

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



(Updated September 2, 2026)

TABLE OF CONTENTS

<u>FOREWORD</u>	<u>1</u>
<u>§ 1 TERMS AND CONCEPTS</u>	<u>3</u>
<u>1.1 Introduction</u>	<u>3</u>
<u>1.2 Proposals</u>	<u>3</u>
<u>1.3 Provisions</u>	<u>3</u>
<u>1.4 How the Authority Determines the Meaning of Proposals and Provisions</u>	<u>3</u>
<u>1.5 Mandatory Subjects of Bargaining</u>	<u>4</u>
<u>1.6 Prohibited Subjects of Bargaining</u>	<u>5</u>
<u>1.7 Permissive Subjects of Bargaining</u>	<u>5</u>
<u>1.8 Negotiability Disputes</u>	<u>5</u>
<u>1.9 Bargaining-Obligation Disputes</u>	<u>8</u>
<u>1.10 Use of the Term “Nonnegotiable”</u>	<u>9</u>
<u>1.11 Written Allegation Concerning the Duty to Bargain</u>	<u>9</u>
<u>1.12 Agency-Head Review/Disapproval</u>	<u>9</u>
<u>1.13 Union’s Petition for Review</u>	<u>10</u>
<u>1.14 Post-Petition Conference</u>	<u>10</u>
<u>1.15 Agency’s Statement of Position</u>	<u>11</u>
<u>1.16 Union’s Response</u>	<u>11</u>
<u>1.17 Agency’s Reply</u>	<u>11</u>
<u>1.18 Parties’ Burdens (and Failure to Meet Burdens)</u>	<u>11</u>
<u>1.19 Divisions and Severance</u>	<u>12</u>
<u>1.20 Hearing Requests and Other Factfinding Procedures</u>	<u>13</u>

1.21	<u>Other Avenues for Resolving Negotiability Issues</u>	<u>14</u>
<u>§ 2</u>	<u>THE NEGOTIABILITY PROCESS</u>	<u>15</u>
2.1	<u>Union Files Petition for Review</u>	<u>15</u>
2.2	<u>Time Limit for Filing Petition</u>	<u>15</u>
(a)	<u>Proposals</u>	<u>15</u>
1.	<u><i>Union requests, in writing, a written allegation of nonnegotiability and agency responds</i></u>	<u>15</u>
2.	<u><i>Union requests, in writing, a written allegation of nonnegotiability, and agency does not respond</i></u>	<u>16</u>
3.	<u><i>Agency provides a written, unrequested allegation of nonnegotiability</i></u>	<u>16</u>
4.	<u><i>Allegations of nonnegotiability, and requests for such allegations, must be in writing</i></u>	<u>17</u>
(b)	<u>Provisions</u>	<u>18</u>
(c)	<u>Date of service of allegation of nonnegotiability or agency-head disapproval</u>	<u>18</u>
2.3	<u>Diagram Summarizing Pre-Petition Process</u>	<u>19</u>
2.4	<u>Format and Content of the Petition</u>	<u>19</u>
2.5	<u>The Post-Petition Conference</u>	<u>21</u>
2.6	<u>Agency's Statement of Position</u>	<u>23</u>
2.7	<u>Union's Response</u>	<u>24</u>
2.8	<u>Agency's Reply</u>	<u>25</u>
2.9	<u>Diagram Summarizing Parties' Filings with the Authority</u>	<u>26</u>
2.10	<u>Other Filings and Amicus Curiae Petitions</u>	<u>27</u>
2.11	<u>Where and How to File</u>	<u>27</u>

<u>2.12</u>	<u>“Service” Required</u>	<u>28</u>
<u>2.13</u>	<u>Additional Procedural Requirements</u>	<u>28</u>
<u>2.14</u>	<u>Noncompliance with Procedural and Other Requirements</u>	<u>29</u>
<u>2.15</u>	<u>Authority’s Decision and Order</u>	<u>30</u>
<u>2.16</u>	<u>After the Authority’s Decision and Order</u>	<u>30</u>
<u>2.17</u>	<u>Diagram Summarizing Possible Conclusions of Authority Decisions and the Post-Decision Process</u>	<u>32</u>
<u>§ 3</u>	<u>BASES FOR DISMISSING PETITIONS</u>	<u>33</u>
<u>3.1</u>	<u>Introduction</u>	<u>33</u>
<u>3.2</u>	<u>Proposal or Provision Nonnegotiable</u>	<u>33</u>
<u>3.3</u>	<u>Failure to Comply with Certain Procedural and Other Requirements</u>	<u>33</u>
<u>3.4</u>	<u>No Negotiability Dispute</u>	<u>33</u>
<u>3.5</u>	<u>Mootness</u>	<u>34</u>
<u>3.6</u>	<u>Petition is “Directly Related” to ULP or Grievance</u>	<u>34</u>
<u>3.7</u>	<u>Previously Filed Petition Bars Proposal or Provision</u>	<u>35</u>
<u>§ 4</u>	<u>SUBSTANTIVE ISSUES</u>	<u>36</u>
<u>4.1</u>	<u>Introduction</u>	<u>36</u>
<u>4.2</u>	<u>Conditions of Employment</u>	<u>36</u>
<u>4.3</u>	<u>Management Rights</u>	<u>38</u>
	<u>(a) Introduction and General Principles</u>	<u>38</u>
	<u>(b) Section 7106(a)</u>	<u>40</u>
	<u>1. Section 7106(a)(1) Rights</u>	<u>41</u>
	<u>i. Mission</u>	<u>41</u>

ii.	<u>Budget</u>	<u>41</u>
iii.	<u>Organization</u>	<u>41</u>
iv.	<u>Number of Employees of the Agency</u>	<u>42</u>
v.	<u>Internal-Security Practices</u>	<u>42</u>
<u>2.</u>	<u>Section 7106(a)(2) Rights</u>	<u>43</u>
i.	<u>Hire Employees</u>	<u>43</u>
ii.	<u>Assign Employees</u>	<u>44</u>
iii.	<u>Direct Employees</u>	<u>44</u>
iv.	<u>Layoff Employees</u>	<u>45</u>
v.	<u>Retain Employees</u>	<u>45</u>
vi.	<u>Suspend</u>	<u>45</u>
vii.	<u>Remove</u>	<u>45</u>
viii.	<u>Reduce in Grade or Pay</u>	<u>46</u>
ix.	<u>Discipline</u>	<u>46</u>
x.	<u>Assign Work</u>	<u>46</u>
xi.	<u>Contract Out</u>	<u>47</u>
xii.	<u>Determine Personnel</u>	<u>48</u>
xiii.	<u>Make Selections to Fill Positions</u>	<u>48</u>
xiv.	<u>Carry Out Mission in Emergencies</u>	<u>48</u>
<u>(c)</u>	<u>Section 7106(b)</u>	<u>49</u>
<u>1.</u>	<u>Section 7106(b)(1) – Generally</u>	<u>49</u>
<u>2.</u>	<u>Section 7106(b)(1) – Numbers, Types, and Grades of Employees or Positions Assigned To Any Organizational Subdivision, Work Project, or Tour of Duty</u>	<u>50</u>

3.	<u><i>Section 7106(b)(1) – Technology, Methods, and Means of Performing Work</i></u>	<u>52</u>
4.	<u><i>Section 7106(b)(2) – Procedures</i></u>	<u>53</u>
5.	<u><i>Section 7106(b)(3) – Appropriate Arrangements</i></u>	<u>57</u>
i.	<u><i>What is an arrangement?</i></u>	<u>57</u>
ii.	<u><i>When is an arrangement “appropriate”?</i></u>	<u>58</u>
(d)	<u><i>“Applicable Laws”</i></u>	<u>59</u>
4.4.	<u><i>Agency Discretion and “Sole and Exclusive” Discretion</i></u>	<u>59</u>
4.5	<u><i>Agency Rules and Regulations – “Compelling Need”</i></u>	<u>60</u>
4.6	<u><i>Non-Dispositive Nature of Prior Agreements and Existing Agency Requirements</i></u>	<u>61</u>
4.7	<u><i>Common Bargaining-Obligation Disputes</i></u>	<u>62</u>
(a)	<u><i>“Covered By” Doctrine</i></u>	<u>62</u>
(b)	<u><i>“De Minimis” Doctrine</i></u>	<u>63</u>
(c)	<u><i>Attempts to Bargain at the Wrong Level</i></u>	<u>65</u>
	<u>CITED DECISIONS</u>	<u>66</u>
	<u>AFTERWORD</u>	<u>74</u>

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; and
- some complex, substantive issues that frequently arise in negotiability cases.

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 – and current versions of the Authority’s Regulations – that may apply to their particular cases. We encourage you to visit the FLRA’s website, www.flra.gov, 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

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, 2424.21, 2424.22](#). All citations to the Authority’s Regulations are to the Regulations in effect at the time of publication of this Guide, unless otherwise noted.

⁴ [5 U.S.C. § 7117\(c\)\(6\)](#).

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 website 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.*, *AFSCME, Loc. 1653*, [74 FLRA 355](#), 355 (2026) (*Local 1653*); *AFGE, Council 220*, [74 FLRA 114](#), 114 (2024) (*Council 220 I*); *NTEU*, [67 FLRA 24](#), 24 (2012) (*NTEU I*), *aff’d sub nom. NTEU v. FLRA*, [No. 12-2574](#) (4th Cir. 2013).

⁷ *See, e.g.*, *AFGE, Council 270*, [73 FLRA 73](#), 73 (2022); *NFFE, Loc. 422*, [50 FLRA 121](#), 121-122 (1995) (*Local 422*).

⁸ [5 C.F.R. § 2424.2\(c\)](#).

⁹ *E.g.*, *NTEU, Chapter 296 & 336*, [74 FLRA 299](#), 299 (2025) (*Chapters 296 & 336*) (Member Wagner concurring on other grounds); *AFGE, Loc. 3430*, [71 FLRA 881](#), 881 (2020) (Member Abbott concurring on other grounds); *AFGE, Loc. 1770*, [64 FLRA 953](#), 953 (2010) (*Local 1770*).

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

¹¹ [5 C.F.R. § 2424.2\(f\)](#).

¹² *See, e.g.*, *AFGE, Loc. 1547*, [70 FLRA 303](#), 304 (2017) (*Local 1547*) (Member DuBester concurring); *NAIL, Loc. 7*, [67 FLRA 654](#), 655 (2014) (*Local 7*) (Member Pizzella concurring in part and dissenting in part on other grounds), *recons. denied*, [68 FLRA 133](#) (2014) (Member Pizzella dissenting).

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](#)¹⁹ (unless those procedures or appropriate arrangements are contrary to some other law).²⁰

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

¹⁴ E.g., *IFPTE*, Loc. 4, [74 FLRA 59](#), 60 (2024) (*Local 4 I*); *NAGE*, Loc. R-109, [66 FLRA 278](#), 278 (2011) (*Local R-109*).

¹⁵ E.g., *Local 4 I*, [74 FLRA at 60](#); *Local R-109*, [66 FLRA at 278-79](#).

¹⁶ See, e.g., *NAGE*, Loc. R1-134, [73 FLRA 637](#), 641-42 (2023) (*Local R1-134*); *IFPTE*, Loc. 3, [51 FLRA 451](#), 459 (1995) (Member Armendariz concurring on other grounds).

¹⁷ *NTEU*, [70 FLRA 701](#), 702 n.17 (2018) (*NTEU II*); *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) (Chair Segal dissenting in part on other grounds).

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

¹⁹ See, e.g., *IFPTE*, Loc. 4, [73 FLRA 635](#), 636 (2023) (*Local 4 II*) (directing agency to bargain over proposal that agency did not dispute was a procedure); *Antilles Consol. Educ. Ass'n*, [73 FLRA 282](#), 284 (2022) (*ACEA*) (directing agency to bargain over proposal that agency did not dispute was an appropriate arrangement).

²⁰ *AFGE*, Loc. 2058, [68 FLRA 676](#), 686 (2015) (*Local 2058*) (Member Pizzella dissenting in part on other grounds) (finding provision that is contrary to law remains so regardless of whether it is a procedure); *NTEU I*, [67 FLRA at 27 n.9](#) (finding 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).

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.²¹ 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.²²

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.²³ Some common examples are matters set forth in [§ 7106\(b\)\(1\) of the Statute](#),²⁴ supervisors’ and managers’ conditions of employment,²⁵ 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.”²⁶

Agency heads cannot disapprove agreements on the basis that they concern permissive subjects of bargaining.²⁷ 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.²⁸ 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.²⁹

1.8 Negotiability Disputes

A negotiability dispute is a disagreement between a union and an agency “concerning the legality of a proposal or provision.”³⁰ 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.”³¹ A negotiability dispute concerning a proposal may arise during bargaining,³² or when an agency claims, during FSIP proceedings, that the proposal is outside the duty to bargain.³³ And negotiability

²¹ See, e.g., *AFGE, Local 32*, [51 FLRA at 497 n.11](#).

²² See *NLRB Union, Loc. 21*, [36 FLRA 853](#), 857-60 (1990).

²³ See, e.g., *AFGE, Local 32*, [51 FLRA at 497 n.11](#).

²⁴ [5 U.S.C. § 7106\(b\)\(1\)](#); see also [5 C.F.R. § 2424.2\(c\)\(4\)](#).

²⁵ E.g., *NAGE, Loc. R1-109*, [61 FLRA 588](#), 590-91 (2006).

²⁶ E.g., *NFFE, IAMAW, Fed. Dist. 1, Fed. Loc. 1998*, [71 FLRA 889](#), 890 (2020) (*Local 1998 I*); *NATCA, AFL-CIO*, [62 FLRA 174](#), 182 (2007) (*NATCA I*) (Chairman Cabaniss concurring in part on other grounds).

²⁷ E.g., *Local 2058*, [68 FLRA at 683](#).

²⁸ See *Ass’n of Civilian Technicians, Mont. Air Chapter No. 29 v. FLRA*, [22 F.3d 1150](#), 1155-56 (D.C. Cir. 1994).

²⁹ [Id.](#)

³⁰ [5 C.F.R. § 2424.2\(c\)](#).

³¹ [Id.](#)

³² E.g., *Local 1653*, [74 FLRA at 355](#); *Council 220 I*, [74 FLRA at 114](#); *NTEU I*, [67 FLRA at 24](#).

³³ See, e.g., *AFGE, SSA Gen. Comm.*, [68 FLRA 407, 407](#) (2015) (*AFGE SSA*) (Member Pizzella dissenting in part on other grounds); *Local 422*, [50 FLRA at 121-22](#).

disputes concerning provisions arise when a union “disagrees with an agency head’s disapproval of a provision as contrary to law.”³⁴

As discussed in [section 4.2](#) below, the Statute requires agencies to bargain only over “conditions of employment” of bargaining-unit employees,³⁵ so one type of negotiability dispute may involve a claim that a proposal does not concern such a condition of employment.³⁶

In addition, parties cannot reach agreements that are “inconsistent with any [f]ederal law or any [g]overnment-wide rule or regulation.”³⁷ Therefore, some examples of negotiability disputes include disagreements between a union and an agency concerning whether a proposal or provision:

- Affects a management right under [§ 7106\(a\) of the Statute](#);³⁸
- Enforces an “applicable law,” within the meaning of [§ 7106\(a\)\(2\) of the Statute](#);³⁹
- Concerns a matter negotiable at the agency’s election under [§ 7106\(b\)\(1\) of the Statute](#);⁴⁰
- Constitutes a “procedure” within the meaning of [§ 7106\(b\)\(2\) of the Statute](#);⁴¹
- Constitutes an “appropriate arrangement” within the meaning of [§ 7106\(b\)\(3\) of the Statute](#);⁴²
- Is consistent with a government-wide rule or regulation;⁴³ or
- Is consistent with some federal statute other than the Statute.⁴⁴

This Guide discusses [§ 7106 of the Statute](#) in greater detail in [section 4.3](#) below.

³⁴ [5 C.F.R. § 2424.2\(c\)](#).

³⁵ [5 U.S.C. § 7103\(a\)\(12\)](#).

³⁶ [5 C.F.R. § 2424.2\(c\)\(2\)](#).

³⁷ [5 U.S.C. § 7117\(a\)\(1\)](#).

³⁸ [5 C.F.R. § 2424.2\(c\)\(1\)](#); see, e.g., *Local R1-134*, [73 FLRA at 642-43](#), 646-47, 649, 651; *NAIL*, Loc. 5, [67 FLRA 85, 86](#) (2012) (*Local 5*).

³⁹ [5 C.F.R. § 2424.2\(c\)\(3\)](#); see, e.g., *Nat’l Weather Serv. Emps. Org.*, [63 FLRA 450](#), 452 (2009) (*Weather Serv.*).

⁴⁰ [5 C.F.R. § 2424.2\(c\)\(4\)](#).

⁴¹ *Id.* [§ 2424.2\(c\)\(5\)](#).

⁴² *Id.*; see, e.g., *NTEU*, [70 FLRA 100](#), 103-04 (2016) (*NTEU III*) (disputing whether a proposal was an appropriate arrangement under [§ 7106\(b\)\(3\)](#)); *AFGE, Loc. 723*, [66 FLRA 639](#), 644-45 (2012) (*Local 723*) (same).

⁴³ [5 C.F.R. § 2424.2\(c\)\(6\)](#); e.g., *NFFE, Loc. 2199, IAMAW, Fed. Dist. 1*, [66 FLRA 412](#), 413 (2011) (*Local 2199*).

⁴⁴ E.g., *U.S. DOD, Def. Logistics Agency*, [70 FLRA 932](#), 933-34 (2018) (*DLA*) (Member DuBester dissenting); *Local 2199*, [66 FLRA at 413](#).

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.”⁴⁵ In other words, otherwise negotiable proposals are barred from negotiation due to a conflict with agency rules or regulations only if the agency demonstrates, under criteria established by the Authority, that the rule or regulation is one for which a compelling need exists.⁴⁶ In this connection, [§ 2424.2\(c\)\(7\) of the Authority’s Regulations](#)⁴⁷ provides that a negotiability dispute may involve a claim that a proposal or provision is negotiable notwithstanding agency rules or regulations because:

- The proposal or provision is consistent with agency rules or regulations for which a compelling need exists;⁴⁸
- The agency rules or regulations violate applicable law, rule, regulation, or appropriate authority outside the agency;⁴⁹
- The agency rules or regulations were not issued by the agency or any primary national subdivision of the agency;⁵⁰
- The union represents an appropriate unit including not less than a majority of the employees in the rule- or regulation-issuing agency or primary national subdivision;⁵¹ or
- No compelling need exists for the rules or regulations to bar negotiations.⁵²

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.⁵³ 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.⁵⁴ Instead, the Authority will “dismiss” the union’s petition as to that proposal.⁵⁵

⁴⁵ [5 C.F.R. § 2424.2\(c\)\(7\)\(i\)](#); e.g., *Local R1-134*, [73 FLRA at 647-48](#); *NAGE, SEIU, Loc. R1-34*, [43 FLRA 1526](#), 1529-32 (1992).

⁴⁶ *AFGE, AFL-CIO, Loc. 3804*, [7 FLRA 217](#), 219-20 (1981).

⁴⁷ [5 C.F.R. § 2424.2\(c\)\(7\)](#).

⁴⁸ [Id. § 2424.2\(c\)\(7\)\(i\)](#).

⁴⁹ [Id. § 2424.2\(c\)\(7\)\(ii\)](#).

⁵⁰ [Id. § 2424.2\(c\)\(7\)\(iii\)](#).

⁵¹ [Id. § 2424.2\(c\)\(7\)\(iv\)](#).

