

DAY 2

**ADVANCED
NEGOTIABILITY:
Agency Discretion,
Laws & Regulations,
& Management Rights**



**Federal Labor
Relations
Authority**

You have learned ...



Management Discretion
Rules & Regulations
Federal Law
Management Rights



Day 2 Agenda



(b)(1) - Permissive Subjects

(b)(2) - Procedures

(b)(3) - Appropriate
Arrangements

Final Project

Feedback



EXCEPTIONS TO MANAGEMENT RIGHTS

5 U.S.C. § 7106(b)

**§ 7106(a) Rights
are “Subject to”
§ 7106(b), Including:**

§ 7106(b)(1)

§ 7106(b)(2)

§ 7106(b)(3)





§ 7106(b)(1)

Permissive Subjects

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- § 7106(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.



**§ 7106(b)(1):
The Chameleon**

- **Part Management Right, Part Exception**
- **Trumps § 7106(a) Rights**
- **If also concerns (b)(2) or (3), then mandatory**

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- 57 FLRA 424, 426 (“In determining whether a proposal is within the scope of [§]7106(b)(1), the Authority assesses whether the proposal concerns: (1) the numbers, types, and grades; (2) of employees or positions; (3) assigned to any organizational subdivision, work project, or tour of duty.”)
- Section 7106(b)(2) and (3) are exceptions to § 7106(b)(1) rights. Where proposals fall within (b)(2) or (3), an agency must bargain them, even if they affect (b)(1) rights. *E.g.*, 62 FLRA 341, 343 (“[W]here an agency proposes to change the conditions of employment of unit employees pursuant to a management right under § 7106(a) or § 7106(b)(1), it is obligated to bargain over procedures, under § 7106(b)(2), and appropriate arrangements, under § 7106(b)(3), that address the particular change proposed.”)
- 62 FLRA 90, 92 (once agency elected to bargain over § 7106(b)(1) matter, bargaining permitted notwithstanding effect on exercise of § 7106(a) rights); 55 FLRA 848, 852 (“Matters encompassed by the terms of [§]7106(b) constitute exceptions to the rights set forth in [§]7106(a). As such, bargaining over matters encompassed by [§]7106(b)(1) is permitted notwithstanding that such matters also affect rights under [§]7106(a).” (citation omitted))
- Agency head cannot disapprove agreements unless otherwise unlawful. *E.g.*, 61 FLRA 336, 338, 339 (after parties reach agreement on § 7106(b)(1) matter, provision may not be disapproved during agency-head review under § 7114(c) unless otherwise unlawful)
- Enforceable in arbitration. 60 FLRA 91, 92 (“As Section 9 is a permissive subject of bargaining, the agency was not obligated to bargain on it. However, once it agreed to that provision, it became fully enforceable through the negotiated grievance procedure notwithstanding its possible effect on management’s right to assign work.”)

(b)(1) - Numbers, Types, & Grades ...

Numbers

- Increase, decrease, or maintain
- Different from (a)(1)

Types

- Distinguishable classes, kinds, groups, or categories that are relevant to staffing patterns

Grades

- Example: General Schedule levels

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- Numbers = increase, decrease, or maintain employees or positions *in an organizational subdivision, work project, or tour of duty*. 57 FLRA 424, 426 (“The phrase ‘numbers, types, and grades’ 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. The Authority has held that a proposal regarding the establishment of staffing patterns or allocation of staff concerns the ‘numbers’ of employees within the meaning of § 7106(b)(1) ‘regardless of whether the proposal would increase, decrease, or maintain the number that the agency proposes to assign or has assigned.’”); see also 73 FLRA 233, 235-36 (“Proposal 1 addresses where certain work would be performed but does not address *how many* employees or positions would perform it. In other words, it would not increase, decrease, or maintain the number of employees or positions performing that work.”)
- Types = distinguishable classes, kinds, groups, or categories *of employees or positions* that are relevant to the establishment of staffing patterns. 52 FLRA 1024, 1032, 1034 (Dental Hygienists); 55 FLRA 549, 552 (Licensed Practical Nurses); see also 53 FLRA 858, 870 (decision to hire examiners under term appointments involved the “type” of employees)
- Grades = for example, GS levels. 52 FLRA 1024, 1032 n.11 (“The proposal is concerned with the number of employees to whom dental assistant duties are assigned – that is, the union is seeking to negotiate over the number of employees or positions to be assigned these duties. Additionally, because the positions of dental assistant, dental hygienist[,] and dental laboratory technician that are involved in this proposal have specific grades attached, this proposal concerns the grades of employees or positions to be assigned dental assistant duties.”)

