at 1032 n.11](#).

⁴⁰⁸ *AFGE, AFL-CIO, Council of Prison Locals, Local 1661*, [29 FLRA 990](#), 1016, *reconsid. denied*, [30 FLRA 492](#) (1987).

⁴⁰⁹ *AFGE, Local 3529*, [55 FLRA 830](#), 832-33 (1999).

⁴¹⁰ E.g., *NAGE, Local R14-23*, [54 FLRA 1302](#), 1306 (1998).

⁴¹¹ E.g., *AFGE, Local 1336*, [52 FLRA 794](#), 802 (1996).

Work project. “Work project” means a “particular job” or “task.”⁴¹² For example, supervising inmates is a work project.⁴¹³

Tour of duty. “Tour of duty” means the hours of a day (a daily tour of duty) and the days of an administrative workweek (a weekly tour of duty) that constitute an employee’s regularly scheduled administrative workweek.⁴¹⁴

3. [Section 7106\(b\)\(1\) - Technology, Methods, and Means of Performing Work](#)

[Section 7106\(b\)\(1\)](#) provides, in pertinent part, that nothing in [§ 7106](#) shall preclude agencies and unions from negotiating, “at the election of the agency, on . . . the technology, methods, and means of performing work.”⁴¹⁵

“Technology . . . of performing work” means “the technical method that will be used in accomplishing or furthering the performance of the [a]gency’s work.”⁴¹⁶ A party alleging that a proposal or provision concerns the technology of performing work must show: (1) the technological relationship of the matter addressed by the proposal or provision to accomplishing or furthering the performance of the agency’s work; and (2) how the proposal or provision would interfere with the purpose for which the technology was adopted.⁴¹⁷ The Authority has found proposals to concern the technology of performing work where, for example, they required management to provide specific equipment to employees for their use in performing the agency’s work.⁴¹⁸

“Method” refers to the way in which an agency performs its work.⁴¹⁹ “Means” refers to any instrumentality – including an agent, tool, device, measure, plan, or policy – that an agency uses to accomplish, or further the performance of, its work.⁴²⁰ Basically, “methods” are *how* an agency performs its work, and “means” are *what the agency uses* to perform that work.⁴²¹

⁴¹² *Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, [55 FLRA 848](#), 853 (1999) (*FCI Bastrop*) (quoting *AFGE, Local 3302, 37 FLRA 350*, 355 (1990)).

⁴¹³ *Id.* at 853-54.

⁴¹⁴ *Branch 11, 57 FLRA at 426.*

⁴¹⁵ [5 U.S.C. § 7106\(b\)\(1\)](#).

⁴¹⁶ *NTEU, 62 FLRA 321*, 326 (2007) (quoting *AFSCME, AFL-CIO, Local 2477, 7 FLRA 578*, 582-83 (1982), *enforced sub nom., Library of Cong. v. FLRA, 699 F.2d 1280* (D.C. Cir. 1983)).

⁴¹⁷ *AFGE, Local 3129, SSA Gen. Comm.*, [58 FLRA 273](#), 275 (2002).

⁴¹⁸ *Fraternal Order of Police, Lodge 1F (R.I.) Fed.*, [32 FLRA 944](#), 958-59 (1988).

⁴¹⁹ E.g., *Local 723, 66 FLRA at 646.*

⁴²⁰ *Id.*

⁴²¹ *Chapter 83, 64 FLRA at 725.*

If a proposal or provision “concerns” a method or means, then the Authority applies a two-part test to determine whether the proposal or provision affects management’s right to determine the methods or means of performing work.⁴²² Specifically, the Authority assesses whether: (1) there is a direct or integral relationship between the method or means the agency has chosen and the accomplishment of the agency’s mission; and (2) the proposal or provision would directly interfere with the mission-related purpose for which the method or means was adopted.⁴²³ The relative importance of a particular method or means is irrelevant.⁴²⁴ In this regard, the method or means need not be indispensable to the accomplishment of the agency’s mission; rather, it need only be a matter that is used to attain or make more likely the attainment of a desired end, or used by the agency to accomplish or further the performance of its work.⁴²⁵

[4. Section 7106\(b\)\(2\) - Procedures](#)

[Section 7106\(b\)\(2\) of the Statute](#) provides that nothing in [§ 7106](#) shall preclude agencies and unions from negotiating over “procedures [that] management officials of the agency will observe in exercising any authority under” [§ 7106](#).⁴²⁶ These “procedures” are mandatory subjects of bargaining: Agencies must bargain over them, even if they affect management rights under [§ 7106\(a\)](#) or [§ 7106\(b\)\(1\)](#).⁴²⁷

Consistent with the principles of concession discussed in [section 1.19](#) above, if a union argues that a proposal or provision is a procedure under [§ 7106\(b\)\(2\)](#), and an agency does not dispute that claim, then the Authority will find the proposal or provision to be a procedure.⁴²⁸ If the agency does dispute the union’s claim, then the union must demonstrate that the proposal or provision is a procedure.⁴²⁹ To determine whether a particular proposal or provision is (or is not) a procedure, parties should research Authority precedent to find proposals and provisions (similar to the one in dispute) that the Authority has analyzed under [§ 7106\(b\)\(2\)](#).

