

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



(Updated April 22, 2013)

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FOREWORD

The Federal Labor Relations Authority's (FLRA's) three-Member, decisional component (the Authority) has prepared this Guide. The FLRA, an independent agency of the executive branch of the federal government, administers the labor-relations program under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), for federal agencies, federal employees, and the unions that represent those employees.

A primary responsibility of the Authority under the Statute is to resolve "negotiability" appeals. *Id.* §§ 7105(a)(E) & 7117(c). As discussed in further detail in this Guide, a union files a negotiability appeal when: (1) an agency has claimed that the union's bargaining proposal is outside the statutory duty to bargain for certain reasons; or (2) an agency head has disapproved a contract that a local agency and a local union have reached, or the Federal Service Impasses Panel (FSIP) has imposed, on the ground that the contract is allegedly unlawful. *See* 5 C.F.R. §§ 2424.2(c) & 2424.21.

This Guide is designed to help parties understand the negotiability process and their rights and responsibilities in connection with that process. We believe that an understanding of the statutory and regulatory scheme will enhance the parties' ability to create a record that allows the Authority to resolve their disputes as completely and expeditiously as possible. 5 U.S.C. § 7117(c)(6). Specifically, this Guide is intended to provide parties with information concerning:

- the key terms and concepts involved in negotiability cases;
- the Authority process in negotiability cases;
- 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 and/or regulations, or the Authority's official policy. It should not be considered as legal advice or as a substitute for adequate preparation and research by the party representatives. The case law in this area is constantly evolving. It is crucial that parties research court, Authority, and other administrative decisions that may apply to their particular cases. We encourage you to visit the FLRA's web site, www.flra.gov, 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; and research Authority decisions in variety of ways, including by using search terms.

§ 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 has not been agreed to by the parties. 5 C.F.R. § 2424.2(e). A proposal is the subject of a negotiability appeal when an agency has declared, during bargaining, that the proposal is outside the duty to bargain. *Id.* § 2424.2(c).

1.3 Provisions

A provision is contract language that a local agency and a union have agreed to include in their collective-bargaining agreement, *e.g.*, *NTEU*, 65 FLRA 509, 514 (2011), *review denied sub nom.*, *U.S. Dep't of the Treasury, Bureau of the Public Debt, Wash., D.C. v. FLRA*, 670 F.3d 1315 (D.C. Cir. 2012), or that the FSIP has imposed as part of their agreement, *e.g.*, *POPA*, 59 FLRA 331, 332 (2003). A provision is the subject of a negotiability appeal when the agency head has disapproved, as contrary to law, a local agency's and a union's contract during the process of "agency-head review" under § 7114(c) of the Statute (which is discussed in further detail below). 5 C.F.R. § 2424.2(f).

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 lawful, the Authority must determine what the proposal or provision means. If the parties do not dispute the asserted meaning of a proposal or provision, and that asserted meaning is consistent with the proposal's or provision's wording, then the Authority bases its negotiability determination on the parties' asserted meaning. *E.g.*, *NTEU*, 65 FLRA at 510. Please note that, in negotiability cases involving provisions, the Authority defers to the meaning that the local agency and the union ascribe to it; the Authority does not defer to the agency head's interpretation of it. *See id.* at 514; *Int'l Bhd. of Elec. Workers, Local 350*, 55 FLRA 243, 244 (1999) (*Local 350*).

Where the local parties dispute the meaning of a proposal or provision, the Authority looks to the proposal's or the provision's plain wording and the union's statement of intent. *E.g.*, *NAGE, Local R-109*, 66 FLRA 278, 278 (2011) (*Local R-109*). If

the union's explanation of the proposal's or the provision's meaning 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. *Id.* But when a union's statement is not inconsistent with the wording of the proposal or the provision, the Authority does not adopt it and, instead, bases the negotiability decision on the wording. *See, e.g., IFPTE, Local 3*, 51 FLRA 451, 459 (1995).