(b)(1) - ... Assigned to Any Organizational Subdivision, ...

- Involving centralization or decentralization
- Staffing of subdivisions (but not *establishing* subdivisions)

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- Centralization: 54 FLRA 1302, 1306 (“Proposal 1 concerns which sections of the agency will perform a specific agency function, and where employees performing that function will be assigned. The proposal thus concerns assignment to an organizational subdivision.”)
- Staffing: 55 FLRA 925, 928 (“As explained above, Proposals 1, 2[,] and 3 require the agency to maintain a certain number and type of employee in the 109th Tactical Airlift Wing. In addition, the agency does not dispute, and there is no basis in the record for rejecting, the union’s contention that the 109th Airlift Wing constitutes an ‘organizational subdivision’ within the meaning of [§]7106(b)(1).”); 52 FLRA 794, 802 (“Although the proposals package the organizational subdivision with its prescribed staffing, the establishment of an organizational subdivision nevertheless entails an agency action that is distinct from the assignment of numbers, types[,] and grades of employees or positions to that subdivision. That is, the establishment of a new organizational entity does not equate to the staffing of that entity.”)
- Note: Although a proposal establishing an organizational subdivision would not affect the § 7106(b)(1) right of assignment to any organizational subdivision, such a proposal would affect the § 7106(a)(1) right to determine the agency’s organization. 52 FLRA 813, 819 (“By establishing organizational subdivisions, Proposal 1 prescribes how the agency will divide itself into organizational units and, concomitantly, how the agency will be structured to accomplish its mission and functions. Therefore, the proposal impermissibly affects the exercise of management’s right to determine its organization under [§]7106(a)(1).”)

(b)(1) - ... Work Project, or Tour of Duty

<p>Work Project</p> <p>Particular job or task</p> 	<p>Tour of Duty</p> <p>Hours of a workday (daily tour) & days of a workweek (weekly tour) that form a regularly scheduled administrative workweek</p>
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- Work project: 55 FLRA 848, 853-54 (“In this case, the foremen’s duty to supervise inmates constitutes a work project under Authority precedent. See 37 FLRA 350, 355 (Authority construed the term ‘work project’ in [§]7106(b)(1) to mean ‘particular job’ or ‘task’). The first two parts of the union’s proposal require the respondent to lay-in the groups of inmates assigned to be supervised by a foreman whose group consists of more than four inmates, whenever that foreman is on leave. The third part of the lay-in proposal states that if employees from other departments take over for an absent foreman, the agency would not have to lay-in the absent foreman’s inmates. Read as a whole, the proposal requires a sufficient number of foremen or substitutes for a work project and, in effect, limits the respondent’s ability to allocate certain numbers of staff to supervise particular inmates.”)
- Tour of duty: 57 FLRA 424, 426 (“The status quo proposals require the agency to schedule employees to a particular tour of duty: a workday that does not include a 30-minute unpaid lunch period. The Authority has found provisions establishing tours of duty to be bargainable at an agency’s election under § 7106(b)(1) of the Statute.”)