⁴²² *Local 723*, [66 FLRA at 646](#).

⁴²³ *Id.*

⁴²⁴ E.g., *AFGE, Local 1164*, [66 FLRA 112](#), 115 (2011).

⁴²⁵ See *FCI Bastrop*, [55 FLRA at 854](#) (discussing means).

⁴²⁶ [5 U.S.C. § 7106\(b\)\(2\)](#).

⁴²⁷ E.g., *Local ZHU*, [65 FLRA at 744](#) (a proposal or provision may be a procedure for the exercise of a management right under either [§ 7106\(a\)](#) or [§ 7106\(b\)\(1\)](#)); *POPA*, [56 FLRA 69](#), 86 (2000) (*POPA III*) (same).

⁴²⁸ E.g., *Local 5*, [67 FLRA at 91](#).

⁴²⁹ E.g., *Local 723*, [66 FLRA at 644](#).

A non-exhaustive list of proposals and provisions that the Authority has found to be procedures includes proposals or provisions that:

- Required advance notice of agency actions or specific events;⁴³⁰
- Prescribed how management would select employees for assignments, as long as management preserved the right to determine that the available employees were equally qualified;⁴³¹
- Required management to take certain actions, as long as the proposals or provisions did not specify the particular persons or positions who would take the actions;⁴³²
- Established advisory committees involving union participation where those committees were not an integral part of management's decision-making process relating to the exercise of its rights under [§ 7106](#);⁴³³
- Required management to delay exercising its rights pending the completion of bargaining or applicable appellate processes;⁴³⁴
- Established the procedures that management would observe in developing and implementing performance standards;⁴³⁵
- Set forth the procedures that management would use in announcing or filling vacancies;⁴³⁶
- Required management to maintain, or show to employees, certain documentation;⁴³⁷

⁴³⁰ *Local 12*, [61 FLRA at 220](#).

⁴³¹ E.g., *U.S. Dep't of Transp., FAA*, [63 FLRA 502](#), 503 (2009); *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Gulf Coast, Pascagoula, Miss.*, [62 FLRA 328](#), 330 (2007); *AFGE, Council 215*, [60 FLRA 461](#), 467 (2004); *SSA, Chi. N. Dist. Office*, [56 FLRA 274](#), 277 (2000).

⁴³² E.g., *AFGE, Council 220*, [65 FLRA 726](#), 728 (2011) (*Council 220*); *NAIL*, [62 FLRA 1](#), 3 (2007); *NLRB, Wash., D.C.*, [61 FLRA 154](#), 161 (2005).

⁴³³ E.g., *NAIL*, [62 FLRA at 3](#).

⁴³⁴ E.g., *Antilles Consol. Educ. Ass'n*, [61 FLRA 327](#), 331-33 (2005) (*ACEA*).

⁴³⁵ E.g., *Council 220*, [65 FLRA at 728-29](#); *POPA*, [47 FLRA 10](#), 65-66, 70-71 (1993) (*POPA II*).

⁴³⁶ E.g., *Local 3354*, [54 FLRA at 814-15](#).

⁴³⁷ E.g., *POPA*, [48 FLRA 129](#), 154, 157-58 (1993) (requiring agency to maintain record of time employees spent doing certain work, and to provide union with detailed reports of certain employee errors); *NTEU*, [47 FLRA 705](#), 718-20 (1993) (requiring agency to share documentation supporting performance appraisals and ratings).

- Required an agency to complete disciplinary processes in a timely manner, but did not prescribe the consequences for the agency's failure to do so (and did not prevent the agency from acting on the underlying disciplinary matters);⁴³⁸
- Required management to evaluate employees' work products at the completion of each assignment;⁴³⁹
- Established the procedures governing the imposition of drug tests on employees, if the procedures did not affect the agency's decision to require employees to undergo random or reasonable-suspicion drug tests;⁴⁴⁰
- Required consistency between position descriptions and performance standards, if management retained discretion to amend the position descriptions;⁴⁴¹ and
- Required an agency to refer a group of candidates from one source (for example, unit employees) to a selecting official for first consideration, but did not preclude the agency from concurrently soliciting, rating, and ranking applicants from another source.⁴⁴²

A non-exhaustive list of proposals and provisions that the Authority has found *not* to be procedures includes proposals or provisions that:

- Precluded agencies from exercising management rights unless or until other events (other than completion of bargaining or applicable appellate processes) occurred;⁴⁴³
- Delayed implementation of management actions that were "necessary for the functioning of the agenc[ies];"⁴⁴⁴
- Conditioned the exercise of management rights on the agreement of employees or a union;⁴⁴⁵
- Required agencies to give advance notice of investigative interviews when the decisions not to do so were part of the agencies' investigative techniques;⁴⁴⁶

⁴³⁸ *NFFE, Local 1438*, [47 FLRA 812](#), 816-18 (1993).

⁴³⁹ *POPA II*, [47 FLRA at 54](#).

⁴⁴⁰ *E.g., NTEU, Chapters 243 & 245*, [45 FLRA 270](#), 279-80 (1992).

⁴⁴¹ *United Power Trades Org.*, [44 FLRA 1145](#), 1155-56 (1992).