⁵² [Id. § 2424.2\(c\)\(7\)\(v\)](#).

⁵³ See *Local 1653*, [74 FLRA at 356](#); *NATCA, Loc. ZHU*, [65 FLRA 738](#), 741 (2011) (*Local ZHU*).

⁵⁴ See *Local 1653*, [74 FLRA at 356](#); *Local ZHU*, [65 FLRA at 741](#).

⁵⁵ See *Local 1653*, [74 FLRA at 356](#); *Local ZHU*, [65 FLRA 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 involved in a particular case, the parties are obligated by law to bargain over a proposal that otherwise may be negotiable.”⁵⁶ Bargaining-obligation disputes involve claims regarding whether the *Statute* requires bargaining – *not* claims regarding whether the parties’ *collective-bargaining agreement* requires bargaining.⁵⁷ Examples of bargaining-obligation disputes include agency claims that: (1) a proposal concerns a matter that is “covered by” a collective-bargaining agreement;⁵⁸ (2) bargaining is not required because there has not been a change in bargaining-unit employees’ conditions of employment or because the effect of the change is “de minimis”;⁵⁹ and (3) the union is attempting to bargain at the wrong level of the agency.⁶⁰ Those types of disputes are discussed in greater detail 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 union may have the opportunity to file an unfair-labor-practice (ULP) charge, or a grievance under the parties’ negotiated grievance procedure, concerning the bargaining-obligation dispute.⁶¹ [Section 3.6](#) below discusses how the Authority processes negotiability cases where the union has filed a ULP charge or a grievance that is directly related to the negotiability petition. If the union has not filed a directly related ULP charge or grievance, then, in the negotiability proceeding, the Authority will “resolve all disputes necessary for disposition of the [negotiability] petition” – including any bargaining-obligation disputes – “unless, in its discretion, the Authority determines that resolving all disputes is not appropriate because, for example, resolution of the bargaining[-]obligation dispute . . . would unduly delay resolution of the negotiability dispute, or the procedures in another, available administrative forum are better suited to resolve the bargaining[-]obligation dispute.”⁶² If the Authority resolves the bargaining-obligation dispute, then its decision will include an order to bargain, but will not include other remedies that could be obtained in a ULP proceeding under [§ 7118\(a\)\(7\) of the Statute](#), such as a cease-and-desist order or an order to post a notice.⁶³

A different process applies if a negotiability petition, or particular proposal(s) or provision(s) within a petition, present *only* a bargaining-obligation dispute – without an accompanying negotiability dispute. In this situation, the Authority will *not* resolve the

⁵⁶ [5 C.F.R. § 2424.2\(a\)](#).

⁵⁷ *E.g.*, *NTEU, Chapter 82*, [59 FLRA 627](#), 629 (2004).

⁵⁸ [5 C.F.R. § 2424.2\(a\)\(1\)](#); *e.g.*, *Local 1653*, [74 FLRA at 356](#); *AFGE SSA*, [68 FLRA at 414](#); *NATCA*, [66 FLRA 213](#), 218 (2011) (*NATCA II*).

⁵⁹ [5 C.F.R. § 2424.2\(a\)\(2\)](#); *see, e.g.*, *NFFE, IAMAW, Fed. Dist. 1, Fed. Loc. 1998*, [69 FLRA 586](#), 589-90 (2016) (*Local 1998 II*) (Member Pizzella concurring in part and dissenting in part on other grounds).

⁶⁰ [5 C.F.R. § 2424.2\(a\)\(3\)](#); *Pro. Airways Sys. Specialists*, [59 FLRA 485](#), 488 n.4 (2003).

⁶¹ [5 C.F.R. § 2424.30\(b\)\(2\)](#).

⁶² *Id.*

⁶³ [Id. § 2424.40\(a\)](#).

bargaining-obligation dispute in the negotiability proceeding.⁶⁴ Instead, the Authority will dismiss the petition, or the portion of the petition that presents only a bargaining-obligation dispute.⁶⁵ Any resolution of those disputes would need to occur in other proceedings, such as ULP or grievance proceedings.⁶⁶

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.⁶⁷ In *AFGE, Local 32*, the Authority stated that, consistent with the wording of the Statute, it would begin to describe bargaining proposals as either “within or outside the duty to bargain.”⁶⁸ 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 Written Allegation Concerning the Duty to Bargain

A written allegation concerning the duty to bargain is an agency allegation that the duty to bargain in good faith does not extend to a proposal.⁶⁹ As discussed in [section 2.2\(a\)1](#) 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.⁷⁰ However, neither the Statute nor the Authority’s Regulations requires that an allegation be made with any particular degree of specificity.⁷¹

1.12 Agency-Head Review/Disapproval

If a union and an agency reach, or the FSIP imposes, a written agreement, then that agreement “shall be subject to approval by” the agency head.⁷² The agency head determines whether, in his or her opinion, the agreement is consistent with “the provisions of [the Statute] and any other applicable law, rule, or regulation.”⁷³ If the agency head determines that one or more of the provisions in the agreement is contrary to law, rule, or regulation, then he or she will disapprove the entire agreement in writing.

⁶⁴ [Id. § 2424.2\(d\)](#).

⁶⁵ [Id.](#) (stating that “[a]n appeal that concerns only a bargaining[-]obligation dispute may not be resolved” through the negotiability process); see also *Local 1653*, [74 FLRA at 356](#); *Local ZHU*, [65 FLRA at 741](#).

⁶⁶ Cf. [5 C.F.R. § 2424.30\(b\)\(2\)](#) (where bargaining-obligation dispute exists, union may have an opportunity to file a ULP charge or grievance).

⁶⁷ See *AFGE, Local 32*, [51 FLRA at 497 n.11](#).

⁶⁸ [Id.](#)

⁶⁹ See [5 C.F.R. § 2424.2\(i\)](#).

⁷⁰ See [id. § 2424.21\(a\)](#), [\(b\)\(1\)](#).

⁷¹ *Pro. Airways Sys. Specialists*, [61 FLRA 97](#), 98 (2005) (*PASS*) (noting that “an agency is first required to specifically support its allegation of nonnegotiability in its statement of position”).

⁷² [5 U.S.C. § 7114\(c\)\(1\)](#).

⁷³ [Id. § 7114\(c\)\(2\)](#).

This is called the “agency-head disapproval.”⁷⁴ The agency head must issue this disapproval within thirty days of: the date on which the agency and the union executed the agreement;⁷⁵ 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.”⁷⁶ If the agency head fails to timely disapprove the agreement, then the agreement takes effect and becomes binding on the parties, but does so subject to the provisions of the Statute and “any other applicable law, rule, or regulation.”⁷⁷ This means that a party may challenge the agreement’s validity in an appropriate proceeding, such as arbitration.⁷⁸

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.⁷⁹ Specifically, the agency head “shall approve” agreements that are consistent with the Statute “and any other applicable law, rule, or regulation.”⁸⁰ Thus, the agency head cannot disapprove an agreement merely because it concerns a permissive subject.⁸¹

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.⁸² As discussed in [section 2.1](#) below, the union’s petition for review initiates the negotiability process before the Authority.⁸³ 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 “will, in its discretion, schedule a post-petition conference” with the union and agency representatives in the case.⁸⁴ Post-petition conferences are discussed in [section 2.5](#) below.

⁷⁴ *E.g.*, *NFFE, VA Council of Consol. Locs.*, [71 FLRA 1193](#), 1194 (2020) (Member DuBester concurring on other grounds).

⁷⁵ [5 U.S.C. § 7114\(c\)](#).

⁷⁶ *AFGE, Nat’l VA Council*, [39 FLRA 1055](#), 1057, *recons. denied*, [40 FLRA 195](#) (1991).

⁷⁷ [5 U.S.C. § 7114\(c\)\(3\)](#).

⁷⁸ *U.S. EPA*, [65 FLRA 113](#), 114-15 (2010) (Member Beck concurring on other grounds) (where agreement took effect as a consequence of agency head’s failure to timely complete agency-head review, agency could challenge enforceability of agreement at arbitration on the basis that it conflicted with § 7106 of the Statute).

⁷⁹ *E.g.*, *NATCA, AFL-CIO*, [61 FLRA 336](#), 338 (2005) (*NATCA III*).

⁸⁰ [5 U.S.C. § 7114\(c\)\(2\)](#).

⁸¹ *E.g.*, *Local 2058*, [68 FLRA at 683](#).

⁸² [5 C.F.R. § 2424.2\(d\)](#).

⁸³ *Id.* [§ 2424.22\(a\)](#).

⁸⁴ *Id.* [§ 2424.23](#).

1.15 Agency's Statement of Position

The agency's statement of position is a document that the agency files after the union files its petition.⁸⁵ It is usually, but not always, due after any post-petition conference.⁸⁶ The contents of, and procedural requirements involving, agency statements of position are discussed in [section 2.6](#) below.

1.16 Union's Response

The union's response is a document that the union may file after the agency files its statement of position.⁸⁷ The contents of, and procedural requirements involving, union responses are discussed in [section 2.7](#) below.

1.17 Agency's Reply

The agency's reply is a document that the agency may file after the union files its response.⁸⁸ The contents of, and procedural requirements involving, agency replies are discussed in [section 2.8](#) below.

1.18 Parties' Burdens (and Failure to Meet Burdens)

In a negotiability case, the union has the burden of: (1) explaining the meaning, operation, and effects of a proposal or provision; and (2) raising and supporting arguments that 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.⁸⁹ The agency has the burden of: (1) explaining the agency's understanding of the meaning, operation, and effects of a proposal or provision, if the agency disagrees with the union's explanations; and (2) raising and supporting arguments that a proposal is outside the duty to bargain, or a provision is contrary to law.⁹⁰

Moreover, each party has the burden of providing the Authority with sufficiently detailed explanations that would enable the Authority to understand the party's positions regarding the meaning, operation, and effects of a proposal or provision.⁹¹ "A party's failure to provide such explanations may affect the Authority's decision in a manner that is adverse to the party."⁹²

⁸⁵ [Id. § 2424.24\(b\)](#).

⁸⁶ *Cf. id. § 2424.23(a)* ("Unless the Authority or an FLRA representative directs otherwise, parties must observe all time limits . . . *regardless of whether a post-petition conference is conducted or may be conducted.*" (emphasis added)).

⁸⁷ [Id. § 2424.25\(b\)](#).

⁸⁸ [Id. § 2424.26\(b\)](#).

⁸⁹ [Id. § 2424.32\(a\)](#).

⁹⁰ [Id. § 2424.32\(b\)](#).

⁹¹ [Id. § 2424.32\(c\)](#).

⁹² [Id.](#)

The Authority may, in its discretion, consider a party's failure to raise and support an argument to be a waiver of that argument.⁹³ And if one party fails to respond to another party's argument or assertion, then the Authority may, in its discretion, treat that failure to respond as a concession of that argument or assertion.⁹⁴ Further, if a party makes an argument but fails to support it, then the Authority may reject that argument as a "bare assertion."⁹⁵

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."⁹⁶ 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."⁹⁷

1.19 Divisions and 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.⁹⁸ In that situation, a union has two options. First, in its petition, the union may submit distinct proposals or provisions for the Authority to assess each distinct proposal's or provision's negotiability.⁹⁹ Second, in its response, a union may "sever" a previously submitted proposal or provision into distinct parts for the

⁹³ [Id. § 2424.32\(d\)\(1\)](#); see also *AFGE, Loc. 2031*, [73 FLRA 769](#), 770 (2023) (*Local 2031*) (Chairman Grundmann concurring on other grounds); *AFGE, Loc. 32*, [73 FLRA 464](#), 467 (2023); *AFGE, Loc. 1938*, [66 FLRA 1038](#), 1040 (2012) (*Local 1938*); *AFGE, Council of Prison Locs. 33*, *Loc. 506*, [66 FLRA 929](#), 940-41 (2012) (*Local 506*).

⁹⁴ [5 C.F.R. § 2424.32\(d\)\(2\)](#); see also *Local 1653*, [74 FLRA at 357-58](#) (union's failure to dispute agency claims that proposals affected management rights and did not fall within exceptions to management rights was a concession that the proposals had the alleged effect, and did not fall within an exception to management rights under [§ 7106\(b\)](#)).

⁹⁵ E.g., *Council 220 I*, [74 FLRA at 116](#); *NFFE, Fed. Dist. 1, Loc. 1998*, *IAMAW*, [66 FLRA 124](#), 128 (2011) (*Local 1998 III*).

⁹⁶ [5 C.F.R. § 2424.32\(d\)\(1\)\(i\)](#).

⁹⁷ [Id. § 2424.32\(d\)\(1\)\(ii\)](#).

⁹⁸ Cf. *Chapters 296 & 336*, [74 FLRA at 301-02](#) (finding provision as a whole contrary to law where union did not sever it); *AFGE, Loc. 1164*, [65 FLRA 836](#), 840 n.3 (2011) (*Local 1164 I*) (finding it unnecessary to resolve union's severance request because proposal as a whole was within the duty to bargain).

⁹⁹ [5 C.F.R. § 2424.22\(b\)](#) ("If the exclusive representative seeks a negotiability determination on particular matters standing alone, then the exclusive representative must submit those matters as distinct proposals or provisions.").

Authority to assess each severed part's negotiability.¹⁰⁰ The union may opt of its own accord to divide or sever; no request to the Authority is necessary.¹⁰¹

[Section 2424.2\(h\) of the Authority's Regulations](#)¹⁰² 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.

If a union opts to sever proposals or provisions, then it must identify the proposal or provision that the union is severing, and provide the exact wording of the newly severed portion(s).¹⁰³ The union must also explain how each severed portion of the proposal or provision may stand alone with independent meaning, and how the severed portion(s) would operate.¹⁰⁴

If a union has opted to sever proposals or provisions in its response, then the agency, in its reply, has an opportunity to challenge any newly severed proposals or provisions as they are new assertions from the union.¹⁰⁵

1.20 Hearing Requests and Other Factfinding Procedures

"When necessary to resolve disputed issues of material fact in a negotiability or bargaining[-]obligation dispute, or when it would otherwise aid in decision making, the Authority, or its designated representative may, in its discretion": direct the parties to

¹⁰⁰ [id. § 2424.25\(d\)](#); see *Chapters 296 & 336, 74 FLRA at 301-02* (dismissing petition where one subsection of provision was contrary to law and union did not sever provision).

¹⁰¹ [5 C.F.R. § 2422.22\(b\)](#) ("The petition will be resolved according to how the [union] divides matters into proposals or provisions."); [id. § 2424.25\(d\)](#) ("The [union] may, of its own accord, accomplish the severance of a previously submitted proposal or provision."). We note that the Authority's Regulations in effect prior to October 12, 2023, required unions to affirmatively request that the Authority sever their proposals or provisions. See [5 C.F.R. §§ 2424.22\(c\)](#) (1999) (former Regulation allowing unions to "request[] severance" in their petitions), [2424.25\(d\)](#) (former Regulation allowing unions to "request severance" in their responses if not requested in their petitions).

¹⁰² [5 C.F.R. § 2424.2\(h\)](#).

¹⁰³ [id. § 2424.25\(d\)](#).

¹⁰⁴ [id.](#)

¹⁰⁵ [id. § 2424.26\(c\)](#) (an agency "must limit" its reply to matters that the union raised for the "first time" in its response).

provide specific documents;¹⁰⁶ direct the parties to provide answers to specific factual questions;¹⁰⁷ refer the matter to a hearing;¹⁰⁸ or take “any other appropriate action.”¹⁰⁹ Either party may request a hearing, but the requesting party must give the reasons for its request.¹¹⁰ And “the Authority rarely grants such requests.”¹¹¹

1.21 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.](#)¹¹² The Authority has held that, consistent with [§ 7105\(a\)\(2\)\(E\)](#), only the Authority may resolve negotiability disputes that arise under [§ 7117\(c\).](#)¹¹³

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.¹¹⁴ By contrast, grievance arbitrators and adjudicators resolving ULP cases may resolve negotiability issues in the course of resolving duty-to-bargain questions.¹¹⁵ But their decisions must be consistent with the Statute and Authority precedent.¹¹⁶

¹⁰⁶ [Id. § 2424.31\(a\).](#)

¹⁰⁷ [Id. § 2424.31\(b\).](#)

¹⁰⁸ [Id. § 2424.31\(c\);](#) see also [id. § 2424.23\(e\).](#)

¹⁰⁹ [Id. § 2424.31\(d\);](#) see also [id. § 2424.23\(e\).](#)

¹¹⁰ [Id. §§ 2424.22\(c\)\(4\), 2424.24\(c\)\(4\).](#)

¹¹¹ [Id. §§ 2424.22\(c\)\(4\), 2424.24\(c\)\(4\);](#) see *Local 4 I*, [74 FLRA at 59-60](#) (denying hearing request).

¹¹² [5 U.S.C. § 7105\(a\)\(2\)\(E\).](#)

¹¹³ *E.g.*, *U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, New Cumberland, Pa.*, [58 FLRA 750](#), 755 (2003).

¹¹⁴ *E.g.*, *AFGE, AFL-CIO, Dep’t of Educ. Council of AFGE Locs.*, [42 FLRA 1351](#), 1353-55 (1991) (*AFGE Locals*); *Commander, Carswell Air Force Base, Tex.*, [31 FLRA 620](#), 624 (1988).

¹¹⁵ See *NTEU*, [64 FLRA 443](#), 446-47 (2010) (*NTEU IV*) (Member Beck dissenting on other grounds) (involving alleged ULPs); *GSA*, [54 FLRA 1582](#), 1587-89 (1998) (involving alleged contractual-bargaining obligation).

¹¹⁶ *E.g.*, *Louis A. Johnson Veterans Admin. Med. Ctr., Clarksburg, W. Va.*, [15 FLRA 347](#), 351 (1984); see also *AFGE Locals*, [42 FLRA at 1353](#).

§ 2 THE NEGOTIABILITY PROCESS

2.1 Union Files Petition for Review

A union's petition for review initiates the negotiability process with the Authority.¹¹⁷ Only a union representative – not an agency representative or any other individual – may file a petition.¹¹⁸

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,¹¹⁹ and the Authority may not extend or waive this time limit.¹²⁰ 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.¹²¹

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,¹²² and the agency provides such a *written* allegation,¹²³ 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.¹²⁴

In cases where a union requests a written allegation and the agency provides one, the Authority strongly encourages unions to include, with their petitions: (1) a copy of the agency's written allegation; and (2) a copy of the union's written request, if the

¹¹⁷ [5 C.F.R. § 2424.22\(a\)](#).

¹¹⁸ [Id. § 2424.20](#).

¹¹⁹ [5 U.S.C. § 7117\(c\)\(2\)](#).

¹²⁰ [5 C.F.R. § 2429.23\(d\)](#); *IBEW, Loc. 1002*, [71 FLRA 779](#), 779 (*Local 1002*), *recons. denied*, [71 FLRA 930](#) (2020); *AFGE, Loc. 3407*, [41 FLRA 265](#), 270 (1991).

¹²¹ *AFGE, Loc. 3529*, [58 FLRA 151](#), 151-52 (2002) (*Local 3529 I*) (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).

¹²² [5 C.F.R. § 2424.11\(a\)](#).

¹²³ [Id. § 2424.11\(b\)](#).

¹²⁴ [Id. § 2424.21\(a\)\(1\)](#).

agency's allegation does not indicate the date of the union's request. If the union does not provide those documents, then the Authority may issue an order directing the union to do so.