(b)(1) - ... Technology of Performing Work ...	
<p>Technology</p> <p>The technical method that will be used in accomplishing or furthering the performance of the agency's work</p>	<p>Effect Questions 1 and 2 BOTH</p> <p>1. Is there a technological relationship between the matter that the proposal or provision addresses and accomplishing the agency's work?</p> <p>2. Does the proposal or provision interfere with the purpose for which the technology was adopted?</p>
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- Technology examples: 58 FLRA 273, 273, 275 (email pilot program to respond to public inquiries submitted on the internet, as well as a determination of which offices would conduct the pilot program); 47 FLRA 272, 279 (phones with rollover capability constitute a technology for providing phone backup, and a decision to maintain fewer phones and not install additional phones to accept rollover calls constitutes an exercise the right to determine the technology of performing work); 46 FLRA 930, 959 (the number, types, and locations of telephones provided to employees for official agency business); 22 FLRA 698, 699 (same); 32 FLRA 944, 955-58 (two-way radios for use in police work); 30 FLRA 672, 674 (the particular type of computer system that will be used to obtain and verify the data upon which pension payments are made); 22 FLRA 502, 506-07 (type of employee-worn respirator); 13 FLRA 422, 423 (calculators for performing agency-assigned duties); 6 FLRA 477, 479 (prohibition on eating in areas where records are stored or used, as part of a group of protective and preventive measures that the agency uses to maintain an environment suitable to the preservation of records); 4 FLRA 150, 154 (secure storage area for the official weapons that employees are authorized to wear in the performance of their duties)
- *But see* 40 FLRA 244, 245 (Authority's adoption of ALJ's analysis of a question concerning the technology of performing work), 257-58 (ALJ's finding that agency's decision to discontinue a past practice of allowing employees to use agency phones for "personal reasons" – unrelated to conducting agency business – did not relate to the technology of performing work)
- Two-part test for determining effects on the technology of performing work: (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. *E.g.*, 58 FLRA 273, 275; 47 FLRA 272, 278.
- Failure to Satisfy Effect Question 1: 41 FLRA 1158, 1175 (proposal: *If the urine sample [for drug testing] is to be provided on-site, where the temperature of each sample will be taken,*

the agency agrees to use some form of disposable thermometers, such that each sample will be tested using a new bulb, to guard against any possibility of tainted samples. [Only the underlined portion was disputed.]; *id.* at 1178 (“[T]he agency has failed to establish that there is a technological relationship between the type of thermometer employed and accomplishing or furthering the performance of the agency’s work. Although the agency argues that the process of measuring temperatures is an integral part of the agency’s administration of its drug testing program, we find that the agency has failed to establish that the method used to measure the temperature of urine specimens is connected with the manner in which the work of the agency is performed.” (citation omitted)); 39 FLRA 504, 505 (proposal: *The Employer agrees to provide a private office for the Medical Staff Quality Assurance employee.*); *id.* at 512 (finding agency failed to establish a technological relationship between the current workspace location of the Medical Staff Quality Assurance employee and the performance of the agency’s work)

- Failure to Satisfy Effect Question 2: 35 FLRA 398, 398-99 (IRS adopted the Automated Examination System (AES) to streamline and automate the examination process, and later adopted AES-compatible workstations that the agency projected would increase productivity by 15 to 25 percent); *id.* at 398 (proposal: *Bargaining unit employees affected by this move will have at least 64 feet of contiguous work space.*); *id.* at 404 (“[A] workstation that is specifically designed to provide ‘containment within reach’ and adjustable features to facilitate employee use of computers and other equipment associated with the AES bears a technological relationship to accomplishing or furthering the performance of the agency’s work. Consequently, we find that the agency’s decision to adopt workstations that are compatible with the AES constitutes a determination as to the technology of performing work.”); *id.* at 405 (“There is no showing here, however, that there is a technological relationship between the conservation of work space and the performance of the work of the agency.”); *id.* at 406 (“Because there is no showing that the union’s proposal would prevent the agency from establishing a workstation that is AES compatible, we reject the agency’s argument that the proposal interferes with the purpose for which the ‘technology’ of AES compatible workstations was adopted. Because there is no showing that the overall size of the AES compatible workstation is encompassed within management’s right to determine the technology of performing the agency’s work, we reject the agency’s argument that by limiting the amount of space the agency could save with the AES compatible workstations, the proposal interferes with the agency’s right to determine the technology of performing its work.)