⁴⁴² *NTEU*, [43 FLRA 1279](#), 1287-88 (1992) (*NTEU VII*).

⁴⁴³ *E.g., ACEA*, [61 FLRA at 331-32](#).

⁴⁴⁴ *E.g., id. at 332*.

⁴⁴⁵ *E.g., AFGE, Local 3529*, [57 FLRA 172](#), 175 (2001) (*Local 3529*).

⁴⁴⁶ *E.g., AFGE, Local 701, Council of Prison Locals 33*, [58 FLRA 128](#), 134 (2002).

- Prevented agencies from determining employee qualifications;⁴⁴⁷
- Prescribed or precluded assignments to particular individuals identified by name or title;⁴⁴⁸
- Required management to assign employees certain duties, at the employees' option;⁴⁴⁹
- Precluded management from assigning employees certain duties;⁴⁵⁰
- Required management to reassign employees to sites designated by the employees;⁴⁵¹
- Required agencies to use competitive procedures to fill vacancies where the requirements prevented management from considering other applicants or using any other appropriate source in actually filling such vacancies;⁴⁵²
- Limited the evidence agencies could use to support disciplinary actions;⁴⁵³
- Limited agencies' discretion to decide whether to restrict overtime assignments to unit employees;⁴⁵⁴
- Substantively limited management's right to determine the content of performance standards;⁴⁵⁵
- Prevented management from holding employees accountable for the performance of assigned work;⁴⁵⁶
- Required agencies to fill positions;⁴⁵⁷
- Prevented agencies from controlling which particular individuals would have access to their facilities;⁴⁵⁸

⁴⁴⁷ E.g., *Fed. Emps. Metal Trades Council of Charleston*, [44 FLRA 683](#), 687-89 (1992).

⁴⁴⁸ See *Council 220*, [65 FLRA at 728-29](#).

⁴⁴⁹ *AFGE, Local 1020*, [47 FLRA 258](#), 263 (1993).

⁴⁵⁰ E.g., *U.S. DOD, Def. Contract Audit Agency, Cent. Region*, [47 FLRA 512](#), 520 (1993).

⁴⁵¹ *NLRB*, [60 FLRA 576](#), 579 (2005).

⁴⁵² E.g., *U.S. DOD, Ala. Air Nat'l Guard, Montgomery, Ala.*, [58 FLRA 411](#), 413 (2003).

⁴⁵³ E.g., *Local 1827*, [58 FLRA at 352](#).

⁴⁵⁴ E.g., *id.* at 353.

⁴⁵⁵ E.g., *AFGE, Local 1858*, [56 FLRA 1115](#), 1116 n.2 (2001).

⁴⁵⁶ E.g., *Local 3529*, [57 FLRA at 179](#).

⁴⁵⁷ E.g., *Local 3354*, [54 FLRA at 814-15](#).

⁴⁵⁸ *AFGE, AFL-CIO, Local 2782*, [49 FLRA 470](#), 474 (1994).

- Established restrictions on management action under [§ 7106](#) based on the results of studies;⁴⁵⁹
- Precluded management from using particular methods of monitoring employees' work performance;⁴⁶⁰
- Precluded management from rating and ranking candidates until after a preliminary placement process for currently employed unit employees was completed;⁴⁶¹ and
- Required management "ordinarily" to approve employees' requests to receive and use advanced sick leave.⁴⁶²

Please note that merely because a proposal or a provision affects a management right under [§ 7106\(a\)](#) (or, for proposals, affects a management right under [§ 7106\(b\)\(1\)](#)), and is not a procedure under [§ 7106\(b\)\(2\)](#), that does not mean that the proposal or provision is nonnegotiable. It is negotiable if it is an appropriate arrangement under [§ 7106\(b\)\(3\)](#), as discussed below.

5. [Section 7106\(b\)\(3\) - Appropriate Arrangements](#)

[Section 7106\(b\)\(3\) of the Statute](#) provides that nothing in [§ 7106](#) precludes agencies and unions from negotiating over "appropriate arrangements for employees adversely affected by the exercise of any authority under" [§ 7106](#).⁴⁶³ These "appropriate arrangements" are mandatory subjects of bargaining: Agencies must bargain over them, despite their effects on management rights under [§ 7106\(a\)](#) or [§ 7106\(b\)\(1\)](#).⁴⁶⁴

i. [What is an arrangement?](#)

To determine whether a proposal or a provision is an appropriate arrangement under [§ 7106\(b\)\(3\)](#), the Authority first determines whether the proposal or provision is intended to be an "arrangement" for employees adversely affected by the exercise of a management right.⁴⁶⁵ Consistent with the principles of concession discussed in [section 1.19](#) above, if an agency does not dispute a union's claim that a proposal or

⁴⁵⁹ *Local 1923*, [44 FLRA at 1437](#).

⁴⁶⁰ *NFFE, Local 1482*, [44 FLRA 637](#), 668-69 (1992).

⁴⁶¹ *NTEU VII*, [43 FLRA at 1287](#).

⁴⁶² *NFFE, Local 405*, [42 FLRA 1112](#), 1127 (1991).

⁴⁶³ [5 U.S.C. § 7106\(b\)\(3\)](#).