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,¹²⁵ and the agency *does not respond* in writing within ten days after receiving the union's request, then the union may file a petition *at any time* after the expiration of that ten-day period.¹²⁶

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 does not 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*

An agency's written allegation of nonnegotiability absent the union's request is called an unrequested allegation of nonnegotiability.¹²⁷ In this case, the union has two options.

The union's first option is to file a petition¹²⁸ (including a copy of the agency's written allegation) within fifteen days of receiving the allegation.¹²⁹ If it fails to file within fifteen days, then the Authority will dismiss the petition, with prejudice, as untimely.¹³⁰ (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 the union so chooses), and, if necessary, later request, in writing, a written allegation of nonnegotiability from the agency.¹³¹ 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

¹²⁵ [Id. § 2424.11\(a\)](#).

¹²⁶ [Id. § 2424.21\(b\)](#).

¹²⁷ [Id. § 2424.11\(c\)](#).

¹²⁸ [Id.](#); *AFGE, Loc. 3928*, [66 FLRA 175](#), 175 (2011) (*Local 3928*) (Member Beck dissenting on other grounds).

¹²⁹ [5 C.F.R. §§ 2424.11\(c\), 2424.21\(a\)\(1\)](#).

¹³⁰ [Id. §§ 2424.11\(c\), 2424.21\(a\)\(1\)](#).

¹³¹ [Id. § 2424.11\(c\)](#).

union *must* file its petition (including a copy of the agency's written allegation) within fifteen days of receiving that allegation.¹³² But if the agency does not provide a written allegation, then the union may file its petition *at any time*, but the union must give the agency ten days to respond to the union's written request before filing the petition.¹³³

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 by timely filing 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.¹³⁴ Please note that, as discussed in [section 1.21](#) 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 FSIP or an FSIP-directed arbitrator may resolve the dispute. More information regarding the FSIP can be found on the [FLRA's website](#).

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.¹³⁵ 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, then 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.

¹³² [Id. § 2424.21\(a\)\(1\)](#).

¹³³ [Id. § 2424.21\(b\)](#).

¹³⁴ [Id. § 2424.11\(c\)](#); 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).

¹³⁵ [5 C.F.R. § 2424.11](#) (noting that a union may file a petition after receiving a "written" allegation of nonnegotiability).

(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 has the opportunity to review that agreement.¹³⁶ If the agency head timely disapproves the agreement (within thirty days of the agreement's execution),¹³⁷ then the union *must* file its petition for review with the Authority within fifteen days of service of the disapproval.¹³⁸ 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,¹³⁹ and there is no negotiability dispute that the Authority may address under [§ 7117 of the Statute](#).¹⁴⁰

(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),¹⁴¹ or service of an agency head's disapproval (in provision cases).¹⁴² 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).¹⁴³ 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).¹⁴⁴ The Authority may not extend or waive the time limit for filing a petition for review.¹⁴⁵

¹³⁶ [5 U.S.C. § 7114\(c\)\(1\)](#).

¹³⁷ See [id. § 7114\(c\)\(2\)](#).

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

¹³⁹ [5 U.S.C. § 7114\(c\)\(3\)](#).

¹⁴⁰ See, e.g., *Local 1770*, [64 FLRA at 953](#); *AFGE, Loc. 1301*, [51 FLRA 1294](#), 1297 (1996).

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

¹⁴² [Id. § 2424.21\(a\)\(2\)](#).

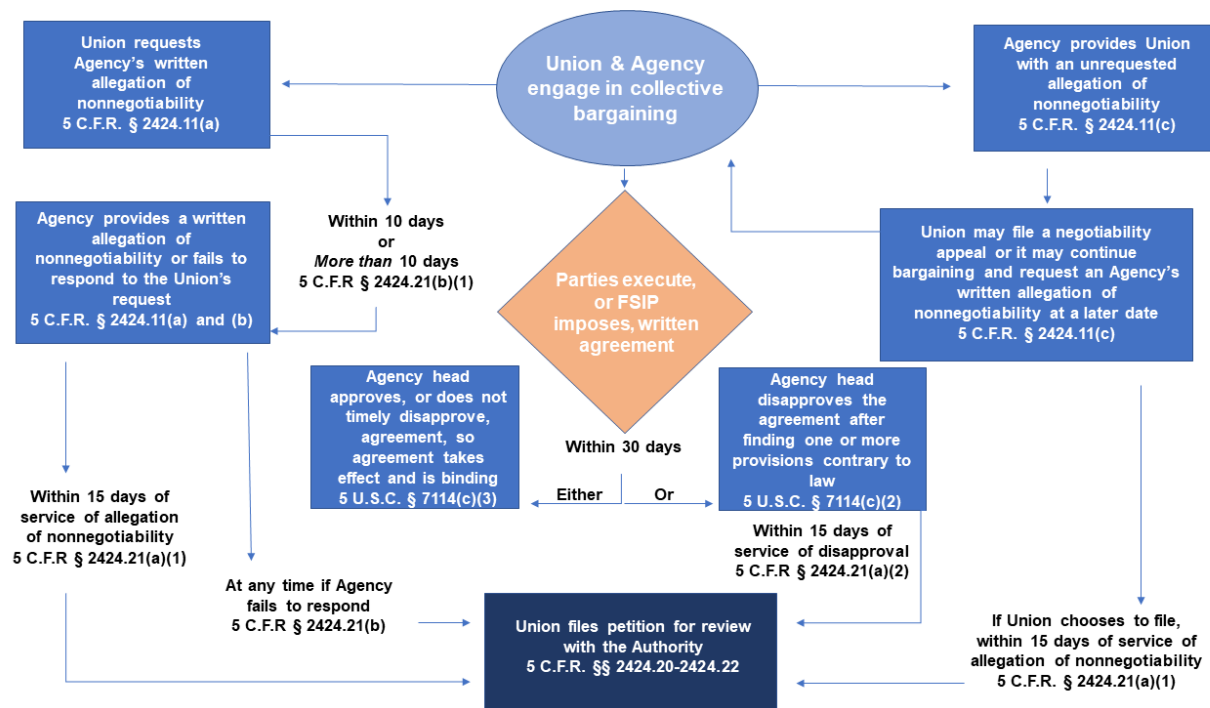
¹⁴³ [Id. § 2429.27\(d\)](#).

¹⁴⁴ [Id. § 2429.22](#).

¹⁴⁵ [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: (1) the [FLRA's eFiling system](#); (2) an Authority form, available [here](#); or (3) plain paper, and providing the same information that the Authority form requests. Although unions are not required to use the Authority's eFiling system, the Authority encourages them to do so because the eFiling system 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 exact wording and explanation of the meaning of the proposal or provision, including an explanation of special terms or phrases, technical language, or other words that are not in common usage, as well as how the proposal or provision is intended to work;¹⁴⁶
- Specific citation to any law, rule, regulation, section of a collective-bargaining agreement, or other authority that the union relies on in its argument or that the union references in the proposal or provision, along with a copy of any such material that the Authority cannot easily access (which the union may upload as attachments if the union eFiles its petition);¹⁴⁷
- An explanation of how the cited law, rule, regulation, section of a collective-bargaining agreement, or other authority relates to the union's argument, proposal, or provision;¹⁴⁸
- A statement as to whether the proposal or provision is also involved in a ULP charge, a grievance, or an impasse procedure before the FSIP, and whether any other negotiability petition has been filed concerning a proposal or provision arising from the same bargaining or the same agency-head review;¹⁴⁹
- Documents relevant to that statement, including a copy of any related ULP charge, grievance, request for impasse assistance, or other negotiability petition;¹⁵⁰ and
- Any request for a hearing before the Authority and the reasons supporting such request, with the understanding that the Authority rarely grants such requests.¹⁵¹

In addition, the petition must include: (1) the names, addresses, telephone numbers, email addresses, 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);¹⁵² and (2) 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).¹⁵³ See sections [2.12](#) and [2.13](#) below for further discussion of the statement-of-service requirement.

¹⁴⁶ [Id. § 2424.22\(c\)\(1\)](#).

¹⁴⁷ [Id. § 2424.22\(c\)\(2\)](#).

¹⁴⁸ [Id. § 2424.22\(c\)\(2\)\(i\)](#).

¹⁴⁹ [Id. § 2424.22\(c\)\(3\)](#).

¹⁵⁰ [Id. § 2424.22\(c\)\(3\)\(i\)](#).

¹⁵¹ [Id. § 2424.22\(c\)\(4\)](#).

¹⁵² See [FLRA, Petition for Review of Negotiability Issues – Proposals \(2026\)](#); [FLRA, Petition for Review of Negotiability Issues – Provisions \(2026\)](#).

¹⁵³ [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).

2.5 The Post-Petition Conference

Generally, after the union files its petition – assuming that there are no procedural deficiencies in the petition – the Authority will, in its discretion, schedule a post-petition conference,¹⁵⁴ as noted in [section 1.14](#) above. The Authority will serve the parties with notice of the date and time for the conference. Post-petition conferences may be conducted via telephone, in person, or through other means.¹⁵⁵ However, they are normally held by telephone, so the notice of the post-petition conference typically includes a telephone number and instructions on how to make the call.

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 (with or without prejudice to the union's refiling of the 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) (with or without conditions).¹⁵⁸

If the designated union or agency representative is not available, then the union or the 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 as to whether the conference should be rescheduled.¹⁵⁹ The requesting party may fax their 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 they should submit a joint written request setting 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 parties' representatives to the conference must be prepared to discuss, clarify, and resolve matters including:

¹⁵⁴ [Id. § 2424.23\(a\)](#).

¹⁵⁵ [Id.](#)

¹⁵⁶ [Id. § 2424.32\(e\)](#).

¹⁵⁷ [Id.](#) But see *Fed. Educ. Ass'n, Stateside Region*, [56 FLRA 473](#), 473-74 (2000) (finding that, where conference was rescheduled at agency's request and union representative was unaware of the date of the rescheduled conference until after the conference had been held, union's failure to participate in post-petition conference was not "so egregious as to warrant dismissal of the petition for review").

¹⁵⁸ [5 C.F.R. § 2424.32\(e\)](#).

¹⁵⁹ [Id. § 2429.23](#).

¹⁶⁰ [Id. § 2429.24\(g\)\(1\)](#).

¹⁶¹ [Id. § 2429.23](#).

¹⁶² [Id.](#)

- 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
- The status of any proceedings – including a ULP charge under [part 2423 of the Authority's Regulations](#), a grievance under the parties' negotiated grievance procedure, or an impasse procedure under [part 2470 of the Authority's Regulations](#) – that are directly related to the negotiability petition.¹⁶³

The Authority representative's primary role during the conference is to obtain information for the record regarding all of the above matters. 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.¹⁶⁴ 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.¹⁶⁵

The Authority representative conducting the conference may grant extensions of time for future filings if the representative determines that doing so will effectuate the purposes of the Statute and the Authority's negotiability Regulations.¹⁶⁶ However, the Authority representative 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.¹⁶⁸ This becomes a part of the official record in the case.

¹⁶³ [Id. § 2424.23\(b\)](#).

¹⁶⁴ See, e.g., *Local 1653*, [74 FLRA at 357 n.27](#) (noting that union modified proposal's wording at post-petition conference, and considering proposal as modified); *Local 3928*, [66 FLRA at 176](#).

¹⁶⁵ [5 C.F.R. § 2424.24\(a\), \(c\)\(2\)](#).

¹⁶⁶ [Id. § 2424.23\(c\)](#).

¹⁶⁷ [Id. § 2429.23\(b\)](#).

¹⁶⁸ [Id. §§ 2424.23\(d\), 2429.12\(a\)](#).

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. In the event that a post-petition conference is not scheduled, or not scheduled before the agency's statement of position is due, the agency must observe its deadline to file its statement, unless directed otherwise.¹⁶⁹ An agency may file its statement of position by using: (1) [FLRA's eFiling system](#); (2) an Authority form, available [here](#); or (3) plain paper, and providing the same information that 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 may withdraw its allegation of nonnegotiability of a proposal or its agency-head disapproval of a provision.¹⁷¹ However, if it does not do so, then the agency must set forth in full:

- All of the arguments and authorities supporting any bargaining-obligation or negotiability claims;
- Any disagreement with claims that the union made in the petition;
- Specific citation to, and explanation of the relevance of, any law, rule, regulation, section of a collective-bargaining agreement, or other authority on which the agency relies; and
- A copy of any such material that the Authority may not easily access, such as internal agency policies (which the agency may upload as attachments if it eFiles the statement of position).¹⁷²

In deciding 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 nonnegotiability,¹⁷³ or the arguments that it made during the post-petition conference.¹⁷⁴ If the agency disagrees with the union's explanation of a proposal's or provision's meaning or operation, then, in its statement of position, the agency must set forth its own explanation of the proposal's or provision's meaning and operation, as well as its reasons for disagreeing with the union's

¹⁶⁹ [Id. §§ 2424.23\(a\), 2424.24\(b\)](#).

¹⁷⁰ [Id. § 2424.24\(b\)](#).

¹⁷¹ [Id. § 2424.24\(c\)\(1\)](#).

¹⁷² [Id. § 2424.24\(c\)\(2\)](#).

¹⁷³ See, e.g., *Local 1653*, [74 FLRA at 356](#) (declining to address management-rights claims made in the allegation but not repeated in the statement of position). But see *AFGE, Loc. 997*, [66 FLRA 499](#), 499-500 (2012) (*Local 997*) (after declining to consider untimely statement of position, considering agency's allegation of nonnegotiability as "part of the record").

¹⁷⁴ Cf. *Local 7*, [67 FLRA at 654](#) ("[A]n agency is not bound by the legal arguments that it raises at a post-petition conference.").

explanation.¹⁷⁵ 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.¹⁷⁶

Additionally, if there are any ULP, grievance, FSIP, or other negotiability proceedings that are directly related to the negotiability petition, then the statement of position must (1) set forth the status of those proceedings and (2) contain any documents relevant to the status updates, including a copy of the related ULP charge, grievance, request for FSIP assistance, or other negotiability petition – if the union has not already provided those documents with its petition.¹⁷⁷ Moreover, if the agency is requesting a hearing, then, in its statement of position, the agency must include that request and set forth reasons supporting that request, with the understanding that the Authority rarely grants such requests.¹⁷⁸

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

2.7 Union's Response

If the union disputes any of the claims in the agency's statement of position, it must file a response within fifteen days of receiving the agency's statement.¹⁷⁹ The union may file its response by using: (1) the [FLRA's eFiling system](#); (2) an Authority form, available [here](#); or (3) plain paper, and providing the same information that the Authority form requests.¹⁸⁰ The response must include:

- Any disagreement with the agency's negotiability or bargaining-obligation claims;
- The arguments and authorities supporting the union's opposition to any agency argument;
- Specific citations to, and explanations of the relevance of, any law, rule, regulation, section of a collective-bargaining agreement, or other authority on which the union relies; and
- A copy of any material that the Authority may not easily access – such as relevant provisions of collective-bargaining agreements or agency policies – which the union may upload as attachments if it eFiles the response.¹⁸¹

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

¹⁷⁶ [Id. § 2424.32\(d\)\(2\)](#); *Local 5*, 67 FLRA at 89.

¹⁷⁷ [5 C.F.R. § 2424.24\(c\)\(3\)](#).

¹⁷⁸ [Id. § 2424.24\(c\)\(4\)](#).

¹⁷⁹ [Id. § 2424.25\(b\)](#).

¹⁸⁰ [Id. § 2424.25\(c\)](#).

¹⁸¹ [Id.](#)

The union is not required to repeat arguments that it made in its petition for review.¹⁸² In addition, if the union chooses to sever any previously submitted proposal or provision, then it must do so in the response.¹⁸³

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.¹⁸⁴ 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\(b\)\(3\)](#), or (for 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.¹⁸⁵

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

2.8 Agency's Reply

Although [§ 7117\(c\) of the Statute](#) does not expressly provide for an agency reply,¹⁸⁶ 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.¹⁸⁷ Thus, the reply is limited to responding to "any facts or arguments" raised for the first time in the union's response; the agency may not 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.¹⁸⁸ 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. 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.¹⁸⁹

The agency must file any reply within fifteen days after the agency receives a copy of the response.¹⁹⁰ In its reply, the agency must:

¹⁸² [Id.](#)

¹⁸³ [Id.](#) [§ 2424.25\(d\)](#).

¹⁸⁴ [Id.](#) [§ 2424.32\(d\)\(2\)](#); see, e.g., *Local 1653*, [74 FLRA at 357-58](#); *Local 1938*, [66 FLRA at 1040](#).

¹⁸⁵ See, e.g., *Local 1653*, [74 FLRA at 357-58](#).

¹⁸⁶ See [5 U.S.C. § 7117\(c\)](#).

¹⁸⁷ *AFGE, Loc. 1748, Nat'l Council of Field Lab. Locs.*, [73 FLRA 233](#), 234 (2022) (*Field Labor Locals*); *AFGE, Loc. 1904*, [56 FLRA 787](#), 788 (2000).

¹⁸⁸ [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); *Council 220 I*, [74 FLRA at 118 n.66](#).

¹⁸⁹ [5 C.F.R. § 2424.26\(a\)](#); see also [id.](#) [§ 2424.26\(c\)](#); *NTEU*, [72 FLRA 752](#), 753-54 (2022) (*NTEU V*) (Chairman DuBester concurring in part and dissenting in part on other grounds).

¹⁹⁰ [5 C.F.R. § 2424.26\(b\)](#).

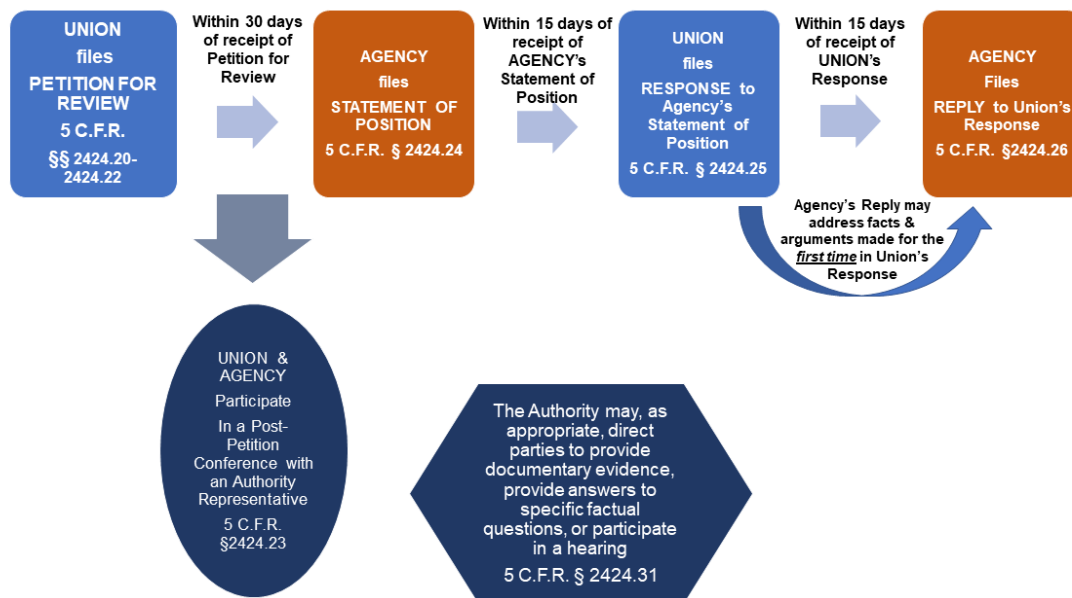
- Identify any disagreements with the union's assertions in its response, including assertions about negotiability and bargaining-obligation matters;
- State the arguments and authorities supporting the agency's position;
- Include specific citation to, and explanation of the relevance of, any law, rule, regulation, section of a collective-bargaining agreement, or other authority on which the agency relies; and
- Provide a copy of any such material that the Authority may not easily access – such as relevant provisions of collective-bargaining agreements or agency policies – which the agency may upload as attachments if it eFiles its reply.¹⁹¹

The agency is not required to repeat arguments that it made in its statement of position.¹⁹²

The agency may file its reply by using: (1) the [FLRA's eFiling system](#); (2) an Authority form, available [here](#); or (3) plain paper, and providing the same information that the Authority form requests. Although agencies are not required to use the Authority's eFiling system, the Authority encourages them to do so because the eFiling system is a useful guide and reminds them to provide all of the required information.