(b)(1) - Methods and Means of Performing Work 1

<p>Methods - "How?"</p> <p>Ways in which an agency performs its work</p>	<p>Means - "With what?"</p> <p>Any instrumentality – including an agent, tool, device, measure, plan, or policy – that an agency uses to accomplish, or further the performance of, its work</p>	<p>!</p> <div style="background-color: #f4a460; padding: 5px; border: 1px solid #ccc;"><p>Relative Importance: Irrelevant to effect on methods-and-means right</p></div>
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- 66 FLRA 499, 502 (proposal concerned the methods and means of performing work when it concerned whether civilian employees (air reserve technicians) could wear an alternative uniform rather than a required military uniform)
- 56 FLRA 69, 91 (proposal requiring the agency to provide support to patent examiners performing gene sequence searching on an automated system by designating personnel to provide assistance to examiners or providing equivalent assistance: *The Office shall continue to provide library support or equivalent for automated gene sequence searching.* “Proposal 59 would require the agency to provide particular support (library support or equivalent) for examiners performing particular work (searching gene sequences). We conclude . . . that, by requiring the agency to facilitate examiners’ performance of work through particular support mechanisms, the proposal affects the agency’s right to determine the methods and means of performing work.”); 56 FLRA at 93 (proposal: *The paper files shall continue to be maintained, as long as the paper files exist.* “[T]he proposal would require the agency to ‘maintain’ the paper files for as long as the agency keeps the paper files. . . . [W]e construe the word ‘maintain’ as requiring the agency to keep the files in an ‘orderly and complete’ fashion. The proposal does not affect the agency’s discretion to determine to no longer keep paper files; however, for as long as the agency determines to keep them, the agency would be required to maintain them in an orderly and complete fashion. . . . Proposal 63 would require the agency to maintain paper files in a particular way. Consistent with Authority precedent, the proposal affects the agency’s right to determine the methods and means of performing work.”)
- Relative importance irrelevant: 66 FLRA 112, 115 (“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.”)

(b)(1) - Methods and Means of Performing Work 2

Effect Question 1	BOTH	Effect Question 2
<p>Is there a direct or integral relationship between the agency's chosen methods or means and the accomplishment of the agency's mission?</p>		<p>Does the proposal/provision directly interfere with the mission-related purpose for which the methods or means were adopted?</p>

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- 69 FLRA 626, 631 (“The agency asserts that its procedure – requiring a specialist to ask an applicant who refuses to provide his or her Social Security number to read certain legal information on the back of the passport application – furthers the agency’s goal of identifying fraud. We find that the agency identifies a method or means that the proposal ‘concerns’ – having the applicant read the back of the passport application.”)
- 66 FLRA 639, 646 (rejecting a union’s § 7016(b)(1) claim as a bare assertion where it did not make any of the required arguments under the test)
- 61 FLRA 48, 52 (“[T]he Authority has consistently held that an agency’s determination that employees must wear a uniform while performing work constitutes a decision as to the methods and means of performing work under § 7106(b)(1) of the Statute. In the circumstances of this case, the agency has made that determination by requiring that the employees covered by this proposal will wear uniforms in performing the agency’s work. In particular, the agency has prescribed the elements of the uniform for use in a Class 3 work environment. However, the agency makes no attempt to justify or explain, in terms of the definitions of the terms ‘methods’ and ‘means’ as used in § 7106(b)(1), how the fact that the wearing of cargo shorts is permitted in some locations, and not in others, relates to how work is done and how shorts are used as a means of performing work. Thus, the agency has not demonstrated how the proposal concerns the methods and means of performing work under § 7106(b)(1). . . . [P]roposals such as the instant proposal, that ‘are limited to attempting to assure that [employees’] uniforms are suitable for the conditions in which employees work’ do not involve the methods and means of performing work.”)
- 59 FLRA 447, 448-50 (“The agency contends that, under § 7106(b)(1) of the Statute, it has the right to decide whether to use partitions, or the size of any partitions chosen, in configuring its work space. The disputed proposals require the agency to use partitions to separate employee work stations. The proposals also require that those partitions be at least 5 feet (60 inches) high. The agency asserts that the partitions that it currently uses to separate employee