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

1.5 Mandatory Subjects of Bargaining

Mandatory subjects of bargaining are subjects that, upon request, a party is required to bargain over. *See, e.g., AFGE, Local 32*, 51 FLRA 491, 497 n.11 (1995) (*Local 32*). These subjects include, among other things, procedures under § 7106(b)(2) of the Statute and appropriate arrangements under § 7106(b)(3) of the Statute, to the extent that bargaining is not otherwise prohibited by law. *See, e.g., NAIL, Local 5*, 67 FLRA 85, 89-92 (2012) (*Local 5*) (finding proposals to be an appropriate arrangements and procedures, and directing bargaining over them); *cf. NTEU*, 67 FLRA 24, 27 n.9 (2012) (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 may not reach agreements on, even if they want to do so, because the law prohibits them from doing so. *See, e.g., Local 32*, 51 FLRA at 497 n.11.

1.7 Permissive Subjects of Bargaining

Sometimes agencies are *permitted* to bargain over something even though they are not *required* to do so. Matters that fall into this category are called "permissive" subjects of bargaining. *See, e.g., id.* A common category of permissive subjects, discussed in detail later in this Guide, involves matters set forth in § 7106(b)(1) of the Statute. *E.g., 5 U.S.C. § 7106(b)(1); 5 C.F.R. § 2424.25(a)*. Some other examples include: supervisory and managerial conditions of employment, *e.g., NAGE, Local R1-109*, 61 FLRA 588, 590-91 (2006); and agreements to bargain below the "level of recognition," *e.g., NATCA, AFL-CIO*, 62 FLRA 174, 182 (2007).

If parties reach an agreement on a permissive subject of bargaining, then the agreement may not be disapproved on agency-head review. *E.g., NTEU*, 65 FLRA at 512.

1.8 Negotiability Disputes

A negotiability dispute is a disagreement between a union and an agency “concerning the legality of a proposal or provision.” 5 C.F.R. § 2424.2(c). 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.” *Id.* Such a dispute also exists when a union “disagrees with an agency head’s disapproval of a provision as contrary to law.” *Id.*

As discussed in further detail later in this Guide, agencies have a statutory obligation to bargain over only “conditions of employment” of bargaining-unit employees, 5 U.S.C. § 7102(2), so one type of negotiability dispute may involve a claim that a proposal does not concern a condition of employment. In addition, parties may not agree to contract provisions that are “inconsistent with any Federal law or any Government-wide rule or regulation.” *Id.* § 7117(a)(1). Therefore, a negotiability dispute may include a claim that a proposal or provision is inconsistent with, for example: the Statute, *e.g., AFGE, Local 1547*, 64 FLRA 813, 816-18 (2010); a federal statute other than the Statute, *e.g., NTEU*, 66 FLRA 809, 814 (2012) (proposal contrary to the Privacy Act); an executive order, *e.g., NFFE, Local 1665*, 49 FLRA 874, 888-90 (1994); or a government-wide regulation, *e.g., AFGE, Local 1547*, 65 FLRA 911, 916-17 (2011) (*Local 1547*), *review denied sub nom., U.S. Dep’t of the Air Force v. FLRA*, 680 F.3d 826 (D.C. Cir. 2012). Further, as discussed in greater detail later in this Guide, agencies have no obligation to bargain over proposals that conflict with an agency regulation for which there is a “compelling need,” 5 U.S.C. § 7117(a)(2), so a negotiability dispute may involve a claim that a proposal is inconsistent with such a regulation, *e.g., NAGE, SEIU, Local R1-34*, 43 FLRA 1526, 1529-32 (1992).

Agencies often rely on § 7106 of the Statute to claim that a proposal or provision is nonnegotiable. *See, e.g., Local 5*, 67 FLRA at 86. Thus, some common examples of negotiability disputes include disagreements concerning whether a proposal or provision: (1) affects a management right under § 7106(a); (2) involves a permissive subject under § 7106(b)(1) of the Statute; (3) is a negotiable procedure under § 7106(b)(2); or (4) is a negotiable, appropriate arrangement under § 7106(b)(3). *See, e.g., AFGE, Local 723*, 66 FLRA 639, 643-46 (2012) (*Local 723*). Section 7106 is discussed at length later in this Guide.

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. *See NATCA, Local ZHU, 65 FLRA 738, 741 (2011) (Local ZHU)*. 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" – such as a claim that the proposal is "covered by" the parties' existing agreement (discussed further below) – the Authority will not resolve whether that proposal is within the duty to bargain. *See id.* Instead, the Authority will "dismiss" the petition as to that proposal. *See id.* at 745.