2.9 Diagram Summarizing Parties' Filings with the Authority

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



¹⁹¹ [Id. § 2424.26\(c\)](#).

¹⁹² [Id.](#)

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, in its discretion, grant the requesting party permission to file the supplemental document.¹⁹³ Parties should submit the supplemental document along with their request to file it.

In addition, non-parties who are “interested person[s]” may petition the Authority for permission to present written or oral arguments as “amicus curiae.”¹⁹⁴ The Authority may grant the petition if the Authority deems it “appropriate” to do so.¹⁹⁵

2.11 Where and How to File

Parties may file all of the documents discussed above: in person;¹⁹⁶ by commercial delivery;¹⁹⁷ by first-class mail;¹⁹⁸ by certified mail;¹⁹⁹ or (for union petitions, agency statements of position, union responses, and agency replies) electronically through the [FLRA’s eFiling system](#), which may be accessed on the [FLRA’s website](#) or through the links from the emails that the eFiling system automatically generates.²⁰⁰

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 300, 1400 K Street NW, Washington, DC 20424-0001.²⁰¹ CIP’s telephone number is (771) 444–5805, 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 personal delivery, then you must schedule an appointment to do so at least one business day in advance by calling (771) 444-5805.²⁰² You must present the documents you wish to file 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.²⁰³

¹⁹³ [Id. § 2424.27.](#)

¹⁹⁴ [Id. § 2429.9.](#)

¹⁹⁵ [Id.](#)

¹⁹⁶ [Id. § 2429.24\(a\), \(e\).](#)

¹⁹⁷ [Id. § 2429.24\(e\).](#)

¹⁹⁸ [Id.](#)

¹⁹⁹ [Id.](#)

²⁰⁰ [Id. § 2429.24\(f\).](#)

²⁰¹ [Id. § 2429.24\(a\).](#)

²⁰² [Id.](#)

²⁰³ [Id.](#)

If you eFile documents, then you may file those documents on any calendar day – including Saturdays, Sundays, and federal holidays.²⁰⁴ The Authority will consider those documents filed on a particular day if you file them at any time up until 11:59 p.m. E.T. on that day.²⁰⁵ Please note that even though you *may* eFile documents on Saturdays, Sundays, and federal holidays, you are *not required* to do so.²⁰⁶

You *may not file any documents with the Authority by email*.²⁰⁷ And you *may not* file petitions for review, statements of position, responses, or replies with the Authority by fax.²⁰⁸

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.²⁰⁹ In addition, unions also must serve the agency head (or his or her designee).²¹⁰ 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.²¹¹ Fax is *not* an acceptable method of service for petitions, statements of position, responses, or replies.²¹² But it is an acceptable method of service for motions (for example, motions for extensions of time and requests to reschedule post-petition conferences), where fax equipment is available.²¹³ 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 a table of contents if your document exceeds ten double-spaced pages, with the exception of fillable forms in the eFiling system;²¹⁴ and

²⁰⁴ [Id.](#)

²⁰⁵ [Id.](#)

²⁰⁶ [Id.](#)

²⁰⁷ [Id.](#)

²⁰⁸ [Id.](#) § 2429.24(g).

²⁰⁹ [Id.](#) §§ 2424.2(g), 2424.22(d), 2424.24(d), 2424.25(e), 2424.26(d), 2429.27.

²¹⁰ [Id.](#) § 2424.2(g); see also [Id.](#) §§ 2424.22(d), 2424.25(e).

²¹¹ [Id.](#) § 2429.27(b).

²¹² [Id.](#)

²¹³ [Id.](#) §§ 2429.24(g), 2429.27(b)(5).

²¹⁴ [Id.](#) § 2429.29.

- 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 system.²¹⁵ 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.²¹⁶

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 usually 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.²¹⁷ 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.²¹⁸ In this regard, if a union doesn't respond or comply, then the Authority may dismiss its petition (with or without prejudice to the union's refiling of the petition); if an

²¹⁵ [Id. § 2429.27\(c\)](#).

²¹⁶ [Id. § 2429.27\(a\)](#).

²¹⁷ *E.g.*, *AFGE, Loc. 2228*, [71 FLRA 586](#), 586-87 (2020) (Member Abbott concurring); *Local 3529 I*, [58 FLRA at 151-52](#).

²¹⁸ [5 C.F.R. § 2424.32\(e\)](#).

agency doesn't respond or comply, then the Authority may order it to bargain over a disputed proposal or rescind its disapproval of a disputed provision (with or without conditions).²¹⁹

2.15 Authority's Decision and Order

The Authority will issue a written decision that explains the specific reasons for its conclusions.²²⁰ The decision will also include an order that varies depending on whether the case concerns proposals or provisions.²²¹

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.²²² In doing so, the Authority makes no judgment as to the proposal's merit.²²³ 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 the Authority's order will state that.²²⁴ 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.²²⁵

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, then it will order the agency head to rescind his or her disapproval of the provision.²²⁶ If the Authority determines that a provision is contrary to law, then it will dismiss the petition for review as to that provision.²²⁷

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.²²⁸

²¹⁹ [Id.](#)

²²⁰ [Id.](#) [§ 2424.40\(a\)](#).

²²¹ [Id.](#)

²²² [Id.](#) [§ 2424.40\(b\)](#).

²²³ *E.g.*, *Local 2031*, [73 FLRA at 770](#); *Local 5*, [67 FLRA at 92 n.11](#).

²²⁴ [5 C.F.R. § 2424.40\(b\)](#).

²²⁵ *Council 220 I*, [74 FLRA at 120](#); *Local 5*, [67 FLRA at 92 n.11](#).

²²⁶ [5 C.F.R. § 2424.40\(c\)](#); *e.g.*, *AFGE, Loc. 2119*, [72 FLRA 706](#), 708-09 (2022) (*Local 2119*) (Member Abbott concurring).

²²⁷ [5 C.F.R. § 2424.40\(c\)](#); *e.g.*, *Local 2119*, [72 FLRA at 709](#).

²²⁸ [5 C.F.R. § 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.²²⁹ A party has sixty days to file such an appeal, beginning on the date on which the Authority issued its order.²³⁰ 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."²³¹

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.²³² The union must report such failure within a reasonable period of time after the sixty-day appeal period (discussed above) expires.²³³ 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.²³⁴

²²⁹ [5 U.S.C. § 7123\(a\)\(1\)](#).

²³⁰ [Id. § 7123\(a\)](#).

²³¹ [Id. § 7123\(c\)](#).

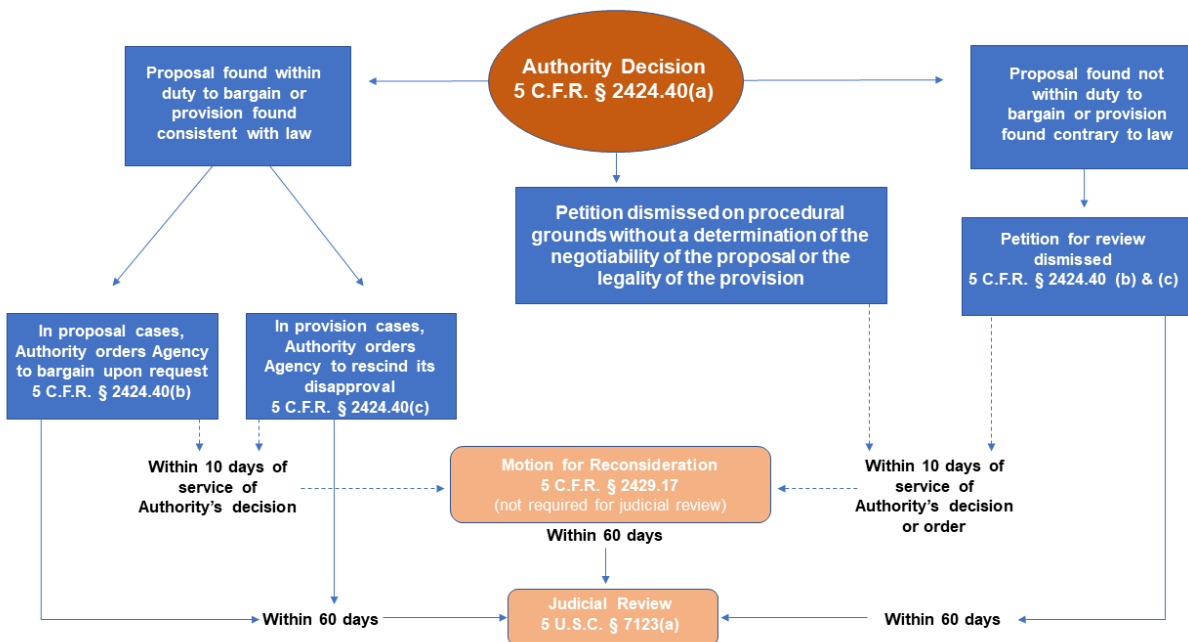
²³² [5 C.F.R. § 2424.41](#).

²³³ [Id.](#); *see also* [5 U.S.C. § 7123\(a\)](#).

²³⁴ [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.²³⁵ 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.²³⁶

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.²³⁷ And where a proposal or provision raises both a bargaining-obligation dispute and a negotiability dispute, the Authority may resolve both disputes in the negotiability proceeding.²³⁸ But where a proposal or provision involves *only* a bargaining-obligation dispute, that dispute *may not be resolved* in a negotiability proceeding.²³⁹ 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.²⁴⁰

²³⁵ [5 C.F.R. § 2424.40\(b\)](#); see, e.g., *AFGE, Loc. 12*, [73 FLRA 603](#), 609 (2023) (*Local 12 I*).

²³⁶ [5 C.F.R. § 2424.40\(b\), \(c\)](#); see, e.g., *Local R1-134*, [73 FLRA at 653](#).

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

²³⁸ [Id. § 2424.30\(b\)\(2\)](#).

²³⁹ [Id. § 2424.2\(d\)](#).

²⁴⁰ E.g., *Local 1653*, [74 FLRA at 356](#); *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.²⁴¹ 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.”²⁴² 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;²⁴³ or the parties had reached a valid, binding agreement about the subject matter of the proposals within the petition.²⁴⁴

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;²⁴⁵ 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.²⁴⁶

The burden of demonstrating mootness falls on the party urging mootness.²⁴⁷

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.²⁴⁸ 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,”²⁴⁹ which can happen when, for example: the union withdraws, or the Authority resolves, the directly related ULP claim;²⁵⁰ or an arbitrator resolves the ULP claim in an award that has become final and binding.²⁵¹ The union may refile the negotiability petition no later than thirty days after

²⁴¹ [5 C.F.R. § 2429.10](#).

²⁴² *E.g.*, *AFGE, Loc. 3937*, [66 FLRA 393](#), 393 (2011) (Member DuBester dissenting in part on other grounds).

²⁴³ *E.g.*, *NTEU, Chapter 207*, [58 FLRA 409](#), 410 (2003).

²⁴⁴ *E.g.*, *Int’l Org. of Masters, Mates & Pilots, Marine Div., Pan. Canal Pilots Branch*, [52 FLRA 251](#), 254-55 (1996).

²⁴⁵ *E.g.*, *Local 3928*, [66 FLRA at 176](#); see also *AFGE, Council 170*, [71 FLRA 1259](#), 1260 (2020) (*Council 170*) (Member DuBester concurring) (rejecting mootness claim where party argued, but failed to provide evidence, that the proposal concerned a process that “already exist[ed] in regulations and policy”).

²⁴⁶ *E.g.*, *NAGE, Loc. R1-109*, [64 FLRA 132](#), 133 (2009) (*Local R1-109 I*) (Member Beck dissenting on other grounds).

²⁴⁷ *Council 170*, [71 FLRA at 1260](#).

²⁴⁸ [5 C.F.R. § 2424.30\(a\)](#).

²⁴⁹ *Id.*

²⁵⁰ *NTEU III*, [70 FLRA at 100](#).

²⁵¹ [5 C.F.R. § 2424.30\(a\)](#); see *AFGE, Loc. 15*, [73 FLRA 125](#), 127 (2022).

the date on which the ULP charge or grievance is resolved administratively, and the Authority will determine whether resolution of the petition is still required.²⁵²

For examples of Authority decisions addressing the “directly related” issue, see *AFGE, Local 1938*²⁵³ and *AFGE, Council 270*.²⁵⁴

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 refile²⁵⁵ – “the effect of the [new] petition is to seek review of the previous allegation.”²⁵⁶ In that situation, the Authority will dismiss the new petition.²⁵⁷ 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.²⁵⁸

²⁵² [5 C.F.R. § 2424.30\(a\)](#); see also, e.g., *NTEU III*, [70 FLRA at 100](#).

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

²⁵⁴ [73 FLRA at 73-74](#) (grievance concerned issues directly related to petition for review).

²⁵⁵ [5 C.F.R. § 2424.30\(a\)](#).

²⁵⁶ *NFFE, Loc. 422*, [50 FLRA 541](#), 542 (1995).

²⁵⁷ *Local 1002*, [71 FLRA at 779-80](#).

²⁵⁸ *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."²⁵⁹ So an agency is not required to bargain over a matter unless that matter "directly affects" the conditions of employment of bargaining-unit employees.²⁶⁰ [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."²⁶¹ However, that section provides that the following matters are not "conditions of employment": (1) matters relating to political activities prohibited under the [Hatch Act](#), (2) matters relating to position classification,²⁶² and (3) matters that are "specifically provided for by [f]ederal statute."²⁶³ 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."²⁶⁴ 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.²⁶⁵ 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."²⁶⁶

²⁵⁹ [5 U.S.C. § 7103\(a\)\(12\)](#).

²⁶⁰ *Antilles Consol. Educ. Ass'n*, [22 FLRA 235](#), 236 (1986) (*Antilles*).

²⁶¹ [5 U.S.C. § 7103\(a\)\(14\)](#).

²⁶² [Id. § 7103\(a\)\(14\)\(B\)](#).

²⁶³ [Id. § 7103\(a\)\(14\)\(C\)](#).

²⁶⁴ *Fraternal Ord. of Police, Lodge #1F*, [57 FLRA 373](#), 383 (2001).

²⁶⁵ [Id.](#); see also *NFFE, Loc. 1998, IAMAW*, [71 FLRA 317](#), 318-19 (2019) (Member DuBester concurring) (finding subject matter of proposals concerning compensatory time off was "specifically provided for" by the Federal Workplace Flexibility Act).

²⁶⁶ *Antilles Consol. Educ. Ass'n*, [56 FLRA 664](#), 665-66 (2000); see also *AFGE, Nat'l VA Council # 53*, [71 FLRA 410](#), 411-13 (2019) (*VA Council #53*) (Member DuBester concurring) (finding VA Accountability Act did not specifically provide for all aspects of the disciplinary process, but instead gave the agency discretion regarding aspects of that process).

A proposal that focuses principally on non-bargaining-unit positions or employees does not concern bargaining-unit employees' conditions of employment.²⁶⁷ In this connection, 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.²⁶⁸

Regarding the first group, a proposal that *directly determines* conditions of employment of employees in other bargaining units is outside the duty to bargain.²⁶⁹ 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."²⁷⁰ 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.²⁷¹ 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.²⁷²

Concerning the second group, proposals that directly implicate the conditions of employment of supervisors are outside the duty to bargain.²⁷³ However, as stated in [section 1.7](#) of this Guide, such matters are permissive subjects of bargaining.²⁷⁴ Thus, an agency may bargain over, and agree to, contract proposals that directly implicate its supervisors' and managers' working conditions.²⁷⁵ 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,²⁷⁶ and it is enforceable in arbitration.²⁷⁷ And proposals that relate principally to unit employees' conditions of

²⁶⁷ *Antilles*, [22 FLRA at 237](#).

²⁶⁸ *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, Loc. 2879, AFL-CIO*, [49 FLRA 1074](#), 1087 (1994) (*Local 2879*) (Member Talkin dissenting in part on other grounds); *AFGE, Loc. 1923*, [44 FLRA 1405](#), 1416-17 (1992) (*Local 1923*).

²⁶⁹ See, e.g., *Local 5*, [67 FLRA at 92](#); *NAGE, Loc. R1-109*, [61 FLRA 593](#), 597 (2006) (*Local R1-109 II*); *Local 2879*, [49 FLRA at 1089](#); see also *Cherry Point*, [952 F.2d at 1442-43](#).

²⁷⁰ *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, [65 FLRA 1052](#), 1054 (2011) (*Newport News*).

²⁷¹ *Local R1-109 II*, [61 FLRA at 597](#).

²⁷² See *AFGE, Loc. 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, Loc. 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").

²⁷³ *AFGE, Loc. 3302*, [52 FLRA 677](#), 682-83 (1996) (*Local 3302*) (Member Armendariz concurring); see also *AFGE, Local 32*, [51 FLRA at 513](#); *Local 2879*, [49 FLRA at 1088](#).

²⁷⁴ *NATCA, Rochester Loc.*, [56 FLRA 288](#), 291 (2000) (*Rochester Local*) (citing *Local 3302*, [52 FLRA at 682](#)).

²⁷⁵ *Local 3302*, [52 FLRA at 681-82](#).

²⁷⁶ E.g., *NATCA III*, [61 FLRA at 339](#).

²⁷⁷ E.g., *Local 3302*, [52 FLRA at 682](#).

employment are not removed from the mandatory scope of bargaining simply because they indirectly affect supervisors.²⁷⁸

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.²⁷⁹ “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.’”²⁸⁰

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](#).

²⁷⁸ See, e.g., NATCA, [66 FLRA 658](#), 660-61 (2012) (Member DuBester dissenting in part on other grounds).

²⁷⁹ *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](#).

²⁸⁰ *NTEU, Chapter 83*, [64 FLRA 723](#), 727 (2010) (*Chapter 83*) (quoting *AFGE, Loc. 1827*, [58 FLRA 344](#), 348 (2003) (*Local 1827*) (Chairman Cabaniss concurring in part on other grounds; Member Armendariz dissenting in part on other grounds)).

[Section 7106](#)²⁸¹ 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.

²⁸¹ [5 U.S.C. § 7106.](#)

A proposal or provision may affect more than one management right, and a party can claim that the proposal or provision affects more than one management right. However, the Authority will address only the management right(s) that a party raises. Thus, an Authority decision finding that a proposal or provision does not affect the management right cited by an agency, and is therefore negotiable, does not preclude the Authority from finding a similar proposal or provision nonnegotiable where an agency claims an effect on a different management right.²⁸²

There are management rights contained in both [§ 7106\(a\)](#) and [§ 7106\(b\)\(1\) of the Statute](#).²⁸³ This Guide discusses those rights separately below.