⁴⁶⁴ See *Local 506*, [66 FLRA at 940-41](#) (Authority assumed effect on right under [§ 7106\(a\)](#) but found proposal within duty to bargain as appropriate arrangement); *POPA III*, [56 FLRA at 86](#) (a proposal or provision may be a procedure or appropriate arrangement for the exercise of a management right under either [§ 7106\(a\)](#) or [§ 7106\(b\)\(1\)](#)).

⁴⁶⁵ *NAGE, Local R14-87*, [21 FLRA 24](#), 31 (1986) (*KANG*).

provision is an arrangement, then the Authority will find that the agency has conceded that the proposal or provision is an arrangement.⁴⁶⁶ But if an agency does dispute a union's claim that a proposal or provision is an arrangement, then the union must demonstrate the following.

An arrangement must seek to mitigate adverse effects flowing from the exercise of a protected management right.⁴⁶⁷ To establish that a proposal or a provision is an arrangement, a union must identify: (1) the effects or reasonably foreseeable effects on employees that flow from the exercise of management's rights; and (2) how those effects are adverse.⁴⁶⁸ Proposals and provisions that address speculative or hypothetical concerns are not arrangements.⁴⁶⁹ The alleged arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.⁴⁷⁰ But the Authority has held that proposals and provisions intended to eliminate the *possibility* of an adverse effect may be appropriate arrangements.⁴⁷¹ In particular, the Authority will find such "prophylactic" proposals and provisions to be sufficiently tailored in situations where it is not possible to draft a proposal targeting only those employees who will be adversely affected by an agency action.⁴⁷²

ii. *When is an arrangement "appropriate"?*

If a proposal or a provision is an arrangement, then the Authority determines whether it is appropriate.⁴⁷³ The test that the Authority applies to determine whether an arrangement is appropriate depends on whether the case involves a proposal or a provision.

If the case involves a proposal, then the Authority applies an "excessive [-]interference" test.⁴⁷⁴ Specifically, the Authority weighs "the competing practical needs of employees and managers" to ascertain whether the benefit to employees flowing from the proposal outweighs the proposal's burden on the exercise of the management right or rights involved.⁴⁷⁵

⁴⁶⁶ E.g., *NTEU III*, [66 FLRA at 812](#).

⁴⁶⁷ *Local 5*, [67 FLRA at 87](#).

⁴⁶⁸ *KANG*, [21 FLRA at 31](#).

⁴⁶⁹ *Local 5*, [67 FLRA at 87](#).

⁴⁷⁰ *Id.*

⁴⁷¹ E.g., *Prison Locals 33*, [66 FLRA at 822](#).

⁴⁷² *Id.*

⁴⁷³ *KANG*, [21 FLRA at 31-33](#).

⁴⁷⁴ *NTEU II*, [65 FLRA at 512](#).

⁴⁷⁵ *KANG*, [21 FLRA at 31-32](#).

If the case involves a provision, however, then the Authority does not apply the excessive-interference test.⁴⁷⁶ Instead, in *NTEU*,⁴⁷⁷ the Authority held that it will assess whether the arrangement “abrogates” – i.e., waives – the affected management right.⁴⁷⁸ In determining whether a provision abrogates a management right, the Authority assesses whether the provision “precludes” the agency from exercising the affected management right.⁴⁷⁹ If it does not, then the arrangement is appropriate, and the Authority will direct the agency head to rescind his or her disapproval of the provision.⁴⁸⁰ (Please note that, as of the date on the front of this Guide, the Authority’s use of the abrogation standard is on appeal to the United States Court of Appeals for the District of Columbia Circuit.⁴⁸¹)

(d) Section 7106(a)(2) - “Applicable Laws”

As discussed previously, agencies must exercise their management rights under [§ 7106\(a\)\(2\)](#) – but not their rights under [§ 7106\(a\)\(1\)](#) – in a manner that complies with “applicable laws.”⁴⁸² Applicable laws include not only statutes, but also the U.S. Constitution, judicial decisions, executive orders, and regulations having the force and effect of law.⁴⁸³ Regulations have the force and effect of law where they: (1) affect individual rights and obligations; (2) were promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress; and (3) were promulgated in accordance with procedural requirements imposed by Congress.⁴⁸⁴ The Statute is *not* an “applicable law” within the meaning of [§ 7106\(a\)\(2\)](#).⁴⁸⁵

Proposals or provisions that require agencies to comply with applicable laws when they exercise their [§ 7106\(a\)\(2\)](#) rights are negotiable.⁴⁸⁶ But proposals or provisions that require agencies to comply with applicable laws when they exercise their [§ 7106\(a\)\(1\)](#) rights are *not* negotiable (unless they are procedures under [§ 7106\(b\)\(2\)](#) or appropriate arrangements under [§ 7106\(b\)\(3\)](#)).⁴⁸⁷

⁴⁷⁶ See *NTEU II*, [65 FLRA at 511-15](#).

⁴⁷⁷ *Id.* (Member Beck dissenting).

⁴⁷⁸ *Id.* at 513; see also *NTEU III*, [66 FLRA at 812](#).

⁴⁷⁹ *NTEU III*, [66 FLRA at 812](#); *NTEU II*, [65 FLRA at 515](#).