work stations – 44 inch-high partitions between cubicles that face each other, and 42 inch-high partitions between side-by-side cubicles – facilitate its news broadcast operations. Specifically, the agency states that its news operations are fast-paced and rapidly changing. The agency maintains that lower partitions allow supervisors and editors to determine whether broadcast personnel who are scheduled to go on the air are at their work stations, permits editors to conduct quick conferences among personnel at a number of work stations all at once, and makes it possible for employees to talk directly to each other without having to leave their work stations. In sum, the agency explains, the lower partitions are more commensurate with the needs of its news broadcast operations because they make it possible to respond more quickly to the ever-changing flow of the news. The agency contends that the 5 foot partitions required by the proposals would impede the ability to supervise and communicate made possible by the lower partitions. The agency’s explanation of the function of the lower partitions in its broadcasting operations establishes that those partitions are a tool or device that is employed for particular purposes in those operations and that they concern the method by which the agency conducts its broadcasting operations. That is, the agency has shown that the proposals concern what it uses to perform its broadcasting work and how it goes about performing that work. Thus, by requiring the use of partitions and specifying the height of the partitions to be used, the proposals concern the methods and means whereby the agency accomplishes its operations. Further, the agency has shown that there is a direct and integral relationship between the use of the lower partitions and the accomplishment of its work, namely, those partitions facilitate the supervision of, and the rapid communication required by, its news broadcast operations. Finally, the agency has demonstrated that the higher partitions called for by the proposals would directly interfere with the mission-related purposes for which the lower partitions are employed. . . . [T]he agency has established that Proposals 2 and 3 concern the methods and means of performing its work within the meaning of § 7106(b)(1) of the Statute.”)

- *But see* 64 FLRA 723, 725 (agency fails to establish a direct and integral relationship; proposal that would prevent the agency from seating employees according to their workgroups did not concern the methods and means of performing work)



§ 7106(b)(1) Group Preview

Read exercise handout page 3 for the fact pattern for this exercise. We will be extending the earlier scenario from the § 7106(a) Group Activity.



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- Read exercise handout page 3.

Practice Preview - § 7106(b)(1)

- **Proposal:** If an irate claimant or potentially dangerous claimant requires interviewing, the employee and claimant will be escorted to the private interviewing room or to an alternative interviewing room or more controllable interview area, and they will not be left alone.
- Please read exercise handout page 4 for the Agency's arguments about why the proposal affects the Agency's § 7106(b)(1) rights.
- After the break, you will split into breakout rooms for ten minutes to discuss whether the Agency's § 7106(b)(1) rights are affected in the ways that the Agency argues.

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- Read exercise handout page 4.

BREAK

10 minutes (approx.)



§ 7106(b)(1) Group Activity

In your breakout rooms, discuss the Agency's (b)(1) arguments. Read exercise handout page 5. Pick someone to speak for your group in 10 mins.



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- Read exercise handout page 5.

Practice Review - § 7106(b)(1)

- **Proposal:** If an irate claimant or potentially dangerous claimant requires interviewing, the employee and claimant will be escorted to the private interviewing room or to an alternative interviewing room or more controllable interview area, and they will not be left alone.
- **Spokespeople:** Did the proposal affect the Agency's (b)(1) right to determine the number of employees assigned to a work project or tour of duty, or its (b)(1) right to determine the methods or means of performing work?