(b) Section 7106(a)

Consistent with the principles regarding concession discussed in [section 1.18](#) 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.²⁸⁴ 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\(a\)](#).²⁸⁵

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,”²⁸⁶ the rights under [§ 7106\(a\)\(1\)](#) do not contain that limitation.²⁸⁷ 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.²⁸⁸ And for all of these rights, there are exceptions, which are discussed in sections [4.3\(c\)](#) and [4.3\(d\)](#) below. So, a proposal or provision that affects a management right is not necessarily nonnegotiable, if it fits within an exception to a management right.²⁸⁹

²⁸² See, e.g., *Nat'l Ass'n of Agric. Emps., Branch 11*, [57 FLRA 424](#), 426 (2001) (*Branch 11*) (in finding that proposal affected right to assign work, Authority distinguished *AFGE, Loc. 1940*, [37 FLRA 1058](#) (1990), which had addressed a different management right).

²⁸³ See, e.g., *Field Labor Locals*, [73 FLRA at 235](#); *Chapter 83*, [64 FLRA at 725-26](#).

²⁸⁴ E.g., *Local 1653*, [74 FLRA at 357-58](#); *NATCA II*, [66 FLRA at 216](#); *Weather Serv.*, [63 FLRA at 452](#).

²⁸⁵ E.g., *Local 997*, [66 FLRA at 502](#).

²⁸⁶ E.g., *NLRB, Pro. Ass'n*, [70 FLRA 289](#), 290 (2017) (*NLRB PA*); *Weather Serv.*, [63 FLRA at 452](#).

²⁸⁷ E.g., *Local 723*, [66 FLRA at 644](#).

²⁸⁸ See *AFGE Council of Prison Locs. 33, Loc. 506*, [66 FLRA 819](#), 822 (2012) (*Prison Locals 33*) (“[M]anagement's right to determine internal security practices includes an agency's right ‘to determine that it will *not* take action against . . . specific threats.’” (emphasis added) (quoting *NFFE, Loc. 2050*, [36 FLRA 618](#), 632 (1990))), *pet. for review granted, decision enforced in part, vacated in part, & remanded sub nom. U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, [737 F.3d 779](#) (D.C. Cir. 2013); *Local 1923*, [44 FLRA at 1466](#) (proposal requiring agency to fill vacancies, rather than leaving them vacant, affected management's rights to hire and assign employees, and the right to select).

²⁸⁹ See, e.g., *Local 4 II*, [73 FLRA at 636](#); *Prison Locals 33*, [66 FLRA at 822-23](#).

The rights in [§ 7106\(a\)\(1\)](#) and the rights in [§ 7106\(a\)\(2\)](#) are discussed separately below.

1. [Section 7106\(a\)\(1\) Rights](#)

i. *Mission*

Management has the right “to determine the mission . . . of the agency.”²⁹⁰ This involves the right to determine what the agency’s mission will or will not include.²⁹¹ It generally does not involve the right to determine how the agency’s mission will be carried out.²⁹² 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 affects this right.²⁹³

ii. *Budget*

Management has the right “to determine the . . . budget . . . of the agency.”²⁹⁴ “[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.²⁹⁵ 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 [the proposal or provision would produce] an increase in costs that is significant and unavoidable and is not offset by compensating benefits.”²⁹⁶ 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.²⁹⁷

iii. *Organization*

Management has the right “to determine the . . . organization . . . of the agency.”²⁹⁸ 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

²⁹⁰ [5 U.S.C. § 7106\(a\)\(1\)](#).

²⁹¹ *E.g.*, *U.S. Dep’t of Energy, Rocky Flat Field Off., Golden, Colo.*, [59 FLRA 159](#), 163 (2003) (Chairman Cabaniss concurring).

²⁹² *Id.*

²⁹³ *E.g.*, *U.S. DOD, Fort Bragg Dependents Schs., Fort Bragg, N.C.*, [49 FLRA 333](#), 349 (1994); *AFGE, Loc. 3231*, [22 FLRA 868](#), 869-70 (1986).

²⁹⁴ [5 U.S.C. § 7106\(a\)\(1\)](#).

²⁹⁵ *Local R1-134*, [73 FLRA at 642](#); *Local 1998 III*, [66 FLRA at 125](#).

²⁹⁶ *Local R1-134*, [73 FLRA at 642-43](#), 651-53; *U.S. DHS, U.S. CBP*, [61 FLRA 113](#), 116 (2005) (Member Armendariz dissenting on other grounds).

²⁹⁷ *Nat’l Weather Serv. Emps. Org.*, [44 FLRA 18](#), 30 (1992).

²⁹⁸ [5 U.S.C. § 7106\(a\)\(1\)](#).

duties.²⁹⁹ For example, it includes the rights to determine: how the agency will be divided into organizational entities such as sections;³⁰⁰ the agency's grade-level structure;³⁰¹ and where, geographically, the agency will provide services or otherwise conduct its operations.³⁰² It also includes the right to determine where duty stations of positions will be maintained.³⁰³

iv. *Number of Employees of the Agency*

Management has the right to determine the “number of employees . . . of the agency.”³⁰⁴ This relates to “the number of employees actually employed by an agency.”³⁰⁵ 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.³⁰⁶ 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.³⁰⁷

v. *Internal-Security Practices*

Management has the right to determine the “internal[-]security practices of the agency.”³⁰⁸ 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.³⁰⁹

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.³¹⁰

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

²⁹⁹ E.g., *Fraternal Ord. of Police, DC Lodge 1, NDW Lab. Comm.*, [72 FLRA 377](#), 378 (2021) (Member Abbott concurring); *U.S. Dep't of Transp., FAA*, [63 FLRA 530](#), 532 (2009).

³⁰⁰ *U.S. Dep't of Transp., FAA*, [58 FLRA 175](#), 178 (2002).

³⁰¹ E.g., *U.S. DOD, Marine Corps Logistics Base, Albany, Ga.*, [57 FLRA 275](#), 278 (2001).

³⁰² E.g., *Local 4 I*, [74 FLRA at 61](#); *Ass'n of Civilian Technicians, N.Y. State Council*, [56 FLRA 444](#), 449 (2000).

³⁰³ See *Local 4 I*, [74 FLRA at 61](#); *DLA*, [70 FLRA at 933-34](#); *Local 3928*, [66 FLRA at 179](#).

³⁰⁴ [5 U.S.C. § 7106\(a\)\(1\)](#).

³⁰⁵ *U.S. DOD, Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, [46 FLRA 298](#), 316 (1992) (*DMA St. Louis*).

³⁰⁶ *Id.*

³⁰⁷ See *id. at 316-17*; *NFFE, Loc. 2148*, [53 FLRA 427](#), 431 (1997) (*Local 2148*).

³⁰⁸ [5 U.S.C. § 7106\(a\)\(1\)](#).

³⁰⁹ See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, [73 FLRA 860](#), 862 (2024); *NTEU III*, [70 FLRA at 102](#); *Local 506*, [66 FLRA at 931](#).

³¹⁰ See *NTEU III*, [70 FLRA at 102](#); *Local 506*, [66 FLRA at 931](#).

plan in the course of resolving a negotiability dispute.³¹¹ Thus, the Authority will not examine the extent to which the plan will actually facilitate the accomplishment of the agency's security objectives.³¹²

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.³¹³

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;³¹⁴ the implementation of agencies' drug-testing programs;³¹⁵ locked doors in the workplace;³¹⁶ and the actions that management would take to ensure the security of their computer systems.³¹⁷

2. [Section 7106\(a\)\(2\) Rights](#)

i. *Hire Employees*

Management has the right to "hire . . . employees in the agency."³¹⁸ The Authority has not specifically defined the right to hire,³¹⁹ but has found that it includes the right to decide whether to fill positions.³²⁰ So proposals or provisions requiring agencies to fill vacancies affect this right.³²¹

³¹¹ See *NTEU III*, [70 FLRA at 102-03](#); *Local 506*, [66 FLRA at 931](#).

³¹² See *NTEU III*, [70 FLRA at 102-03](#); *AFGE, Loc. 1712*, [62 FLRA 15](#), 17-18 (2007) (*Local 1712*).

³¹³ *NTEU*, [62 FLRA 267](#), 270 (2007) (Chairman Cabaniss dissenting in part on other grounds), *review granted in part on other grounds sub nom. NTEU v. FLRA*, [550 F.3d 1148](#) (D.C. Cir. 2008).

³¹⁴ *AFGE, Nat'l Border Patrol Council*, [66 FLRA 96](#), 99 (2011).

³¹⁵ *Local 723*, [66 FLRA at 643-44](#).

³¹⁶ *AFGE, Loc. 2145*, [64 FLRA 231](#), 234 (2009).

³¹⁷ *Local 1712*, [62 FLRA at 17](#).

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

³¹⁹ *NAGE, Loc. R5-184*, [52 FLRA 1024](#), 1026 n.5 (1997) (*Local R5-184*).

³²⁰ *E.g., AFGE, Loc. 2755*, [62 FLRA 93](#), 94-95 (2007).

³²¹ *E.g., AFGE, Loc. 3354*, [54 FLRA 807](#), 812-13 (1998) (*Local 3354*).

ii. *Assign Employees*

Management has the right to “assign . . . employees in the agency.”³²² This right concerns the right to assign employees to positions.³²³ It involves not only the initial hiring of an individual and assignment to a position, but also post-hiring situations,³²⁴ such as reassignment of employees to different positions, and temporary assignments or details.³²⁵ It also includes the right to decide when an assignment should begin and end.³²⁶ 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.³²⁷ 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.³²⁸

iii. *Direct Employees*

Management has the right to “direct . . . employees in the agency.”³²⁹ This involves the rights to supervise employees and to determine the quantity, quality, and timeliness of their work.³³⁰ Thus, this right includes, among other things, the rights to establish performance standards,³³¹ to evaluate employees and hold them accountable under those standards,³³² to select particular methods for supervising employees (such as by unannounced visits and spot-checking of their work),³³³ and to require employees to account for their duty time.³³⁴ But the right to direct employees does *not* include the right to decide whether to reward performance that already has been evaluated.³³⁵

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

³²³ *E.g.*, *U.S. Dep’t of VA, St. Cloud VA Med. Ctr., St. Cloud, Minn.*, [62 FLRA 508](#), 510 (2008) (*VAMC St. Cloud*).

³²⁴ *E.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Marianna, Fla.*, [56 FLRA 467](#), 469-70 (2000).

³²⁵ *E.g.*, *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, [68 FLRA 189](#), 193 (2015) (Member Pizzella dissenting on other grounds).

³²⁶ *E.g.*, *AFGE, Loc. 12*, [61 FLRA 209](#), 218 (2005) (*Local 12 II*) (Member Pope concurring in part and dissenting in part on other grounds).

³²⁷ *E.g.*, *U.S. Dep’t of the Treasury, IRS*, [70 FLRA 792](#), 793 (2018) (Member DuBester dissenting); *VAMC St. Cloud*, [62 FLRA at 510](#).

³²⁸ *See AFGE, Loc. 3584, Council of Prison Locs. C-33*, [64 FLRA 316](#), 317 (2009).

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

³³⁰ *E.g.*, *SSA, Off. of Hearings Operations*, [71 FLRA 687](#), 690 (2020) (Member DuBester dissenting).

³³¹ *E.g.*, *NTEU II*, [70 FLRA at 703-04](#); *Weather Serv.*, [63 FLRA at 453](#).

³³² *U.S. Dep’t of the Treasury, IRS*, [73 FLRA 888](#), 889-90 (2024) (*IRS*); *Local 12 I*, [73 FLRA at 605-06](#).

³³³ *E.g.*, *NTEU, Chapter 337*, [74 FLRA 412](#), 413-14 (2026) (*Chapter 337*); *Local 1712*, [62 FLRA at 17](#).

³³⁴ *E.g.*, *AFGE, Council 224*, [60 FLRA 278](#), 279 (2004) (Chairman Cabaniss concurring on other grounds).

³³⁵ *See Local R1-134*, [73 FLRA at 646-47](#); *U.S. DHS, U.S. CBP*, [63 FLRA 505](#), 508 (2009) (*CBP*); *NAGE, Loc. R1-203*, [55 FLRA 1081](#), 1083 (1999) (*Local R1-203*) (Chair Segal concurring on other grounds).

iv. *Layoff Employees*

Management has the right to “layoff . . . employees in the agency.”³³⁶ 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.³³⁷

v. *Retain Employees*

Management has the right to “retain employees in the agency.”³³⁸ This is the right to establish policies or practices that encourage or discourage employees from remaining employed by an agency.³³⁹ The Authority has found that proposals and provisions affected this right where, for example, they required agencies to offer voluntary-separation-incentive pay,³⁴⁰ or required agencies to provide compensation that would encourage “special[-]rate” employees to remain employed with the agency.³⁴¹

vi. *Suspend*

Management has the right to “suspend . . . employees.”³⁴² The Authority has found that a proposal affected this right when the proposal gave employees the option of canceling their own previously imposed suspensions.³⁴³

vii. *Remove*

Management has the right to “remove . . . employees.”³⁴⁴ 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;³⁴⁵ required an agency to vacate certain positions and make them available to certain categories of employees;³⁴⁶ or precluded management from taking actions against an employee for a particular “offense,” including unacceptable performance.³⁴⁷

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

³³⁷ *E.g.*, *Local 1827*, [58 FLRA at 345-46](#).

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

³³⁹ *Local 1827*, [58 FLRA at 346](#).

³⁴⁰ *NTEU V*, [72 FLRA at 757](#); *Local 5*, [67 FLRA at 87](#).

³⁴¹ *U.S. Dep’t of Commerce, PTO*, [60 FLRA 839](#), 841-42 (2005).

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

³⁴³ *See NTEU & NTEU Chapter 91*, [19 FLRA 647](#), 650 (1985).

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

³⁴⁵ *Fed. Union of Scientists & Eng’rs, NAGE, Loc. R1-144*, [23 FLRA 804](#), 805-06 (1986); *AFGE, Loc. 2612, AFL-CIO*, [19 FLRA 1012](#), 1014 (1985); *AFGE, AFL-CIO, Loc. 1603*, [3 FLRA 4](#), 5-6 (1980).

³⁴⁶ *Ass’n of Civilian Technicians, N.Y. State Council*, [11 FLRA 475](#), 482 (1983).

³⁴⁷ *NFFE, Loc. 1214*, [40 FLRA 1181](#), 1200-01 (1991) (*Local 1214*); *NAGE, Loc. R4-45*, [40 FLRA 56](#), 59-61 (1991) (*Local R4-45*); *see NTEU*, [53 FLRA 539](#), 579 (1997) (*NTEU VI*).

viii. *Reduce in Grade or Pay*

Management has the right to “reduce in grade or pay . . . employees.”³⁴⁸ 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 particular offense;³⁴⁹ 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.³⁵⁰

ix. *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.”³⁵¹ This includes the rights to: discipline employees for both performance-related and nonperformance-related conduct;³⁵² investigate and determine appropriate investigative techniques in connection with deciding whether discipline is justified;³⁵³ decide the evidence or information (including prior offenses) upon which the agency may base its determination to take, or support, disciplinary actions;³⁵⁴ and determine what disciplinary penalty to impose.³⁵⁵ For example, proposals immunizing employees from discipline for specified conduct or performance affects the right to discipline employees.³⁵⁶

x. *Assign Work*

Management has the right to “assign work.”³⁵⁷ 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.³⁵⁸ 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.³⁵⁹ Additionally, it

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

³⁴⁹ *E.g.*, *NTEU VI*, [53 FLRA at 579](#).

³⁵⁰ *Local 1214*, [40 FLRA at 1200-01](#).

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

³⁵² *E.g.*, *AFGE, Loc. 1164*, [67 FLRA 316](#), 317-19 (2014) (*Local 1164 II*) (Member Pizzella concurring); *AFGE, Council of Prison Locs. 33*, [65 FLRA 142](#), 145 (2010).

³⁵³ *E.g.*, *AFSCME, Loc. 2830*, [60 FLRA 124](#), 127 (2004).

³⁵⁴ *E.g.*, *NFFE, IAMAW, Fed. Dist. 1, Loc. 1998*, [69 FLRA 626](#), 632 (2016) (*Local 1998 IV*) (Member Pizzella dissenting on other grounds); *NATCA*, [61 FLRA 341](#), 346 (2005) (*NATCA IV*) (Member Armendariz dissenting on other grounds); *NTEU, Chapter 243*, [49 FLRA 176](#), 202-03 (1994) (Member Armendariz concurring in part and dissenting in part on other grounds).

³⁵⁵ *E.g.*, *POPA*, [53 FLRA 625](#), 679 (1997); *Local R4-45*, [40 FLRA at 59-61](#).

³⁵⁶ *Local 1998 IV*, [69 FLRA at 632](#); *Local 1164 II*, [67 FLRA at 318](#); *NATCA I*, [62 FLRA at 181](#).

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

³⁵⁸ *E.g.*, *Chapters 296 & 336*, [74 FLRA at 300](#); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Seagoville, Tex.*, [74 FLRA 40](#), 43 (2024); *ACEA*, [73 FLRA at 283](#); *Local 2119*, [72 FLRA at 708-09](#); *NLRB PA*, [70 FLRA at 289-90](#); *Prison Locals 33*, [66 FLRA at 823](#).

³⁵⁹ *E.g.*, *PASS*, [61 FLRA at 99](#).

includes the rights to: establish job requirements for various levels of performance;³⁶⁰ determine the content of performance standards and elements;³⁶¹ supervise employees and determine the quantity, quality, and timeliness of their work;³⁶² determine the particular measures of supervising employees' work (for example, through unannounced spot checks);³⁶³ enforce established performance standards;³⁶⁴ and evaluate employees and hold them accountable for their work.³⁶⁵ (Please note that, in some respects, the right to assign work involves similar rights as the rights to assign and direct employees, discussed above in sections [4.3\(b\)2.ii](#) and [4.3\(b\)2.iii](#), respectively.)

A proposal or provision does not affect the right to assign work merely because it requires the agency to take some action.³⁶⁶ Further, a proposal or provision requiring seniority-based assignments does not affect the right to assign work, as long as management retains discretion to determine that employees are equally qualified for the assignments.³⁶⁷ In addition, the right to assign work does not include the right to determine whether to reward performance.³⁶⁸ As such, the right to assign work does not encompass decisions as to whether to grant performance awards,³⁶⁹ or to determine eligibility for "incentive[-]pay bonus[es]."³⁷⁰

xi. *Contract Out*

Management has the right to "make determinations with respect to contracting out."³⁷¹ 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;³⁷² required an agency to delay contracting-out decisions;³⁷³ or required an agency to conduct a cost study before contracting out.³⁷⁴

³⁶⁰ E.g., *AFGE, Loc. 225*, [56 FLRA 686](#), 687 (2000) (*Local 225*).

³⁶¹ E.g., *NTEU*, [66 FLRA 186](#), 191 (2011); *Weather Serv.*, [63 FLRA at 453](#).

³⁶² E.g., *Indep. Union of Pension Emps. for Democracy & Just.*, [72 FLRA 571](#), 573 (2021) (*IUPEDJ*) (Chairman DuBester concurring); *SSA, Off. of Hearing Operations*, [72 FLRA 108](#), 111-12 (2021) (Chairman DuBester dissenting in part).

³⁶³ E.g., *Local 1712*, [62 FLRA at 16-17](#).

³⁶⁴ E.g., *Local 12 I*, [73 FLRA at 605-06](#).

³⁶⁵ E.g., *IRS*, [73 FLRA at 889-90](#); *Local 12 I*, [73 FLRA at 605-06](#).

³⁶⁶ *NTEU IV*, [64 FLRA at 447](#).