⁴⁸⁰ E.g., *NTEU II*, [65 FLRA at 515, 519](#).

⁴⁸¹ *IRS v. FLRA*, [No. 12-1456](#) (D.C. Cir. Nov. 20, 2012).

⁴⁸² [5 U.S.C. § 7106\(a\)\(2\)](#).

⁴⁸³ *Fed. Prof'l Nurses Ass'n, Local 2707*, [43 FLRA 385](#), 390 (1991).

⁴⁸⁴ See *AFGE, Local 1441*, [61 FLRA 201](#), 206 (2005).

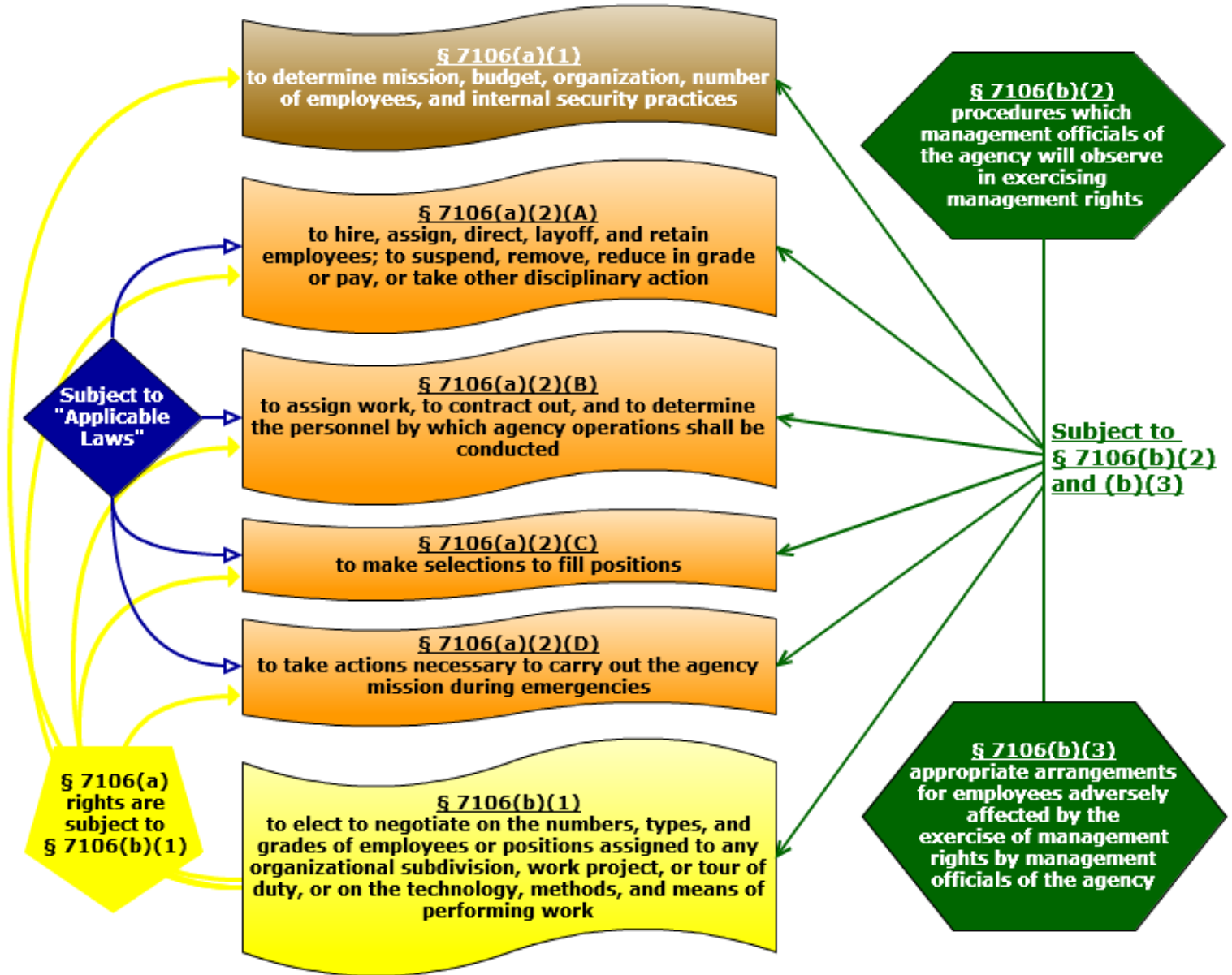
⁴⁸⁵ *Dep't of the Treasury, IRS v. FLRA*, [494 U.S. 922](#), 930 (1990).

⁴⁸⁶ E.g., *Weather Serv.*, [63 FLRA at 452](#).

⁴⁸⁷ E.g., *Local 723*, [66 FLRA at 644](#).