1.9 Bargaining-Obligation Disputes

A bargaining-obligation dispute involves a disagreement between a union and an agency concerning whether, in the specific circumstances of a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable. 5 C.F.R. § 2424.2(a). Bargaining-obligation disputes involve claims regarding whether the *Statute* requires bargaining – *not* claims regarding whether the parties' *agreement* requires bargaining. *E.g., NTEU, Chapter 82, 59 FLRA 627, 629 (2004)*. Examples of bargaining-obligation disputes include disagreements between a union and an agency concerning agency claims that: (1) a proposal concerns a matter that is "covered by" a collective-bargaining agreement; and (2) bargaining is not required over a change in bargaining-unit employees' conditions of employment because the effect of the change is "de minimis." *Id.* This Guide discusses those two examples in more detail further below.

If a negotiability proceeding involves both a negotiability dispute and a bargaining-obligation dispute, then the Authority may resolve both types of disputes in the proceeding. *See* 5 C.F.R. § 2424.30(b)(2). 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 an unfair-labor-practice (ULP) proceeding under § 7118(a)(7) of the *Statute*, such as a cease-and-desist order or an order to post a notice. *See id.* § 2424.40(a).

If a case involves *only* a bargaining-obligation dispute, then that dispute may *not* be resolved in a negotiability proceeding. *Id.* § 2424.2(d). So the Authority will dismiss a petition (or portion of a petition) if the petition (or portion) presents only a bargaining-obligation dispute. *Id.*; *see also Local ZHU, 65 FLRA at 741*. And any resolution of those disputes would need to occur in other proceedings, such as ULP or grievance proceedings. *Cf.* 5 C.F.R. § 2424.3(b)(2) (where bargaining-obligation dispute exists, Authority will inform union of any opportunity to file a ULP charge or grievance).

1.10 “Nonnegotiable”

The Authority used to use the term “nonnegotiable” to refer to both prohibited and permissive subjects of bargaining. *See Local 32*, 51 FLRA at 497 n.11. In *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.” *Id.* 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. In order to avoid wordiness, this Guide uses the term “nonnegotiable” to describe both proposals that are outside the duty to bargain and provisions that are contrary to law.

1.11 Allegation of Nonnegotiability

An allegation of nonnegotiability is an agency claim that a union’s proposal is not within the agency’s duty to bargain in good faith. *See* 5 C.F.R. §§ 2424.2(i). As discussed later in this Guide, 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. *See id.* § 2424.21(a).

1.12 Agency-Head Review/Disapproval

If a union and an agency reach, or the FSIP imposes, a written agreement, then that agreement must be reviewed by the agency head, who determines whether, in his or her opinion, the agreement is consistent with law. 5 U.S.C. § 7114(c). If the agency head determines that one or more of the provisions in the agreement is contrary to law, then he or she will issue a letter that disapproves the agreement. 5 C.F.R. § 2424.21(c). This letter is often called “the agency-head disapproval.” *E.g., NTEU*, 65 FLRA at 513. The agency head must issue this disapproval within thirty days of the date on which the local agency and the union execute the agreement. 5 U.S.C. § 7114(c). If he or she fails to do so, then the agreement takes effect and becomes binding on the parties, subject to the provisions of the Statute and “any other applicable law, rule, or regulation.” *Id.* § 7114(c)(3).

An agency-head’s authority to disapprove an agreement is narrower than a local- agency representative’s authority to declare a bargaining proposal outside the duty to bargain. *E.g., NTEU*, 65 FLRA at 512. Specifically, he or she may not disapprove agreements that are consistent with the Statute “and any other applicable law, rule, or regulation.” 5 U.S.C. § 7114(c)(2). Thus, the agency head may not disapprove agreements concerning permissive subjects. *E.g., NTEU*, 65 FLRA at 512. And, as discussed in greater detail later in this Guide, the agency head may not disapprove arrangements negotiated under § 7106(b)(3) of the Statute unless those arrangements “abrogate” a management right. *E.g., id.* at 511-15.

1.13 Union Petition for Review

A petition for review is an appeal that a union files with the Authority to request resolution of a negotiability dispute. 5 C.F.R. § 2424.2(d). As discussed further below, the union's petition for review initiates the negotiability process. *Id.* § 2424.22(a). The contents of, and procedural requirements involving, petitions for review are discussed in greater detail later in this Guide.