³⁶⁷ *AFGE, Loc. 1164*, [60 FLRA 785](#), 787 (2005). Additionally, as long as management retains the right to determine that employees are equally qualified to perform an assignment, a proposal or provision that requires management to make seniority-based assignments does not affect the right to assign work.

³⁶⁸ See *Local R1-134*, [73 FLRA at 646-47](#); *CBP*, [63 FLRA at 508](#).

³⁶⁹ *IUPEDJ*, [72 FLRA at 573](#); *Local R1-203*, [55 FLRA at 1083](#).

³⁷⁰ *FDIC*, [64 FLRA 79](#), 81 (2009) (Chairman Pope dissenting in part on other grounds).

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

³⁷² E.g., *Local 12 II*, [61 FLRA at 210](#).

³⁷³ E.g., *U.S. Dep't of the Army, Corps of Eng'rs, Nw. Div. & Portland Dist.*, [60 FLRA 595](#), 597 (2005).

³⁷⁴ *AFGE, Loc. 1345*, [48 FLRA 168](#), 204 (1993) (Member Armendariz dissenting in part on other grounds).

xii. *Determine Personnel*

Management has the right to “determine the personnel by which agency operations shall be conducted.”³⁷⁵ This includes the right to determine the particular employees to whom work will be assigned.³⁷⁶ So proposals and provisions that require an agency to assign particular duties to a particular individual affect this right.³⁷⁷

xiii. *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”³⁷⁸

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.³⁷⁹

The right to select also includes the right to fill positions by selecting candidates from any appropriate source without restriction.³⁸⁰ So proposals and provisions that limit the sources from which management can select affect this right.³⁸¹

xiv. *Carry Out Mission in Emergencies*

Management has the right to “take whatever actions may be necessary to carry out the agency mission during emergencies.”³⁸² This includes the rights to: (1) independently assess whether an emergency exists, and (2) decide what actions are needed to address the emergency.³⁸³ Proposals and provisions that define what constitutes an “emergency” affect this right, without regard to the content of the

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

³⁷⁶ *U.S. Dep’t of VA, Veterans Health Admin., Consol. Mail Outpatient Pharmacy, Leavenworth, Kan.*, [72 FLRA 606](#), 607-08 (2021) (*Leavenworth VA*) (Chairman DuBester concurring; Member Abbott concurring); *U.S. Dep’t of VA, Med. Ctr., Detroit, Mich.*, [61 FLRA 371](#), 373 (2005) (*Detroit VA*).

³⁷⁷ *E.g.*, *Leavenworth VA*, [72 FLRA at 607-08](#); *Detroit VA*, [61 FLRA at 373-74](#).

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

³⁷⁹ *See U.S. Dep’t of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, [72 FLRA 541](#), 546 (2021) (Member Abbott concurring; Chairman DuBester concurring in part and dissenting in part on other grounds); *NTEU*, [61 FLRA 618](#), 622 (2006).

³⁸⁰ *Ass’n of Civilian Technicians, Pa. State Council*, [54 FLRA 552](#), 558 (1998).

³⁸¹ *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, Loc. R4-45*, [54 FLRA 218](#), 225 (1998) (discussing proposals requiring management to fill vacancies from a single source).

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

³⁸³ *See U.S. Dep’t of VA, VA Reg’l Off., St. Petersburg, Fla.*, [58 FLRA 549](#), 551 (2003) (Member Pope concurring).

definition.³⁸⁴ So do proposals and provisions that preclude management from acting until a particular individual declares an emergency.³⁸⁵

(c) Section 7106(b)

All of the rights set forth in [§ 7106\(a\)](#) are “[s]ubject to” [§ 7106\(b\) of the Statute](#).³⁸⁶ [Section 7106\(b\)](#) provides that “[n]othing in [[§ 7106](#)] shall preclude any agency and any labor organization from negotiating” several types of matters.³⁸⁷ Those types of matters are set forth in [§ 7106\(b\)\(1\), \(2\), and \(3\)](#), and are discussed separately below.

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.”³⁸⁸ In other words, those matters are permissive subjects of bargaining: Agencies may, but are not legally required to, bargain over them.³⁸⁹ An agency that elects to bargain over [§ 7106\(b\)\(1\)](#) matters may withdraw from bargaining over those matters at any time before reaching agreement.³⁹⁰ However, as with other permissive subjects, agency heads cannot disapprove agreements concerning these matters unless they are otherwise unlawful,³⁹¹ and agreements regarding [§ 7106\(b\)\(1\)](#) matters are enforceable in arbitration.³⁹² In this connection, [§ 7106\(b\)\(1\)](#) is an exception to [§ 7106\(a\)](#), so a proposal or provision that affects a management right under [§ 7106\(a\)](#) is lawful if it also concerns a [§ 7106\(b\)\(1\)](#) matter.³⁹³ 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 constitutes a [§ 7106\(b\)\(2\)](#) procedure or [§ 7106\(b\)\(3\)](#) appropriate arrangement.³⁹⁴ A discussion of the individual portions of [§ 7106\(b\)\(1\)](#) follows.

³⁸⁴ See *Local 350*, [55 FLRA at 245](#).

³⁸⁵ E.g., *Tidewater Va. Fed. Emps. Metal Trades Council, AFL-CIO*, [31 FLRA 131](#), 132-33 (1988).

³⁸⁶ [5 U.S.C. § 7106\(a\)](#).

³⁸⁷ *Id.* [§ 7106\(b\)](#).

³⁸⁸ *Id.* [§ 7106\(b\)\(1\)](#).

³⁸⁹ E.g., *Ass’n of Civilian Technicians, Ky. Long Rifle Chapter & Bluegrass Chapter*, [70 FLRA 968](#), 969 (2018) (ACT Kentucky) (Member DuBester concurring in part and dissenting in part on other grounds); *U.S. Dep’t of Transp., FAA, Alaskan Region*, [62 FLRA 90](#), 92 (2007) (FAA Alaska).

³⁹⁰ *ACT Kentucky*, [70 FLRA at 969](#).

³⁹¹ E.g., *id.*

³⁹² E.g., *Consumer Fin. Prot. Bureau*, [73 FLRA 670](#), 678 (2023) (CFPB); *FAA Alaska*, [62 FLRA at 92](#).

³⁹³ E.g., *CFPB*, [73 FLRA at 678](#); *FAA Alaska*, [62 FLRA at 92](#).

³⁹⁴ E.g., *ACT Kentucky*, [70 FLRA at 969](#); *U.S. GSA*, [62 FLRA 341](#), 343 (2008).

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.”³⁹⁵ 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.³⁹⁶ If a proposal does, then it is negotiable only at the election of the agency. 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.³⁹⁷ 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, to an organizational subdivision, work project, or tour of duty concerns the “numbers” of employees or positions within the meaning of [§ 7106\(b\)\(1\)](#).³⁹⁸ A proposal that concerns “numbers” of employees or positions within the meaning of [§ 7106\(b\)\(1\)](#) is negotiable only at the election of the agency. As noted in [section 4.3\(b\)1.iv](#) 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 determine the “number of employees . . . of the agency,” which refers to the *total* number of employees in the agency.³⁹⁹

Types. “Types” are distinguishable classes, kinds, groups, or categories of employees or positions that are relevant to the establishment of staffing patterns.⁴⁰⁰ Proposals that concern “types” within the meaning of [§ 7106\(b\)\(1\)](#) are negotiable only at the election of the agency. 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.⁴⁰¹ Additionally, the Authority has found firefighters to be a type of employee.⁴⁰² 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”

³⁹⁵ [5 U.S.C. § 7106\(b\)\(1\)](#).

³⁹⁶ See *Local 2058*, [68 FLRA at 683](#); *Local 723*, [66 FLRA at 645](#).

³⁹⁷ *Field Labor Locals*, [73 FLRA at 235](#); *Local 723*, [66 FLRA at 645](#); *Local R5-184*, [52 FLRA at 1030-31](#).

³⁹⁸ *Field Labor Locals*, [73 FLRA at 235](#); *Branch 11*, [57 FLRA at 426](#).

³⁹⁹ See *Local 2148*, [53 FLRA at 431](#); *DMA St. Louis*, [46 FLRA at 316-17](#).

⁴⁰⁰ See *Field Labor Locals*, [73 FLRA at 235](#); *Local 723*, [66 FLRA at 645](#); *Local R5-184*, [52 FLRA at 1031](#).

⁴⁰¹ *Local R5-184*, [52 FLRA at 1031-32](#); cf. *NAGE, Loc. R5-184*, [55 FLRA 549](#), 552 (1999)

(Member Wasserman dissenting on other grounds) (finding it undisputed that licensed-practical-nurse positions were “types” of positions).

⁴⁰² *U.S. Dep’t of the Navy, Navy Region Mid-Atl. Fire & Emergency Servs., Naval Weapons Station Earle, N.J.*, [74 FLRA 384](#), 390 (2026) (*Weapons Station Earle*) (Chairman Kiko concurring on other grounds).

identified them as a distinguishable class, kind, group, or category.⁴⁰³ The party claiming that a proposal or provision concerns “types” bears the burden of establishing a relationship between the claimed “type” and staffing patterns.⁴⁰⁴

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,⁴⁰⁵ or when they concerned “entry[-]level” positions.⁴⁰⁶ Proposals that concern “grades” of employees or positions within the meaning of § 7106(b)(1) are negotiable only at the election of the agency. 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\(b\)\(1\)](#).⁴⁰⁷

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\(b\)\(1\)](#).⁴⁰⁸ Where the dominant requirement of proposals was to *establish* organizational subdivisions, the Authority found they were outside the duty to bargain because they both affected management’s right to determine its organization and were not electively negotiable under [§ 7106\(b\)\(1\)](#).⁴⁰⁹ However, proposals or provisions that prescribe the *staffing* of such organizational subdivisions can concern the numbers, types, and grades of employees or positions assigned to an organizational subdivision.⁴¹⁰ Proposals that concern “organizational subdivision[s]” within the meaning of § 7106(b)(1) are negotiable only at the election of the agency.

Work project. “Work project” means a “particular job” or “task.”⁴¹¹ For example, firefighters’ performance of certain types of “burns,”⁴¹² and work-crew foremen’s supervision of inmates, are work projects.⁴¹³ Proposals concerning “work project[s]” within the meaning of § 7106(b)(1) are negotiable at the election of the agency.

⁴⁰³ *Local R5-184*, [52 FLRA at 1034](#).

⁴⁰⁴ *E.g.*, *Local 723*, [66 FLRA at 645](#); *Local R5-184*, [52 FLRA at 1031](#).

⁴⁰⁵ *E.g.*, *Local R5-184*, [52 FLRA at 1032 n.11](#).

⁴⁰⁶ *AFGE, AFL-CIO, Council of Prison Locs.*, *Loc. 1661*, [29 FLRA 990](#), 1016 (1987).

⁴⁰⁷ *Field Labor Locals*, [73 FLRA at 235-36](#) (proposal specifying that employees in a particular organizational office and at specified locations would perform certain work, but did not address the grade levels of the employees or positions who would perform those tasks); *AFGE, Loc. 3529*, [55 FLRA 830](#), 832-33 (1999) (proposal that would require agency to transfer staffing function for bargaining-unit positions, but did not involve the grade of staff to be assigned to a particular subdivision).

⁴⁰⁸ *E.g.*, *NAGE, Loc. R14-23*, [54 FLRA 1302](#), 1306 (1998) (Member Wasserman dissenting in part on other grounds).

⁴⁰⁹ *AFGE, Loc. 1336*, [52 FLRA 794](#), 802 (1996) (Member Armendariz concurring).

⁴¹⁰ See [id.](#)

⁴¹¹ *E.g.*, *Weapons Station Earle*, [74 FLRA at 390](#).

⁴¹² [Id.](#)

⁴¹³ *Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, [55 FLRA 848](#), 853-54 (1999) (*FCI Bastrop*) (Chair Segal concurring).

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 Under [§ 7106\(b\)\(1\)](#), proposals concerning the numbers, types, or grades of employees assigned to a tour of duty are negotiable only at the election of the agency.

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, and negotiable only at the election of the agency, where, for example, they required management to provide specific equipment to employees for their use in performing the agency’s work.⁴¹⁸

Proposals concerning the “methods [or] means of performing work” within the meaning of [§ 7106\(b\)\(1\)](#) are negotiable only at the election of the agency. “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 However, they do not include the evaluation of employee performance.⁴²²

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.⁴²³ Specifically, the Authority assesses whether: (1) there is a direct or integral relationship

⁴¹⁴ *Branch 11*, [57 FLRA at 426](#).

⁴¹⁵ [5 U.S.C. § 7106\(b\)\(1\)](#).

⁴¹⁶ *NTEU*, [62 FLRA 321](#), 326 (2007) (Chairman Cabaniss dissenting on other grounds).

⁴¹⁷ *AFGE, Loc. 3129, SSA Gen. Comm.*, [58 FLRA 273](#), 275 (2002) (Chairman Cabaniss concurring).

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

⁴¹⁹ *Local 1998 IV*, [69 FLRA at 630](#); *Local 723*, [66 FLRA at 646](#).

⁴²⁰ *Local 1998 IV*, [69 FLRA at 630-31](#).

⁴²¹ *Chapter 83*, [64 FLRA at 725](#).

⁴²² *IRS*, [73 FLRA at 890](#); *AFGE, Council 238*, [62 FLRA 350](#), 352 (2008).

⁴²³ *Local 1998 IV*, [69 FLRA at 631](#); *Local 723*, [66 FLRA at 646](#).

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.⁴²⁴ The relative importance of a particular method or means is irrelevant.⁴²⁵ In this regard, the method or means need not be indispensable to the accomplishment of the agency's mission.⁴²⁶ Rather, it need only be used to attain, or make more likely the attainment of, a desired end.⁴²⁷ If an agency disputing the negotiability of a proposal establishes both parts of the two-part test, then the proposal is negotiable only at the election of the agency.

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](#).⁴²⁸ These “procedures” are mandatory subjects of bargaining: Agencies must bargain over them, even if they affect management rights under [§ 7106\(a\)](#) or [§ 7106\(b\)\(1\)](#).⁴²⁹

Consistent with the principles of concession discussed in [section 1.18](#) 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.⁴³⁰ If the agency does dispute the union's claim, then the union must demonstrate that the proposal or provision is a procedure.⁴³¹ 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\(b\)\(2\)](#).

⁴²⁴ *Local 1998 IV*, [69 FLRA at 631](#); *Local 723*, [66 FLRA at 646](#).

⁴²⁵ *AFGE, Loc. 1164*, [66 FLRA 112](#), 115 (2011).

⁴²⁶ *Id.*

⁴²⁷ *Id.*; see also *FCI Bastrop*, [55 FLRA at 854](#) (finding that a means “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 for the accomplishing or furthering of the performance of its work’”) (quoting *NTEU*, [41 FLRA 1195](#), 1202 (1991)).

⁴²⁸ [5 U.S.C. § 7106\(b\)\(2\)](#).

⁴²⁹ *AFGE, Loc. 3974*, [67 FLRA 306](#), 309 (2014); 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 II*) (same).

⁴³⁰ E.g., *Local 4 II*, [73 FLRA at 636](#); *Local 5*, [67 FLRA at 91](#).

⁴³¹ E.g., *Local 723*, [66 FLRA at 644](#).

As with all negotiability determinations, whether the Authority will find a proposal or provision to be a procedure under [§ 7106\(b\)\(2\)](#) depends on the specific facts and the parties' particular arguments in individual cases. With that caveat, some examples of proposals and provisions that the Authority has found to be procedures (and thus negotiable) have included proposals or provisions that:

- Require advance notice of agency actions or specific events;⁴³²
- Prescribe how management will select employees for assignments, as long as management preserves the right to determine that the available employees are equally qualified;⁴³³
- Establish advisory committees involving union participation where those committees are not an integral part of management's decision-making process relating to the exercise of its rights under [§ 7106](#);⁴³⁴
- Establish the procedures that management will observe in developing and implementing performance standards;⁴³⁵
- Set forth the procedures that management will use in announcing or filling vacancies;⁴³⁶
- Require management to maintain, or show to employees, certain documentation;⁴³⁷
- Require an agency to complete disciplinary processes in a timely manner, but do not prescribe the consequences for the agency's failure to do so (and do not prevent the agency from acting on the underlying disciplinary matters);⁴³⁸

⁴³² *Local 12 II*, [61 FLRA at 220](#).

⁴³³ *E.g.*, *U.S. DHS, U.S. CBP*, [74 FLRA 6](#), 10-11 (2024); *U.S. DHS, U.S. CBP, Laredo Field Off., Hidalgo Port of Entry*, [70 FLRA 216](#), 217-18 (2017); *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).

⁴³⁴ *E.g.*, *NAIL*, [62 FLRA 1](#), 3 (2007) (Chairman Cabaniss concurring).

⁴³⁵ *E.g.*, *U.S. Dep't of VA, James A. Haley Veterans Hosp. Clinics*, [73 FLRA 880](#), 885 (2024) (then-Member Kiko concurring on other grounds); *AFGE, Council 220*, [65 FLRA 726](#), 728-29 (2011) (*Council 220 II*) (Member Beck concurring in the result on other grounds); *POPA*, [47 FLRA 10](#), 65-66, 70-71 (1993) (*POPA III*).

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

⁴³⁷ *E.g.*, *POPA*, [48 FLRA 129](#), 154, 157-58 (1993) (Member Armendariz dissenting in part on other grounds) (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) (Member Armendariz dissenting in part on other grounds) (requiring agency to share documentation supporting performance appraisals and ratings).

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

- Require an agency to conduct certain types of investigations and/or give employees notice and an opportunity to respond to discipline before imposing discipline;⁴³⁹
- Require management to evaluate employees' work products at the completion of each assignment;⁴⁴⁰
- Establish the procedures governing the imposition of drug tests on employees, if the procedures do not affect the agency's decision to require employees to undergo random or reasonable-suspicion drug tests;⁴⁴¹
- Establish certain telework approval and revocation procedures;⁴⁴² and
- Require consistency between position descriptions and performance standards, if management retains discretion to establish the performance standards and amend the position descriptions.⁴⁴³

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

- Preclude agencies from exercising management rights unless or until other events (other than completion of bargaining or applicable appellate processes) occur;⁴⁴⁴
- Delay implementation of management actions that are "necessary for the functioning of the agency;"⁴⁴⁵
- Condition the exercise of management rights on the agreement of employees or a union;⁴⁴⁶
- Require agencies to give advance notice of investigative interviews when the decisions not to do so are part of the agencies' investigative techniques;⁴⁴⁷

⁴³⁹ *Consumer Fin. Prot. Bureau*, [73 FLRA 781](#), 783 (2024).

⁴⁴⁰ *POPA III*, [47 FLRA at 54](#).

⁴⁴¹ *E.g.*, *NTEU, Chapters 243 & 245*, [45 FLRA 270](#), 279-80 (1992).

⁴⁴² *E.g.*, *U.S. Dep't of Educ., Fed. Student Aid*, [71 FLRA 1166](#), 1169 (2020) (Member DuBester concurring).

⁴⁴³ *United Power Trades Org.*, [44 FLRA 1145](#), 1155-56 (1992).

⁴⁴⁴ *E.g.*, *Antilles Consol. Educ. Ass'n*, [61 FLRA 327](#), 331-32 (2005) (Chairman Cabaniss dissenting in part).

⁴⁴⁵ *E.g.*, [id. at 332](#).

⁴⁴⁶ *AFGE, Loc. 3529*, [57 FLRA 172](#), 175 (2001) (*Local 3529 II*) (Member Wasserman dissenting in part on other grounds).