(e) Diagram Summarizing § 7106 of the Statute

The following diagram illustrates how the various subsections of § 7106 of the Statute interact with one another:



[4.4 Agency Discretion and “Sole and Exclusive” Discretion](#)

Generally, if a matter is within an agency’s discretion – and not outside the duty to bargain on some other ground, such as it being “covered by” an existing collective-bargaining agreement – then the agency must bargain over it.⁴⁸⁸

But where a law or an applicable regulation gives an agency “sole and exclusive discretion” over a matter, the Authority has found that it would be contrary to law to require the agency to exercise that discretion through collective bargaining.⁴⁸⁹ In resolving an agency’s claim that a proposal or provision is not negotiable because the agency has sole and exclusive discretion, the Authority examines the plain wording and legislative history of the statute or regulation that the agency relies on.⁴⁹⁰ The Authority has found that wording such as “without regard to the provisions of other laws” and “notwithstanding any other provision of law” shows that an agency has sole and exclusive discretion.⁴⁹¹ But a law or regulation need not use any specific phrase or words in order to give an agency sole and exclusive discretion.⁴⁹²

[4.5 Agency Rules and Regulations - “Compelling Need”](#)

Agencies may prescribe rules, regulations, and official declarations of policy (agency rules and regulations) that govern the resolution of matters within their particular agencies.⁴⁹³ Generally, agencies must bargain over proposals that conflict with agency rules and regulations.⁴⁹⁴

But [§ 7117\(a\)\(2\) of the Statute](#) provides, in pertinent part, that the duty to bargain “extend[s] to matters [that] are the subject of any agency rule or regulation . . . only if the Authority has determined under [\[§ 7117\(b\)\]](#) that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.”⁴⁹⁵ So an agency need not bargain over a union’s proposal if the agency: (1) identifies a

⁴⁸⁸ E.g., *AFGE, Locals 3807 & 3824*, [55 FLRA 1](#), 4-5 (1998); *AFGE, Nat’l Border Patrol Council*, [51 FLRA 1308](#), 1335 (1996).

⁴⁸⁹ E.g., *POPA I*, [59 FLRA at 346, 351](#); *Ass’n of Civilian Technicians, Mile High Chapter*, [53 FLRA 1408](#), 1412 (1998) (ACT).

⁴⁹⁰ *U.S. Dep’t of the Interior, Bureau of Indian Affairs, Sw. Indian Polytechnic Inst., Albuquerque, N.M.*, [58 FLRA 246](#), 248-50 (2002) (*Indian Affairs*); *NAGE, Local R5-136*, [56 FLRA 346](#), 348-49 (2000); ACT, [53 FLRA at 1412-16](#).

⁴⁹¹ *AFGE, Local 3295*, [47 FLRA 884](#), 895 (1993) (internal citations and alteration omitted).

⁴⁹² *Indian Affairs*, [58 FLRA at 248](#); see also *Ass’n of Civilian Technicians, Tex. Lone Star Chapter 100*, [55 FLRA 1226](#), 1229 n.7, *reconsid. denied*, [56 FLRA 432](#) (2000), *pet. for review denied sub nom.*, *Ass’n of Civilian Technicians v. FLRA*, [250 F.3d 778](#) (D.C. Cir. 2001).

⁴⁹³ E.g., *U.S. Dep’t of the Army, Fort Campbell Dist., 3rd Region, Fort Campbell, Ky.*, [37 FLRA 186](#), 193-94 (1990).

⁴⁹⁴ See *AFGE, Local 3824*, [52 FLRA 332](#), 336 (1996) (*Local 3824*) (claim that proposal was contrary to agency regulation did not demonstrate that proposal was outside the duty to bargain).

⁴⁹⁵ [5 U.S.C. § 7117\(a\)\(2\)](#).

specific agency-wide or primary-national-subdivision-wide rule or regulation; (2) shows that the proposal conflicts with the rule or regulation; and (3) demonstrates that there is a compelling need for the rule or regulation under the standards set forth in [§ 2424.50 of the Authority's Regulations](#).⁴⁹⁶ That section⁴⁹⁷ provides:

A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

(a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner that is consistent with the requirements of an effective and efficient government.

(b) The rule or regulation is necessary to ensure the maintenance of basic merit principles.

(c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

If an agency claims that a proposal conflicts with an agency rule or regulation for which there is a compelling need, then the compelling-need claim must be resolved in a negotiability proceeding; it cannot be decided in other proceedings, such as ULP proceedings.⁴⁹⁸

⁴⁹⁶ *Local 5*, [67 FLRA at 89](#).

⁴⁹⁷ [5 C.F.R. § 2424.50](#).

⁴⁹⁸ *E.g., FLRA v. Aberdeen Proving Ground, Dep't of the Army*, [485 U.S. 409](#), 412-14 (1988); *AFGE, Local 1786*, [49 FLRA 534](#), 542 (1994).

[4.6 Irrelevance of Prior Agreements and Existing Agency Requirements](#)

That an agency has agreed to a proposal in the past does not mean that it must bargain over similar – or even identical – proposals in the future.⁴⁹⁹ For example, prior bargaining over permissive subjects does not make future bargaining over those subjects mandatory.⁵⁰⁰ In addition, that an agency already follows a particular practice – for example, where that practice is embodied in an agency rule or regulation – does not, by itself, make that practice negotiable.⁵⁰¹ But, as discussed above, agencies cannot rely on agency rules and regulations to decline to bargain unless there is a compelling need for those rules or regulations.⁵⁰²

[4.7 Common Bargaining-Obligation Disputes](#)

As discussed in [section 1.9](#) above, when the Authority resolves negotiability disputes, the Authority may also resolve bargaining-obligation disputes.⁵⁰³ Three types of bargaining-obligation disputes involve claims that: (1) the subject matter of a proposal is “covered by” a collective-bargaining agreement; (2) a union is attempting to bargain over changes in conditions of employment that are only “de minimis”;⁵⁰⁴ and (3) a union is attempting to bargain at the wrong “level” of the agency – specifically, below the level of recognition.⁵⁰⁵ We discuss these three examples in more detail here.