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Relevant Authority Analysis:

- “Proposals that determine the number of employees who are assigned to a particular job or task directly interfere with management’s right to determine the number of employees assigned to a work project under [§]7106(b)(1). Proposal 3 would directly interfere with the Agency’s right to determine the number of employees assigned to a work project by requiring employees interviewing irate or potentially dangerous claimants to be accompanied by another employee. The proposal is, therefore, a matter over which the Agency may elect to bargain under [§]7106(b)(1). The Agency, however, has elected not to bargain.” 37 FLRA at 355-56 (citations omitted).
- “[Methods and means] need not be indispensable to the accomplishment of an Agency’s mission. The term ‘performing work’ is intended to include those matters that directly and integrally relate to the Agency’s operations as a whole.” *Id.* at 357.
- “The Agency states that the obligation to establish a private or an alternative interviewing room ‘infringes on Agency management’s right to determine the [method or means] by which [the agency] will carry out its assigned mission.’ Even assuming that proposals concerning the use of Agency office space could constitute a ‘methods’ or ‘means’ within the meaning of [§]7106(b)(1), under the test outlined above, such proposals would not be nonnegotiable unless the proposed use of space was directly and integrally related to the Agency’s operations as a whole. In short, it must be shown not just that the proposal concerns the use of office space for work, but that the proposed use has some connection to, or is determinative of, how the Agency will perform its work.” *Id.*
- “Proposal 3 requires the Agency to provide ‘the private interviewing room,’ ‘an alternative interviewing room,’ or a ‘more controllable interview area.’ The Agency provides no evidence that the proposal would require it to do anything other than make existing space available for the interview. The record provides no evidence, for example, that the proposal would require

modification of the existing office space in order for that space to be suitable for interviewing 'irate' or 'potentially dangerous' clients. Consequently, we find that the Agency has not demonstrated a connection between the proposed use of space and the performance of the Agency's work. We conclude, therefore, that the proposal does not concern the methods and means of performing work within the meaning of [§]7106(b)(1) of the Statute." *Id.*

- "[N]o showing has been made here that a connection or 'link' exists between the use of Agency workspace and the performance of the Agency's work." *Id.*

Procedures

5 U.S.C. § 7106(b)(2)

5 U.S.C. § 7106(b)(2)

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

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

(b)(2) - Procedures

- ✓ **Mandatory subjects – must bargain, despite effect on § 7106(a) or § 7106(b)(1)**
- ! **Look to Authority precedent**

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- Procedures: 61 FLRA 209, 220; 61 FLRA 327, 331-32; 45 FLRA 270, 280
- Not procedures: 70 FLRA 100, 104; 68 FLRA 676, 679; 58 FLRA 128, 134

Examples of Procedures

- ✓ Requiring advance notice of certain agency actions
- ✓ Requiring management to delay exercise of rights pending completion of bargaining or appellate processes
- ⊘ Precluding management from assigning employees certain duties
- ⊘ Substantively limiting right to determine content of performance standards

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- Advance Notice: 61 FLRA 209, 220
- *But* cannot require notice when “surprise” is investigative technique: 58 FLRA 128, 134
- Delay Exercise: 61 FLRA 327, 331-33
- Precluding Assignment of Duties: 47 FLRA 512, 520; 70 FLRA 100
- Limiting Content of Performance Standards: 56 FLRA 1115, 1116 n.2

1 Procedures: Test Your Knowledge

Where agency conducts random drug testing, a proposal imposing notice and procedural requirements when an employee must provide a second sample for reasons outside the employee's control is _____ .