⁴⁴⁷ *E.g.*, *AFGE, Loc. 701, Council of Prison Locs. 33*, [58 FLRA 128](#), 134 (2002) (Chairman Cabaniss concurring in part and dissenting in part on other grounds).

- Prevent agencies from determining employee qualifications;⁴⁴⁸
- Prescribe or preclude assignments to particular individuals identified by name or title;⁴⁴⁹
- Require management to assign employees certain duties, at the employees' option;⁴⁵⁰
- Preclude management from assigning employees certain duties;⁴⁵¹
- Require management to reassign employees to sites designated by the employees;⁴⁵²
- Require agencies to use competitive procedures to fill vacancies where the requirements prevent management from considering other applicants or using any other appropriate source in actually filling such vacancies;⁴⁵³
- Limit the evidence agencies may use to support disciplinary actions;⁴⁵⁴
- Substantively limit management's right to determine the content of performance standards;⁴⁵⁵
- Prevent management from holding employees accountable for the performance of assigned work;⁴⁵⁶
- Require agencies to fill positions;⁴⁵⁷
- Prevent agencies from controlling which particular individuals will have access to their facilities;⁴⁵⁸
- Prevent agencies from using their chosen internal-security practices;⁴⁵⁹

⁴⁴⁸ *E.g., Nat'l Educ. Ass'n, Overseas Educ. Ass'n, Fort Bragg Ass'n of Educators*, [53 FLRA 898](#), 908-12 (1997).

⁴⁴⁹ *Local 1547*, [70 FLRA at 305](#); see *Council 220 II*, [65 FLRA at 728-29](#).

⁴⁵⁰ *AFGE, Loc. 1020*, [47 FLRA 258](#), 263 (1993).

⁴⁵¹ *E.g., U.S. DOD, Def. Cont. Audit Agency, Cent. Region*, [47 FLRA 512](#), 520 (1993).

⁴⁵² *NLRB*, [60 FLRA 576](#), 579 (2005) (Chairman Cabaniss concurring in part on other grounds; Member Pope dissenting in part on other grounds).

⁴⁵³ *E.g., U.S. DOD, Ala. Air Nat'l Guard, Montgomery, Ala.*, [58 FLRA 411](#), 412-13 (2003).

⁴⁵⁴ *E.g., Local 1827*, [58 FLRA at 352](#).

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

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

⁴⁵⁷ *E.g., Local 3354*, [54 FLRA at 815-16](#).

⁴⁵⁸ *AFGE, AFL-CIO, Loc. 2782*, [49 FLRA 470](#), 474 (1994) (Member Armendariz concurring in part on other grounds).

⁴⁵⁹ *NTEU III*, [70 FLRA at 104](#); *Local 2058*, [68 FLRA at 679](#).

- Establish restrictions on management action under [§ 7106](#) based on the results of studies;⁴⁶⁰
- Preclude management from using particular methods of monitoring employees' work performance;⁴⁶¹
- Preclude management from rating and ranking candidates until after a preliminary placement process for currently employed unit employees is completed;⁴⁶² and
- Require management "ordinarily" to approve employees' requests to receive and use advanced sick leave.⁴⁶³

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 may still be 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](#).⁴⁶⁴ These "appropriate arrangements" are mandatory subjects of bargaining: Agencies must bargain over them, despite their effects on management rights under [§ 7106\(a\)](#) or [§ 7106\(b\)\(1\)](#).⁴⁶⁵

i. *What is an arrangement?*

To determine whether a proposal or a provision is an appropriate arrangement under [§ 7106\(b\)\(3\)](#), and thus negotiable, 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.⁴⁶⁶ Consistent with the principles of concession discussed in [section 1.18](#) above, if an agency does not dispute a union's claim that a proposal or provision is an arrangement, then the Authority will find that the agency has conceded that the proposal or provision is an arrangement.⁴⁶⁷ But if an

⁴⁶⁰ *Local 1923*, [44 FLRA at 1437](#).

⁴⁶¹ *Chapter 337*, [74 FLRA at 413-14](#).

⁴⁶² *E.g.*, *NTEU*, [43 FLRA 1279](#), 1287 (1992).

⁴⁶³ *NFFE, Loc. 405*, [42 FLRA 1112](#), 1127 (1991).

⁴⁶⁴ [5 U.S.C. § 7106\(b\)\(3\)](#).

⁴⁶⁵ *NTEU V*, [72 FLRA at 755](#); *NATCA IV*, [61 FLRA at 344](#); see *POPA II*, [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\(b\)\(1\)](#)).

⁴⁶⁶ *NAGE, Loc. R14-87*, [21 FLRA 24](#), 31 (1986) (*KANG*); *e.g.*, *Council 220 I*, [74 FLRA at 116](#).

⁴⁶⁷ *E.g.*, *Local 4 I*, [74 FLRA at 62](#).

agency does dispute a union's claim that a proposal or provision is an arrangement, then the union must demonstrate that the proposal or provision is an arrangement under the following test.

An arrangement must seek to mitigate adverse effects flowing from the exercise of a protected management right.⁴⁶⁸ 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.⁴⁶⁹ Proposals and provisions that address speculative or hypothetical concerns are not arrangements.⁴⁷⁰ In the negotiability context, the alleged arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.⁴⁷¹ But the Authority has held that proposals and provisions intended to eliminate the *possibility* of an adverse effect may be appropriate arrangements.⁴⁷² 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.⁴⁷³

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

If a proposal or a provision is an arrangement, then the Authority determines whether it is *appropriate* by applying the test first set forth in the Authority's decision in *NAGE, Local R14-87 (KANG)*.⁴⁷⁴ Specifically, the Authority assesses whether the proposal or provision "excessively interferes" with the affected management right.⁴⁷⁵ The excessive-interference test is a balancing test in which the Authority weighs "the competing practical needs of employees and managers" to ascertain whether the benefit to employees flowing from the proposal or provision outweighs the proposal's or provision's burden on the exercise of the management right or rights involved.⁴⁷⁶ If the benefits to employees outweigh the burdens on the exercise of management rights, then the arrangement is appropriate and thus negotiable; if they do not, then the arrangement is not appropriate and thus nonnegotiable.⁴⁷⁷

⁴⁶⁸ *Local R1-134*, [73 FLRA at 643](#); *Local 5*, [67 FLRA at 87](#).

⁴⁶⁹ *KANG*, [21 FLRA at 31](#); e.g., *Local R1-134*, [73 FLRA at 643](#).

⁴⁷⁰ *Local R1-134*, [73 FLRA at 644](#); *Local 5*, [67 FLRA at 87](#).

⁴⁷¹ *Local R1-134*, [73 FLRA at 644](#); *Local 5*, [67 FLRA at 87](#). But see *CFPB*, [73 FLRA at 680](#) (holding that, in the arbitration context, the Authority will apply a rebuttable presumption that the tailoring requirement is met).

⁴⁷² E.g., *U.S. Dep't of Transp., FAA*, [74 FLRA 335](#), 341 (2026) (*FAA*); *Prison Locals 33*, [66 FLRA at 822](#).

⁴⁷³ *Prison Locals 33*, [66 FLRA at 822](#).

⁴⁷⁴ [21 FLRA at 31-33](#).

⁴⁷⁵ *Id.*; *Council 220 I*, [74 FLRA at 116](#); *CFPB*, [73 FLRA at 680](#).

⁴⁷⁶ *KANG*, [21 FLRA at 31-32](#); see, e.g., *FAA*, [74 FLRA at 341](#).

⁴⁷⁷ *Council 220 I*, [74 FLRA at 116](#).

This balancing test is fact specific.⁴⁷⁸ Consequently, an arrangement that is found to be appropriate in one setting may not be appropriate in another.⁴⁷⁹ In reaching a conclusion, the Authority will carefully examine the evidence and arguments supporting each party's claimed benefits and burdens. For this reason, parties should "address any and all relevant considerations as specifically as possible."⁴⁸⁰

(d) **"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."⁴⁸¹ 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.⁴⁸² 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.⁴⁸³ The Statute is *not* an "applicable law" within the meaning of [§ 7106\(a\)\(2\)](#).⁴⁸⁴

Proposals or provisions that require agencies to comply with applicable laws when they exercise their [§ 7106\(a\)\(2\)](#) rights are negotiable.⁴⁸⁵ 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\(b\)\(3\)](#)).⁴⁸⁶

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 (see [section 4.7\(a\)](#) below) – then the agency must bargain over it.⁴⁸⁷

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

⁴⁷⁸ E.g., [id. at 116-20](#) (weighing benefits and burdens).

⁴⁷⁹ Compare [id. at 118-20](#) (finding adjudication-time provision not to be appropriate where burdens on management outweighed benefits to employees), with *Local 1164 I*, [65 FLRA at 836](#), 838-40 (finding similar proposal to be appropriate where benefits to employees outweighed burdens on management).

⁴⁸⁰ *KANG*, [21 FLRA at 33](#).

⁴⁸¹ [5 U.S.C. § 7106\(a\)\(2\)](#).

⁴⁸² *Fed. Pro. Nurses Ass'n, Loc. 2707*, [43 FLRA 385](#), 390 (1991).

⁴⁸³ *U.S. DOD, Ill. Nat'l Guard, Scott Air Force Base, Ill.*, [69 FLRA 345](#), 347 (2016); *AFGE, Loc. 1441*, [61 FLRA 201](#), 206 (2005) (Chairman Cabaniss concurring).

⁴⁸⁴ *Dep't of the Treasury, IRS v. FLRA*, [494 U.S. 922](#), 930 (1990).

⁴⁸⁵ *Local 997*, [66 FLRA at 500-01](#); *Weather Serv.*, [63 FLRA at 452](#).

⁴⁸⁶ E.g., *Local 723*, [66 FLRA at 644](#).

⁴⁸⁷ *VA Council # 53*, [71 FLRA at 411-13](#); e.g., *AFGE, Nat'l Border Patrol Council*, [51 FLRA 1308](#), 1335 (1996).

require the agency to exercise that discretion through collective bargaining.⁴⁸⁸ 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 on which the agency relies.⁴⁸⁹ 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.⁴⁹⁰ But a law or regulation need not use any specific phrase or words in order to give an agency sole and exclusive discretion.⁴⁹¹

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.⁴⁹² Generally, agencies must bargain over proposals that conflict with agency rules and regulations.⁴⁹³

However, [§ 7117\(a\)\(2\) of the Statute](#) provides, in pertinent part, that agencies are not required to bargain over proposals that conflict with agency rules and regulations "if the Authority has determined under [\[§ 7117\(b\) of the Statute\]](#) that [a] compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation."⁴⁹⁴ So an agency need not bargain over a union's proposal that conflicts with an agency rule or regulation if the agency: (1) identifies a 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](#).⁴⁹⁵

⁴⁸⁸ E.g., *POPA I*, [59 FLRA at 346](#), 351; *Ass'n of Civilian Technicians, Mile High Chapter*, [53 FLRA 1408](#), 1412 (1998) (ACT).

⁴⁸⁹ *IFPTE, Loc. 4, Chapter 1*, [71 FLRA 1135](#), 1136 (2020) (*Local 4 III*) (Member DuBester concurring); *U.S. Dep't of the Interior, Bureau of Indian Affs., Sw. Indian Polytechnic Inst., Albuquerque, N.M.*, [58 FLRA 246](#), 248-50 (2002) (*Indian Affairs*); *NAGE, Loc. R5-136*, [56 FLRA 346](#), 348-49 (2000); e.g., *ACT*, [53 FLRA at 1412-16](#).

⁴⁹⁰ *Local 4 III*, [71 FLRA at 1136](#); *AFGE, Loc. 3295*, [47 FLRA 884](#), 895 (1993) (Member Talkin dissenting).

⁴⁹¹ *Local 4 III*, [71 FLRA at 1136](#); *Indian Affairs*, [58 FLRA at 248](#); see also *Ass'n of Civilian Technicians, Tex. Lone Star Chapter 100*, [55 FLRA 1226](#), 1229 n.7 (2000).

⁴⁹² E.g., *U.S. Dep't of the Army, Fort Campbell Dist., Third Region, Fort Campbell, Ky.*, [37 FLRA 186](#), 193-94 (1990).

⁴⁹³ See, e.g., *AFGE, Loc. 0906*, [74 FLRA 146](#), 153-54 (2024) (then-Member Kiko dissenting on other grounds); *AFGE SSA*, [68 FLRA at 408](#); *AFGE, Loc. 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).

⁴⁹⁴ [5 U.S.C. § 7117\(a\)\(2\)](#).

⁴⁹⁵ *Local 5*, [67 FLRA at 89](#).

[Section 2424.50](#)⁴⁹⁶ provides:

A compelling need exists for an agency rule or regulation concerning any condition of employment when the rule or regulation was issued by the agency or any primary national subdivision of the agency, and the agency demonstrates that the rule or regulation satisfies one 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.⁴⁹⁷

4.6 Non-Dispositive Nature 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.⁴⁹⁸ For example, prior bargaining over permissive subjects does not make future bargaining over those subjects mandatory.⁴⁹⁹ In addition, that an agency already follows a particular practice

⁴⁹⁶ [5 C.F.R. § 2424.50](#). We note that if a union represents a “majority of the employees . . . to whom [an agency] rule or regulation is applicable,” then a claim that there is a compelling need for an agency rule or regulation will not bar negotiations over a proposal that allegedly conflicts with that rule or regulation. [5 U.S.C. § 7117\(a\)\(3\)](#); see, e.g., *AFGE SSA*, [68 FLRA at 408-09](#) (agency’s argument that proposal conflicted with agency policy did not establish proposal outside the duty to bargain where (a) agency did not address whether there was a “compelling need” for the policy and (b) agency did not contest union’s assertion that it represented “considerably more than one-half” of the relevant employees).

⁴⁹⁷ E.g., *FLRA v. Aberdeen Proving Ground, Dep’t of the Army*, [485 U.S. 409](#), 412-14 (1988); *AFGE, Loc. 1786*, [49 FLRA 534](#), 542 (1994).

⁴⁹⁸ See *SSA*, [73 FLRA 370](#), 373 n.35 (2022) (then-Member Kiko dissenting on other grounds); *NTEU*, [61 FLRA 554](#), 557 (2006); *Rochester Local*, [56 FLRA at 291-92](#).

⁴⁹⁹ *Rochester Local*, [56 FLRA at 291-92](#); see also *Local 225*, [56 FLRA at 689](#).

– for example, where that practice is embodied in an agency rule or regulation – does not, by itself, make that practice negotiable.⁵⁰⁰ 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.⁵⁰¹

4.7 Common Bargaining-Obligation Disputes

As discussed in [section 1.9](#) above, when the Authority resolves a negotiability dispute, the Authority may also resolve a bargaining-obligation dispute concerning the same proposal.⁵⁰² Three examples of bargaining-obligation disputes include claims that: (1) a proposal concerns a matter that is “covered by” a collective-bargaining agreement; (2) bargaining is not required because there has not been a change in bargaining-unit employees’ conditions of employment or because the effect of a change is “de minimis”; and (3) a union is attempting to bargain at the wrong “level” of the agency.⁵⁰³ 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 have already been resolved by bargaining.⁵⁰⁴ This doctrine applies to any collectively bargained agreement between the parties, including not only term agreements,⁵⁰⁵ but also more limited agreements such as memoranda of understanding.⁵⁰⁶ However, the covered-by doctrine does not excuse a failure to bargain when an agreement “specifically contemplates” additional bargaining over the matter.⁵⁰⁷ To assess whether a particular proposal is “covered by” the parties’ agreement, the Authority applies a two-prong test.⁵⁰⁸

Under the first prong, the Authority examines whether the agreement expressly contains the subject matter of the proposal.⁵⁰⁹ The Authority does not require an “exact congruence” between the proposal’s subject matter and the agreement’s text;⁵¹⁰ if a “reasonable reader” would conclude that the agreement settles the matter in dispute, then the matter is covered by the parties’ agreement.⁵¹¹ For example, the Authority has found that an agreement did not expressly contain the subject matter of a proposal

⁵⁰⁰ *E.g.*, *Veterans Admin. Staff Nurses Council, Loc. 5032, WFNHP, AFT, AFL-CIO*, [29 FLRA 849](#), 861 (1987).

⁵⁰¹ *E.g.*, *AFGE SSA*, [68 FLRA at 408-09](#); *Local 3824*, [52 FLRA at 336](#).

⁵⁰² [5 C.F.R. § 2424.30\(b\)\(2\)](#); *see, e.g.*, *Local 1998 IV*, [69 FLRA at 633-34](#).

⁵⁰³ [5 C.F.R. § 2424.2\(a\)\(1\)-\(3\)](#).

⁵⁰⁴ *AFGE, Loc. 3972*, [74 FLRA 252](#), 254 (2025) (*Local 3972*); *Local 1998 III*, [66 FLRA at 126](#).

⁵⁰⁵ *E.g.*, *NTEU, Chapter 172*, [74 FLRA 80](#), 86 (2024) (*Chapter 172*); *NATCA II*, [66 FLRA at 216-17](#).

⁵⁰⁶ *E.g.*, *Ass’n of Admin. L. Judges, IFPTE*, [72 FLRA 302](#), 303 (2021) (*Law Judges*) (Member Abbott concurring on other grounds); *Local R1-109 I*, [64 FLRA at 134](#).

⁵⁰⁷ *See Chapter 172*, [74 FLRA at 86](#); *Law Judges*, [72 FLRA at 303](#).

⁵⁰⁸ *Local 3972*, [74 FLRA at 254](#); *Local 1998 III*, [66 FLRA at 126](#).

⁵⁰⁹ *Chapter 172*, [74 FLRA at 86](#); *NATCA II*, [66 FLRA at 216](#); *U.S. Dep’t of HHS, SSA, Balt., Md.*, [47 FLRA 1004](#), 1018 (1993) (*SSA Balt.*).

⁵¹⁰ *Local 3972*, [74 FLRA at 254](#); *Local 1998 III*, [66 FLRA at 126](#).

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

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.⁵¹²

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]." ⁵¹³ In order to satisfy the second prong, a proposal must be "more than tangentially related to" a contract provision.⁵¹⁴ 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.⁵¹⁵

Where an agency establishes – under either prong – that a proposal concerns a matter that is "covered by" an existing agreement, the agency is not obligated to bargain over the proposal.⁵¹⁶ A non-exhaustive list of Authority decisions finding matters to be covered by collective-bargaining agreements includes: *AFGE, Local 3972*;⁵¹⁷ *NTEU, Chapter 172*;⁵¹⁸ *U.S. DHS, U.S. CBP, El Paso, Texas*;⁵¹⁹ *NATCA*;⁵²⁰ *NATCA, AFL-CIO*;⁵²¹ and *Professional Airways System Specialists*.⁵²² A non-exhaustive list of Authority decisions finding matters *not* to be covered by collective-bargaining agreements includes: *Ass'n of Administrative Law Judges, IFPTE*;⁵²³ *U.S. Department of the Interior, U.S. Geological Survey, Great Lakes Science Center, Ann Arbor, Michigan*;⁵²⁴ *NFFE, Federal District 1, Local 1998, IAMAW*;⁵²⁵ and *United American Nurses, District of Columbia Nurses Ass'n & United American Nurses, Local 203*.⁵²⁶

(b) "De Minimis" Doctrine

Sometimes, the effects of a management-initiated change to conditions of employment are too minor to require management to bargain over either the substance or the impact and implementation of the change. In determining the threshold at which a change to conditions of employment triggers a statutory duty to bargain, the Authority

⁵¹² *NATCA II*, [66 FLRA at 216](#).