[\(a\) “Covered By” Doctrine](#)

Under the Authority’s “covered by” doctrine, a party is not required to bargain over conditions of employment that already have been resolved by bargaining.⁵⁰⁶ This doctrine applies to any collectively bargained agreement between the parties, including not only term agreements,⁵⁰⁷ but also more limited agreements such as memoranda of understanding.⁵⁰⁸ To assess whether a particular proposal is “covered by” the parties’ agreement, the Authority applies a two-prong test.⁵⁰⁹

⁴⁹⁹ See NTEU, [61 FLRA 554](#), 557 (2006); *Rochester Local*, [56 FLRA at 291-92](#) (citing *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Glass Co., Chem. Div.*, [404 U.S. 157](#) (1971)).

⁵⁰⁰ *Rochester Local*, [56 FLRA at 291-92](#); see also *Local 225*, [56 FLRA at 689](#).

⁵⁰¹ E.g., *Veterans Admin. Staff Nurses Council, Local 5032, WFNHP, AFT, AFL-CIO*, [29 FLRA 849](#), 861 (1987).

⁵⁰² E.g., *Local 3824*, [52 FLRA at 336](#).

⁵⁰³ [5 C.F.R. § 2424.30\(b\)\(2\)](#).

⁵⁰⁴ *Id.* [§ 2424.2\(a\)\(1\)-\(2\)](#).

⁵⁰⁵ *PASS I*, [59 FLRA at 488 n.4](#).

⁵⁰⁶ *Local 1998*, [66 FLRA at 126](#).

⁵⁰⁷ E.g., *NATCA II*, [66 FLRA at 216-17](#).

⁵⁰⁸ E.g., *Local R1-109*, [64 FLRA at 134](#).

⁵⁰⁹ *Local 1998*, [66 FLRA at 126](#).

Under the first prong, the Authority examines whether the agreement expressly contains the subject matter of the proposal.⁵¹⁰ The Authority does not require an “exact congruence” between the proposal’s subject matter and the agreement’s text;⁵¹¹ if a “reasonable reader” would conclude that the agreement settles the matter in dispute, then the matter is covered by the parties’ agreement.⁵¹² For example, the Authority has found that an agreement did not expressly contain the subject matter of a proposal where the agreement concerned the same general range of matters as the proposal, but the proposal did not modify or conflict with the agreement’s express terms.⁵¹³

If the agreement does not expressly contain the subject matter of the proposal, then, under the second prong of the “covered by” doctrine, the Authority determines whether the matter is “inseparably bound up with, and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the [agreement].”⁵¹⁴ In order to satisfy the second prong, a proposal must be “more than tangentially related to” a contract provision.⁵¹⁵ Rather, the party asserting the “covered by” argument must demonstrate that the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the agreement that the negotiations that resulted in the agreement are presumed to have foreclosed further bargaining over the matter.⁵¹⁶

A non-exhaustive list of Authority decisions finding matters to be covered by collective-bargaining agreements includes: *NATCA*,⁵¹⁷ *NATCA, AFL-CIO*,⁵¹⁸ and *Prof'l Airways Sys. Specialists*.⁵¹⁹ A non-exhaustive list of Authority decisions finding matters not to be covered by collective-bargaining agreements includes: *NFFE, Fed. Dist. 1, Local 1998, IAMAW*⁵²⁰ and *United Am. Nurses, D.C. Nurses Ass'n & United Am. Nurses, Local 203*.⁵²¹

(b) “De Minimis” Doctrine

An agency is not required to bargain over a change that has only a “de minimis” effect on conditions of employment.⁵²² When determining whether a change has only a

⁵¹⁰ *NATCA II*, [66 FLRA at 216](#).

⁵¹¹ *Local 1998*, [66 FLRA at 126](#) (citation omitted).

⁵¹² *Id.*

⁵¹³ *NATCA II*, [66 FLRA at 216](#).

⁵¹⁴ *Id.* (quoting *U.S. Dep't of HHS, SSA, Balt., Md.*, [47 FLRA 1004](#), 1018 (1993) (internal quotation marks omitted)).

⁵¹⁵ *Local 1998*, [66 FLRA at 126](#).

⁵¹⁶ *Id.*

⁵¹⁷ [66 FLRA at 218](#).

⁵¹⁸ [62 FLRA at 178-79](#).

⁵¹⁹ [56 FLRA 798](#), 803-05 (2000).

⁵²⁰ [66 FLRA at 126-27](#).

⁵²¹ [64 FLRA 879](#), 882-83 (2010).