Negotiable Procedure



Not a Negotiable Procedure

- 45 FLRA 270, 277-80
- 58 FLRA 128, 133-34

2 Procedures: Test Your Knowledge

Provision requires agency to provide union with 24-hours notice before conducting investigatory interview of a bargaining-unit member is _____.



Negotiable Procedure



Not a Negotiable Procedure

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- 45 FLRA 270, 277-80 (proposal establishes the procedural requirements for obtaining a replacement sample; would not affect the agency's decision to require employees to undergo a random or a reasonable suspicion drug test)
- 58 FLRA 128, 133-34 (not negotiable procedure when "surprise" is an investigative technique)



Appropriate Arrangements

5 U.S.C. § 7106(b)(3)



Statutory Wording

5 U.S.C. § 7106(b)(3): “Nothing in this section shall preclude any agency and any labor organization from negotiating appropriate arrangements for employees adversely affected by the exercise of any authority under this section.”

Appropriate Arrangements

Mandatory subjects of bargaining – must bargain, even if they affect § 7106(a) or § 7106(b)(1).

Within duty to bargain even if they're not procedures under § 7106(b)(2).

In determining if a proposal or provision is an appropriate arrangement, the Authority applies the test set out in *KANG*.

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- *NAGE, Loc. R14-87 and Kan. Army Nat'l Guard*, 21 FLRA 24 (1986). Although cases are usually referenced using the name of the first party, the Authority has always referred to this decision using an acronym for the second party's name – *KANG*.

***KANG* Analysis**

Arrangement?

The Authority determines whether a proposal/provision is intended to be an “arrangement” for employees adversely affected by the exercise of a management right.

Appropriate?

If proposal/provision is an arrangement, then the Authority determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with the relevant management rights.

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- 21 FLRA 24 (KANG)

Arrangements - Adverse Effects 1

- ✓ Must seek to mitigate adverse effects flowing from exercise of a management right
- ✓ Must identify actual effects or reasonably foreseeable effects that flow from exercise of management rights, and how those effects are adverse
- ⊘ Can't be speculative or hypothetical

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- Mitigate adverse effects: 68 FLRA 676, 679-680
- Identify actual effects or reasonably foreseeable effects: 73 FLRA 125, 128
- Can't be speculative or hypothetical: 67 FLRA 85, 87

Arrangements - Tailored 2

- ✓ Must be “tailored” to compensate/benefit employees suffering adverse effects due to management right
- ✓ May be “prophylactic”

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- Tailored: 64 FLRA 275, 277
- May be prophylactic: 64 FLRA 953, 959-60



Exercise 1: Agency is reducing the number of armed escort officers.

Proposal: The agency will encourage the servicing hospitals to have rooms where inmates are housed with doors securable by escort officers.

Union states proposal would encourage hospitals to install secured doors for rooms that house inmates, which would alleviate problems officers would face associated with securing the room and inmate with only one armed officer.

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- REMEMBER - In order to establish that a proposal is an arrangement, a union must demonstrate (1) the effects or the reasonably foreseeable effects on employees that flow from the exercise of management's rights and how those effects are adverse; AND (2) that the proposal is sufficiently tailored.
- 66 FLRA 929, 940-41

Exercise 2: The agency sought to revise its administrative manual.



Provision: "The Associate Commissioner approves or denies requests for tour extensions and home leave for employees. Except to the extent government-wide policies and regulations expressly confer discretionary authority, all such decisions will be consistent with those policies and regulations and the policies of the Agency."

- 51 FLRA 1308, 1319

Arrangement “Appropriate”?

Under *KANG*, the Authority weighs the burdens on the exercise of management rights against the benefits to employees to determine if the arrangement is appropriate.



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- 21 FLRA 24 (*KANG*)

Exercise 3: Agency revised procedures used by specialists to adjudicate passport applications.

Proposal: SSA appendix steps that might otherwise be performed for adults do not need to be followed for minors in cases where performing the step will not affect the outcome to issue.

