

Section 7106(b)(1) and Other Permissive Subjects of Bargaining

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Section 7106(b)(1) Permissive Subjects of Bargaining

The Statute makes the following topics
bargainable at the election of an agency:

Numbers, Types, and Grades of Employees or
Positions Assigned to Any Organizational
Subdivision, Work Project, or Tour of Duty

Technology, Methods, and Means of Performing
Work

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Other Permissive Subjects of Bargaining

The Statute also makes bargainable the following topics:

Matters that are not mandatory conditions of employment

Limitations on rights granted under the Statute to labor organizations (waiver)

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Numbers, Types, and Grades of Employees or Positions Assigned to any Organizational Subdivision, Work Project or Tour of Duty

Definitions:

“Numbers” signifies an increase or decrease in, or maintenance of, employees or positions.

See 52 FLRA 1024, 1034-35

“Types” means distinguishable classes, kinds, groups or categories of employees or positions.

See 52 FLRA 1024, 1029-31

“Grades” are classes of positions within specified ranges or rates of pay (See 5 C.F.R. section 511.101(d))

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“Employees” are individuals employed in an agency (See section 7103(a)(2)(A))

“Positions” refers to the duties and responsibilities assigned to and performed by employees (See 5 C.F.R. section 511.101(e))

“Organizational Subdivision” refers to an agency component .

See 54 FLRA 1302, 1306

“Work Project” means a particular job or task.

See 52 FLRA 1024, 1032

“Tour of Duty” refers to the hours of an employee’s workday or workweek.

See 51 FLRA 386, 397

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The phrase “Numbers, Types, and Grades” in section 7106(b)(1) is generally defined as staffing patterns or allocation of staff for the purpose of an agency’s organization and the accomplishment of its work.

See 52 FLRA 1024, 1029-31

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Classification

Classification Matters Do Not Fall Within the Scope of Negotiable 7106(b)(1) Matters

What are classification matters?

Classification is the “analysis and identification of a position and placing it in a class under the position classification plan established by OPM under chapter 51 of title 5, United States Code.” Classification entails “the identification of the appropriate title, series, grade, and pay system of a position.” See 54 FLRA 1302, 1308-09

Classification is distinguishable from “numbers, types, and grades.” Negotiations over staffing patterns do not require an agency to classify or reclassify positions. See 55 FLRA 509

Classification matters are excluded from conditions of employment that may be bargained.

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Technology, Methods and Means of Performing Work

1. The proposal must concern a method or means.

“Method” refers to the way in which an agency performs its work.

“Means” is any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for accomplishing or furthering the performance of its work.

2. It must be shown that: a) there is a direct an integral relationship between the particular methods or means the agency has chosen and the accomplishment of the agency’s mission; and b) the proposal would directly interfere with the mission-related purpose for which the method or means was adopted.

See, for example, 53 FLRA 1435, 1437-38

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Other Permissive Subjects of Bargaining

Matters that are not mandatory conditions of employment

For example, bargaining over conditions of employment of supervisory personnel

See 56 FLRA 288, 53 FLRA 606

Limitations on rights granted under the Statute to labor organizations

For example, requiring an exclusive representative to negotiate separate agreements covering a single bargaining unit

See 53 FLRA 1269

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Authority Decisions and Orders on Section 7106(b)(1) and Other Permissive Subjects of Bargaining

In negotiability appeals involving proposals, if the Authority finds that a proposal is bargainable only at the election of the agency, the Authority will so state.

See 5 C.F.R. § 2424.40(b); 56 FLRA 1043

In negotiability appeals involving provisions, if the Authority finds that the provision was bargainable at the election of the agency, the Authority will direct the agency head to rescind its disapproval of the provision.

See C.F.R. § 2424.40(c)

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ADDRESSING 7106(a) & 7106(b) CLAIMS

Example 1:

Where a union does not dispute an agency's claim that a proposal is outside the duty to bargain under section 7106(a) but claims that the proposal is bargainable under section 7106(b)(1), the Authority first examines whether the proposal is bargainable under section 7106(b)(1). If it is, there is no need to address the section 7106(a) claim, because (b)(1) is an exception to (a). See 51 FLRA 386

Example 2:

Where an agency claims that a proposal affects a management right under section 7106(a) and a union disagrees or claims that the proposal is within the duty to bargain under section 7106(b)(2) and/or (3), as well as being electively bargainable under section 7106(b)(1), the Authority first resolves the claims that would determine if the proposal is within the duty to bargain (the (b)(2) and (b)(3) claims) and then, if necessary, resolves the claims that would determine if the proposal is electively bargainable (the (b)(1) claim). See 54 FLRA 171

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Example 3:

Where a proposal imposes two or more distinguishable but inseparable requirements, the Authority determines which is the "dominant requirement." If the dominant requirement relates to a 7106(b)(1) matter, the proposal is electively bargainable. If the dominant requirement concerns a management right, the proposal is not electively bargainable even though it may involve 7106(b)(1) matters. See 52 FLRA 794

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Bargaining Obligation over Section 7106(b)(1) & Other Permissive Matters

Parties can choose to bargain over permissive matters.

Parties can incorporate agreed-upon provisions in their collective bargaining agreements.

An election to bargain can be revoked at any time up to agreement.

A party cannot insist to impasse on a permissive subject (but parties can contractually agree to use impasse procedures for permissive subjects).

Agency heads cannot disapprove agreed-upon provisions solely because they are permissively negotiable.

Contract provisions incorporating permissively bargained subjects do not terminate automatically on contract expiration. A party wishing to terminate a provision must provide explicit notice of its intent to terminate.

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Enforcement of Contract Provisions

Permissively bargained matters that are agreed upon are enforceable through grievance arbitration provided that the provisions are otherwise consistent with the Statute.

See 52 FLRA 677

Once parties have defined their bargaining obligation through an agreement the issue of whether the parties have complied with the agreement is a matter of contract interpretation for the arbitrator.

See 55 FLRA 1063

The Authority applies the BEP analysis, 53 FLRA 146, when addressing claims that enforcement of a section 7106(b)(1) provision impermissibly affects a section 7106(a) management right.

See 56 FLRA 943

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