⁵²² See, e.g., *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, [64 FLRA 85](#), 89 (2009).

de minimis effect, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining-unit employees' conditions of employment.⁵²³ The number of employees affected by a change is not dispositive of whether the change is de minimis.⁵²⁴

For some examples of Authority decisions addressing this doctrine, see, for example: *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr. Detachment 12, Kirtland Air Force Base, N.M.*;⁵²⁵ *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*;⁵²⁶ *U.S. Dep't of VA, Med. Ctr., Leavenworth, Kan.*;⁵²⁷ *U.S. DHS, Border & Transp. Sec. Directorate, U.S. CBP, Border Patrol, Tucson Sector, Tucson, Ariz.*;⁵²⁸ *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*;⁵²⁹ *SSA, Office of Hearings & Appeals, Charleston, S.C.*;⁵³⁰ and *POPA*.⁵³¹

(c) Attempts to Bargain at Wrong Level

There is no statutory duty to bargain below the level of recognition (which, as stated in [section 1.7](#) above, is the level of the agency at which the bargaining obligation between the agency and the union exists).⁵³² But bargaining below the level of recognition is a permissive subject of bargaining,⁵³³ so parties at the level of recognition may authorize lower-level bargaining.⁵³⁴ And note that if the level of recognition is at a lower level in an agency, then the agency cannot decline to bargain solely because the matters over which the union requests bargaining are, or may be, also subject to negotiations at a higher organizational level.⁵³⁵

⁵²³ *Id.*

⁵²⁴ *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr. Detachment 12, Kirtland Air Force Base, N.M.*, [64 FLRA 166](#), 173 (2009).

⁵²⁵ *Id.* at 173-74.

⁵²⁶ [64 FLRA at 89-90](#).

⁵²⁷ [60 FLRA 315](#), 318 (2004).

⁵²⁸ [60 FLRA 169](#), 175-76 (2004).

⁵²⁹ [59 FLRA 728](#), 728-29 (2004).

⁵³⁰ [59 FLRA 646](#), 654-55 (2004) (Member Armendariz concurring and Member Pope dissenting), *pet. for review denied sub nom.*, *Ass'n of Admin. Law Judges v. FLRA*, [397 F.3d 957](#) (D.C. Cir. 2005).

⁵³¹ [21 FLRA 580](#), 585-86 (1986).

⁵³² *NATCA I*, [62 FLRA at 182](#) (citing *U.S. FDA, Ne. & Mid-Atl. Regions*, [53 FLRA 1269](#), 1273-74 (1988) (*FDA*); *DOD Dependents Sch.*, [12 FLRA 52](#), 53 (1983)).

⁵³³ *Id.* (citing *FDA*, [53 FLRA at 1274](#)).

⁵³⁴ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, [66 FLRA 978](#), 980-81 (2012) (citing *FDA*, [53 FLRA at 1274](#)).

⁵³⁵ *AFGE, Local 1401*, [67 FLRA 34](#), 37 (2012) (citing *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal.*, [39 FLRA 1357](#), 1358-59, 1363-71 (1991)).

FREQUENTLY CITED DECISIONS

Some of the most frequently cited Authority and court decisions are:

Antilles Consol. Educ. Ass'n, [22 FLRA 235](#), 236 (1986) (setting forth test for determining whether a matter directly affects bargaining-unit employees' conditions of employment).

Commander, Carswell Air Force Base, Tex., [31 FLRA 620](#), 624 (1988) (Authority must resolve "substantively identical" duty-to-bargain issue before FSIP or interest arbitrators may make negotiability determinations).

NAGE, Local R14-87, [21 FLRA 24](#), 31 (1986) (setting forth test for determining whether a proposal is an appropriate arrangement under [§ 7106\(b\)\(3\)](#) - often called the "KANG" test).

NTEU, [65 FLRA 509](#), 511-15 (2011), *review denied sub nom., U.S. Dep't of the Treasury, Bureau of the Public Debt, Wash., D.C. v. FLRA*, [670 F.3d 1315](#) (D.C. Cir. 2012) (setting forth test for determining whether a provision is an appropriate arrangement under [§ 7106\(b\)\(3\)](#)). (Please note that, as of the date on the front of this Guide, this test is on appeal to the U.S. Court of Appeals for the D.C. Circuit. See *Dep't of the Treasury, IRS, Office of the Chief Counsel v. FLRA*, [No. 12-1456](#) (D.C. Cir. Nov. 20, 2012).)

SSA, [47 FLRA 1004](#), 1018 (1993) (setting forth test for determining whether a proposal is "covered by" an existing collective-bargaining agreement).

U.S. Dep't of the Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA, [952 F.2d 1434](#), 1442 (D.C. Cir. 1992) (holding that proposal directly affecting conditions of employment of non-employees or non-unit employees not outside the duty bargain where proposal addresses matters that "vitaly affect" bargaining-unit employees' conditions of employment).

AFTERWORD

We hope that this Guide is helpful. Though it is not an official interpretation of [the Statute](#) or the [FLRA's Regulations](#), and is not official policy of the Authority, we believe that the Guide can be useful to litigants, negotiators, and others. As stated previously, we encourage you to visit the FLRA's web site, at www.fra.gov, to access even more information and guidance, including the wording of the Statute and the FLRA's Regulations, as well as the Authority's published [decisions](#).