The union argues the proposal will benefit specialists by increasing their ability to meet production quotas. Agency argues the proposal prevents the assignment of certain work, using fraud controls, and undermines the integrity of the U.S. passport.



- Assume the proposal at issue satisfies the “arrangement” test.
- 69 FLRA 626, 629



Exercise 4: The agency changed the schedules and shifts assigned to operations supervisors and front-line managers.

Proposal: Coverage for operations supervisors/front-line managers who are on leave will not be provided by all unit employees in order to reduce the adverse impact of working forced overtime.

The union asserts the proposal benefits BUEs because it mitigates “employee burnout” resulting from forced overtime, reduced training opportunities, reduced breaks, and reduced ability to take leave.

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- The agency argues the proposal is not an appropriate arrangement because it effectively prohibits the agency from using unit employees to fill shifts when a supervisor is taking any kind of leave.
- 66 FLRA 658, 661-62

**Exercise 5:
Union sought to
modify agency
policy on
performance
improvement
plans.**

Proposal: If an employee has been on a performance improvement plan (PIP), and demonstrated acceptable performance, and then the employee's performance relapses within the year following commencement of the PIP, after a change in supervisor, the employee will be given another opportunity to improve.

The union asserts that the proposal would afford the adversely affected employees the opportunity to "understand the performance criteria from the viewpoint of the new supervisor."

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- The Agency argues the proposal is not appropriate because it prevents the agency from exercising its management right to suspend, remove, reduce in grade or pay, or take other disciplinary action against employees.
- 63 FLRA 340, 341-42

Exercise 6: The agency is implementing a new policy subjecting employees to medical and physical exams, as well as random drug and alcohol testing.

Proposal: For scientific personnel, no physical examinations shall be required to work on Agency vessels.

Parties agreed the proposal would prevent the agency from applying the new policy to scientific personnel. The union asserts the proposal would benefit scientific personnel by relieving them from performing crew duties; protect them from being disciplined for performing crew duties poorly; and exclude them from undergoing medical and physical exams, and random drug and alcohol testing.



- The agency argues the proposal is not an appropriate arrangement because it would prevent the agency from ensuring that scientific personnel are fit, and drug and alcohol free, to safely contribute to vessel operations and help during emergencies.
- 66 FLRA 639, 645
- More information on random drug testing proposals: 42 FLRA 730, 741-43



BREAK

15 minutes (approx.)



FINAL PROJECT

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Project - Directions

- The final project has two scenarios. We will split you into breakout rooms for ten minutes to discuss the first scenario with your groups. *If possible, please refrain from looking at the next slide for the answer.*
- The directions for the first scenario are on page 6 of the exercise handout. Please follow the directions carefully and choose someone in your group to explain the group's consensus for the first scenario.

Project - Answers

- 1 The proposal is negotiable as written, under § 7106(b)(2), for the reasons stated in *POPA*, 47 FLRA 10, 28 (1993) (“Provisions requiring consistency between position descriptions and performance elements do not restrict an agency’s choice of performance elements. Rather, such provisions permit an agency to achieve consistency between performance elements and the position description by amending the descriptions.”).

Project - Directions

- Again, we will split you into breakout rooms for ten minutes to discuss the second scenario with your groups. *If possible, please refrain from looking at the next slide for the answer.*
- The directions for the second scenario are on page 7 of the exercise handout. Please follow the directions carefully and choose someone in your group to explain the group's consensus for the second scenario.

Project - Answers

- 2** The wording affects the right to assign work, for the reasons stated in *POPA*, 47 FLRA 10, 23-24 (1993) (“Proposals or provisions that concern the assignment of specific duties to particular individuals directly interfere with an agency’s right to assign work under section 7106(a)(2)(B).”).



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The End.

THANK YOU

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Appendix 1

5 U.S.C. § 7106 - MANAGEMENT RIGHTS & EXCEPTIONS

(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 action 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.

**How the
Parts of
§ 7106
Interact**