⁵¹³ *U.S. Dep't of the Interior, U.S. Geological Surv., Great Lakes Sci. Ctr., Ann Arbor, Mi.*, [68 FLRA 734](#), 739 (2015); *NATCA II*, [66 FLRA at 216](#); *SSA Balt.*, [47 FLRA at 1018](#).

⁵¹⁴ *Local 1998 III*, [66 FLRA at 126](#).

⁵¹⁵ *Id.*

⁵¹⁶ *E.g.*, *NATCA II*, [66 FLRA at 218](#).

⁵¹⁷ [74 FLRA at 254-55](#).

⁵¹⁸ [74 FLRA at 86-87](#).

⁵¹⁹ [69 FLRA 261](#), 264-65 (2016) (Member Pizzella dissenting in part on other grounds).

⁵²⁰ [66 FLRA at 218](#).

⁵²¹ [62 FLRA at 178-79](#).

⁵²² [56 FLRA 798](#), 803-05 (2000).

⁵²³ [72 FLRA at 303](#).

⁵²⁴ [68 FLRA at 739](#).

⁵²⁵ [66 FLRA at 126-27](#).

⁵²⁶ [64 FLRA 879](#), 882-83 (2010).

has applied both a “de minimis” test and a “substantial impact” test.⁵²⁷ Specifically, for many years prior to issuing its policy statement in *U.S. Department of Education (Education)*,⁵²⁸ the Authority applied a “de minimis” test.⁵²⁹ Then, in *Education*, the Authority replaced the de minimis standard with a test under which an agency’s statutory bargaining obligation would extend only to changes having a “substantial impact on a condition of employment.”⁵³⁰ In *AFGE, AFL-CIO v. FLRA (AFGE)*,⁵³¹ the U.S. Court of Appeals for the District of Columbia Circuit vacated the policy statement in *Education*. Subsequently, in *SSA, Baltimore, Maryland*, a majority of the Authority found that, because *AFGE* vacated *Education*, the de minimis standard applies “unless and until” the Authority adopts a new standard.⁵³² Nevertheless, the majority noted that they were “not opposed to revisiting” the de minimis standard in a future case.⁵³³

In assessing whether the effect of a change is more than de minimis, the Authority looks primarily to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on conditions of employment.⁵³⁴ The number of employees affected by a change is not dispositive of whether the change is de minimis.⁵³⁵ For some examples of Authority decisions addressing this doctrine, see, for example: *SSA, Region VII, Kansas City, Missouri*;⁵³⁶ *U.S. DOL*;⁵³⁷ *NFFE, IAMAW, Federal District 1, Federal Local 1998*;⁵³⁸ *U.S. DOJ, Federal BOP*;⁵³⁹ *U.S. Department of the Air Force, Air Force Materiel Command, Space & Missile Systems Center Detachment 12, Kirtland Air Force Base, New Mexico*;⁵⁴⁰ *U.S. Department of the Air*

⁵²⁷ *SSA, Balt., Md.*, [74 FLRA 441](#), 442 (2026) (Member Wagner concurring in part and dissenting in part).

⁵²⁸ [71 FLRA 968](#), 971 (2020) (Member DuBester dissenting).

⁵²⁹ See, e.g., *U.S. Dep’t of the Air Force, 913th Air Wing, Willow Grove Air Rsrv. Station, Willow Grove, Pa.*, [57 FLRA 852](#), 857 (2002); *U.S. Dep’t of HHS, SSA, Balt., Md.*, [36 FLRA 655](#), 688 (1990).

⁵³⁰ [71 FLRA at 971](#).

⁵³¹ [25 F.4th 1](#) (D.C. Cir. 2022).

⁵³² [74 FLRA at 443](#).

⁵³³ [Id. at 443 n.32](#).

⁵³⁴ [Id. at 443](#); *U.S. Dep’t of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, [64 FLRA 85](#), 89 (2009).

⁵³⁵ *Local 1998 II*, [69 FLRA at 590](#); *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) (Member Beck concurring in part on other grounds).

⁵³⁶ [70 FLRA 106](#), 109-11 (2016) (finding a more-than-de-minimis effect where change caused increased workloads and performance of new duties).

⁵³⁷ [70 FLRA 27](#), 30-31 (2016) (Member Pizzella dissenting on other grounds) (denying exception to arbitrator’s finding of de minimis effects where arbitrator found that the grievant performed similar duties and did not lose promotion potential after reassignment and change of position description).

⁵³⁸ [69 FLRA at 589-90](#) (finding more-than-de-minimis effects where changes affected six bargaining-unit employees, had the potential to significantly affect the number of hours they worked (including outside regular hours), and had the potential to present safety issues).

⁵³⁹ [68 FLRA 728](#), 731-33 (2015) (denying exception to an arbitrator’s finding of more-than-de-minimis effects where agency established a national policy that limited reimbursement to employees for cell-phone calls that they made while on travel).

⁵⁴⁰ [64 FLRA at 173-74](#) (finding a more-than-de-minimis effect where employee required to give up a “second” office while keeping a primary office, and change in office affected, among other things, his ability to perform certain duties and to access certain equipment).

*Force, 355th MSG/CC, Davis-Monthan Air Force Base, Arizona;*⁵⁴¹ *U.S. DHS, Border and Transportation Security Directorate, Bureau of CBP, Washington, D.C.;*⁵⁴² and *SSA, Office of Hearings and Appeals, Charleston, South Carolina.*⁵⁴³

(c) Attempts to Bargain at Wrong Level

As stated in [section 1.7](#) above, the “level of recognition” is the level of the agency at which the bargaining obligation between the agency and the union exists. There is no statutory duty to bargain below the level of recognition.⁵⁴⁴ But bargaining below the level of recognition is a permissive subject of bargaining,⁵⁴⁵ so parties at the level of recognition may authorize lower-level bargaining.⁵⁴⁶ 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.⁵⁴⁷

⁵⁴¹ [64 FLRA at 89-90](#) (finding a more-than-de-minimis effect where employee was assigned numerous new duties in addition to his regular duties).

⁵⁴² [59 FLRA 728](#), 728-29, 735-36 (2004) (adopting administrative law judge’s finding of de minimis effect where only effect on employees’ working conditions “centered almost exclusively on individual personal preferences among the duties assigned to employees”).

⁵⁴³ [59 FLRA 646](#), 654-55 (2004) (Member Armendariz concurring; Member Pope dissenting) (finding change in the number of reserved parking spaces had de minimis effect where the only impact on unit employees was that they parked in some different parking spaces), *aff’d sub nom. Ass’n of Admin. L. Judges v. FLRA*, [397 F.3d 957](#) (D.C. Cir. 2005).

⁵⁴⁴ *NATCA I*, [62 FLRA at 182](#); *U.S. Food & Drug Admin., Ne. & Mid-Atl. Regions*, [53 FLRA 1269](#), 1273-74 (1998).

⁵⁴⁵ *Local 1998 I*, [71 FLRA at 890](#); *NATCA I*, [62 FLRA at 182](#).

⁵⁴⁶ *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Brooklyn, N.Y.*, [69 FLRA 44](#), 46 (2015); *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, [66 FLRA 978](#), 980-81 (2012).

⁵⁴⁷ *AFGE, Loc. 1401*, [67 FLRA 34](#), 37 (2012); *Dep’t of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal.*, [39 FLRA 1357](#), 1358-59 (1991).

CITED DECISIONS

Authority Decisions

- SSA, *Balt., Md.*, [74 FLRA 441](#) (2026) (Member Wagner concurring in part and dissenting in part)
- NTEU, *Chapter 337*, [74 FLRA 412](#) (2026)
- U.S. Dep't of the Navy, *Navy Region Mid-Atl. Fire & Emergency Servs., Naval Weapons Station Earle, N.J.*, [74 FLRA 384](#) (2026) (Chairman Kiko concurring)
- AFSCME, *Loc. 1653*, [74 FLRA 355](#) (2026)
- U.S. Dep't of Transp., *FAA*, [74 FLRA 335](#) (2026)
- NTEU, *Chapter 296 & 336*, [74 FLRA 299](#) (2025) (Member Wagner concurring)
- AFGE, *Loc. 3972*, [74 FLRA 252](#) (2025)
- AFGE, *Loc. 0906*, [74 FLRA 146](#) (2024) (then-Member Kiko dissenting)
- AFGE, *Council 220*, [74 FLRA 114](#) (2024)
- NTEU, *Chapter 172*, [74 FLRA 80](#) (2024)
- IFPTE, *Loc. 4*, [74 FLRA 59](#) (2024)
- U.S. DOJ, *Fed. BOP, Fed. Corr. Inst., Seagoville, Tex.*, [74 FLRA 40](#) (2024)
- U.S. DHS, *U.S. CBP*, [74 FLRA 6](#) (2024)
- U.S. Dep't of the Treasury, *IRS*, [73 FLRA 888](#) (2024)
- U.S. Dep't of VA, *James A. Haley Veterans Hosp. Clinics*, [73 FLRA 880](#) (2024) (then-Member Kiko concurring)
- U.S. DOJ, *Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, [73 FLRA 860](#) (2024)
- Consumer Fin. Prot. Bureau, [73 FLRA 781](#) (2024)
- AFGE, *Loc. 2031*, [73 FLRA 769](#) (2023) (Chairman Grundmann concurring)
- Consumer Fin. Prot. Bureau, [73 FLRA 670](#) (2023)
- NAGE, *Loc. R1-134*, [73 FLRA 637](#) (2023)
- IFPTE, *Loc. 4*, [73 FLRA 635](#) (2023)
- AFGE, *Loc. 12*, [73 FLRA 603](#) (2023)
- AFGE, *Loc. 32*, [73 FLRA 464](#) (2023)
- SSA, [73 FLRA 370](#) (2022) (then-Member Kiko dissenting)
- Antilles Consol. Educ. Ass'n, [73 FLRA 282](#) (2022)
- AFGE, *Loc. 1748, Nat'l Council of Field Lab. Locs.*, [73 FLRA 233](#) (2022)
- AFGE, *Loc. 15*, [73 FLRA 125](#) (2022)
- AFGE, *Council 270*, [73 FLRA 73](#) (2022)
- NTEU, [72 FLRA 752](#) (2022) (Chairman DuBester concurring in part and dissenting in part)
- AFGE, *Loc. 2119*, [72 FLRA 706](#) (2022) (Member Abbott concurring)
- U.S. Dep't of VA, *Veterans Health Admin., Consol. Mail Outpatient Pharmacy, Leavenworth, Kan.*, [72 FLRA 606](#) (2021) (Chairman DuBester concurring; Member Abbott concurring)
- Indep. Union of Pension Emps. for Democracy & Just., [72 FLRA 571](#) (2021) (Chairman DuBester concurring)

- *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, [72 FLRA 541](#) (2021) (Member Abbott concurring; Chairman DuBester concurring in part and dissenting in part)
- *Fraternal Ord. of Police, DC Lodge 1, NDW Lab. Comm.*, [72 FLRA 377](#) (2021) (Member Abbott concurring)
- *Ass'n of Admin. L. Judges, IFPTE*, [72 FLRA 302](#) (2021) (Member Abbott concurring)
- *SSA, Off. of Hearing Operations*, [72 FLRA 108](#) (2021) (Chairman DuBester dissenting in part)
- *AFGE, Council 170*, [71 FLRA 1259](#) (2020) (Member DuBester concurring)
- *NFFE, VA Council of Consol. Locs.*, [71 FLRA 1193](#) (2020) (Member DuBester concurring)
- *U.S. Dep't of Educ., Fed. Student Aid*, [71 FLRA 1166](#) (2020) (Member DuBester concurring)
- *IFPTE, Loc. 4, Chapter 1*, [71 FLRA 1135](#) (2020) (Member DuBester concurring)
- *U.S. Dep't of Educ.*, [71 FLRA 968](#) (2020) (Member DuBester dissenting)
- *NFFE, IAMAW, Fed. Dist. 1, Fed. Loc. 1998*, [71 FLRA 889](#) (2020)
- *AFGE, Loc. 3430*, [71 FLRA 881](#) (2020) (Member Abbott concurring)
- *IBEW, Loc. 1002*, [71 FLRA 779](#), *recons. denied*, [71 FLRA 930](#) (2020)
- *SSA, Off. of Hearings Operations*, [71 FLRA 687](#) (2020) (Member DuBester dissenting)
- *AFGE, Loc. 2228*, [71 FLRA 586](#) (2020) (Member Abbott concurring)
- *AFGE, Nat'l VA Council # 53*, [71 FLRA 410](#) (2019) (Member DuBester concurring)
- *NFFE, Loc. 1998, IAMAW*, [71 FLRA 317](#) (2019) (Member DuBester concurring)
- *U.S. DOD, Def. Logistics Agency*, [70 FLRA 932](#) (2018) (Member DuBester dissenting)
- *Ass'n of Civilian Technicians, Ky. Long Rifle Chapter & Bluegrass Chapter*, [70 FLRA 968](#) (2018) (Member DuBester concurring in part and dissenting in part)
- *U.S. Dep't of the Treasury, IRS*, [70 FLRA 792](#) (2018) (Member DuBester dissenting)
- *NTEU*, [70 FLRA 701](#) (2018)
- *AFGE, Loc. 1547*, [70 FLRA 303](#) (2017) (Member DuBester concurring)
- *NLRB, Pro. Ass'n*, [70 FLRA 289](#) (2017)
- *U.S. DHS, U.S. CBP, Laredo Field Off., Hidalgo Port of Entry*, [70 FLRA 216](#) (2017)
- *SSA, Region VII, Kan. City, Mo.*, [70 FLRA 106](#) (2016)
- *NTEU*, [70 FLRA 100](#) (2016)
- *U.S. DOL*, [70 FLRA 27](#) (2016) (Member Pizzella dissenting)
- *NFFE, IAMAW, Fed. Dist. 1, Loc. 1998*, [69 FLRA 626](#) (2016) (Member Pizzella dissenting)
- *NFFE, IAMAW, Fed. Dist. 1, Fed. Loc. 1998*, [69 FLRA 586](#) (2016) (Member Pizzella concurring in part and dissenting in part)
- *U.S. DOD, Ill. Nat'l Guard, Scott Air Force Base, Ill.*, [69 FLRA 345](#) (2016)

- *U.S. DHS, U.S. CBP, El Paso, Tex.*, [69 FLRA 261](#) (2016) (Member Pizzella dissenting in part)
- *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Brooklyn, N.Y.*, [69 FLRA 44](#) (2015)
- *U.S. Dep't of the Interior, U.S. Geological Surv., Great Lakes Sci. Ctr., Ann Arbor, Mi.*, [68 FLRA 734](#) (2015)
- *U.S. DOJ, Fed. BOP*, [68 FLRA 728](#) (2015)
- *AFGE, Loc. 2058*, [68 FLRA 676](#) (2015) (Member Pizzella dissenting in part)
- *AFGE, SSA Gen. Comm.*, [68 FLRA 407](#) (2015) (Member Pizzella dissenting in part)
- *U.S. DHS, U.S. CBP, U.S. Border Patrol, Yuma Sector*, [68 FLRA 189](#) (2015) (Member Pizzella dissenting)
- *NAIL, Loc. 7*, [67 FLRA 654](#) (2014) (Member Pizzella concurring in part and dissenting in part), *recons. denied*, [68 FLRA 133](#) (2014) (Member Pizzella dissenting)
- *AFGE, Loc. 1164*, [67 FLRA 316](#) (2014) (Member Pizzella concurring)
- *AFGE, Loc. 3974*, [67 FLRA 306](#) (2014)
- *NAIL, Loc. 5*, [67 FLRA 85](#) (2012)
- *AFGE, Loc. 1401*, [67 FLRA 34](#) (2012)
- *NTEU*, [67 FLRA 24](#) (2012), *aff'd sub nom. NTEU v. FLRA*, [No. 12-2574](#) (4th Cir. 2013)
- *AFGE, Loc. 1938*, [66 FLRA 1038](#) (2012)
- *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, [66 FLRA 978](#) (2012)
- *AFGE, Council of Prison Locs. 33, Loc. 506*, [66 FLRA 929](#) (2012)
- *AFGE Council of Prison Locs. 33, Loc. 506*, [66 FLRA 819](#) (2012), *pet. for review granted, decision enforced in part, vacated in part, & remanded sub nom. U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, [737 F.3d 779](#) (D.C. Cir. 2013)
- *NATCA*, [66 FLRA 658](#) (2012) (Member DuBester dissenting in part)
- *AFGE, Loc. 723*, [66 FLRA 639](#) (2012)
- *AFGE, Loc. 997*, [66 FLRA 499](#) (2012)
- *NFFE, Loc. 2199, IAMAW, Fed. Dist. 1*, [66 FLRA 412](#) (2011)
- *AFGE, Loc. 3937*, [66 FLRA 393](#) (2011) (Member DuBester dissenting in part)
- *NAGE, Loc. R-109*, [66 FLRA 278](#) (2011)
- *NATCA*, [66 FLRA 213](#) (2011)
- *NTEU*, [66 FLRA 186](#) (2011)
- *AFGE, Loc. 3928*, [66 FLRA 175](#) (2011) (Member Beck dissenting)
- *NFFE, Fed. Dist. 1, Loc. 1998, IAMAW*, [66 FLRA 124](#) (2011)
- *AFGE, Loc. 1164*, [66 FLRA 112](#) (2011)
- *AFGE, Nat'l Border Patrol Council*, [66 FLRA 96](#) (2011)
- *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, [65 FLRA 1052](#) (2011)
- *AFGE, Loc. 1164*, [65 FLRA 836](#) (2011)
- *NATCA, Loc. ZHU*, [65 FLRA 738](#) (2011)
- *AFGE, Council 220*, [65 FLRA 726](#) (2011) (Member Beck concurring)

- AFGE, *Council of Prison Locs.* 33, [65 FLRA 142](#) (2010)
- U.S. EPA, [65 FLRA 113](#) (2010) (Member Beck concurring)
- AFGE, *Loc. 1770*, [64 FLRA 953](#) (2010)
- *United Am. Nurses, D.C. Nurses Ass'n & United Am. Nurses, Loc. 203*, [64 FLRA 879](#) (2010)
- NTEU, *Chapter 83*, [64 FLRA 723](#) (2010)
- NTEU, [64 FLRA 443](#) (2010) (Member Beck dissenting)
- AFGE, *Loc. 3584, Council of Prison Locs. C-33*, [64 FLRA 316](#) (2009)
- AFGE, *Loc. 2145*, [64 FLRA 231](#) (2009)
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- NATCA, [64 FLRA 161](#) (2009)
- NAGE, *Loc. R1-109*, [64 FLRA 132](#) (2009) (Member Beck dissenting)
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- FDIC, [64 FLRA 79](#) (2009) (Chairman Pope dissenting in part)
- U.S. Dep't of Transp., *FAA*, [63 FLRA 530](#) (2009)
- U.S. DHS, *U.S. CBP*, [63 FLRA 505](#) (2009)
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- NTEU, [62 FLRA 321](#) (2007) (Chairman Cabaniss dissenting)
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- NATCA, *AFL-CIO*, [62 FLRA 174](#) (2007) (Chairman Cabaniss concurring in part)
- AFGE, *Loc. 2755*, [62 FLRA 93](#) (2007)
- U.S. Dep't of Transp., *FAA, Alaskan Region*, [62 FLRA 90](#) (2007)
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- AFGE, Loc. 12, [61 FLRA 209](#) (2005) (Member Pope concurring in part and dissenting in part)
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- AFGE, Loc. 1858, [56 FLRA 1115](#) (2001)
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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 website, at www.flra.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](#).