1.14 Post-Petition Conference

After the union files its petition for review, the Authority schedules a "post-petition conference" – normally, a telephone conference – with the union and agency representatives in the case. *Id.* § 2424.23. Parties are required to participate in post-petition conferences (or to designate someone to participate on their behalf), and to be knowledgeable about the dispute and have the authority to discuss and resolve matters. *Id.* § 2424.23(b). Post-petition conferences are discussed in greater detail later in this Guide.

1.15 Collaboration and Alternative Dispute Resolution (CADR) Office

The Authority's CADR office "assists parties in reaching agreements to resolve disputes." *Id.* § 2424.2(b). The CADR office engages in interest-based mediation and facilitation in an attempt to get parties to resolve their negotiability cases outside of the formal, litigative process. Participation in CADR is fully voluntary: The parties cannot be required to use it. *See id.* § 2424.10 (noting that CADR will assist the parties "as agreed upon by the parties"). However, CADR is often successful at getting parties to reach mutually agreeable resolution, so the Authority encourages parties to consider using CADR's services. CADR's role in the negotiability process is discussed in greater detail below.

1.16 Agency's Statement of Position

The agency's statement of position is a document that the agency files after the union files its petition, and typically after the post-petition conference. *Id.* § 2424.24. The statement of position is where the agency must explain why it believes a proposal is outside the duty to bargain or why a provision is contrary to law. *Id.* § 2424.24(a). The contents of, and procedural requirements involving, statements of position are discussed in greater detail later in this Guide.

1.17 Union's Response

The union's response is a document that the union may file after the agency files its statement of position. *Id.* § 2424.25(b). The response is where the union must set

forth any disagreements that it has with claims in the agency's statement of position. *Id.* §§ 2424.25(a) & 2424.25(c). The contents of, and procedural requirements involving, union responses are discussed in greater detail later in this Guide.

1.18 Agency's Reply

The agency's reply is a document that the agency may file after the union files its response. *Id.* § 2424.26. Although § 7117(c) of the Statute does not expressly provide for agency replies, 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. *NTEU*, 66 FLRA 892, 899 (2012). Thus, the reply is limited to responding to the arguments raised for the first time in the union's response; it 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. 5 C.F.R. § 2426(a); *see also id.* § 2424.26(c) (an agency "must limit" its reply to matters that the union raised for the "first time" in its response); *NTEU*, 66 FLRA at 899. The contents of, and procedural requirements involving, agency replies are discussed in greater detail later in this Guide.

1.19 Parties' Burdens (and Failure to Meet Burdens)

Each party in a negotiability case is responsible for creating a record and supporting its arguments. *See, e.g., id.* at 898-99; *AFGE, AFL-CIO, Local 53*, 42 FLRA 938, 958-59 (1991). The union has the burden of 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; and, if the union is requesting "severance" (discussed further below), why severance is appropriate. 5 C.F.R. § 2424.32(a). The agency has the burden of raising and supporting arguments that the proposal or provision is outside the duty to bargain or contrary to law, respectively, and, where applicable, why severance is not appropriate. *Id.* § 2424.32(b).

Failure to raise and support an argument will, where appropriate, be deemed a waiver of such argument. *Id.* § 2424.32(c); *e.g., AFGE, Local 1938*, 66 FLRA 1038, 1040 (2012) (*Local 1938*); *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 940-41 (2012) (*Local 506*). Therefore, where appropriate, a party's failure to respond to an argument or assertion raised by the other party will be deemed a concession to that argument or assertion. 5 C.F.R. § 2424.32(c)(ii)(2); *see also NATCA*, 66 FLRA 213, 216 (2011) (union's failure to dispute agency claim that proposal affected management right was a concession that the proposal had the alleged effect). Also consistent with this principle, if a party makes an argument but fails to support it, then the Authority may reject the argument as a "bare assertion." *E.g., NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 128 (2011) (*Local 1998*).

Absent good cause, arguments that could have been, but were not, raised by a union in its petition for review, or in its response to the agency's statement of position, may not be made at any other stage of the negotiability proceeding, or in "any other proceeding." 5 C.F.R. § 2424.32(c)(i). Similarly, absent good cause, arguments that could have been, but were not, raised by an agency in its statement of position, or in its reply to the union's response, may not be raised at any other stage of the negotiability proceeding, or in "any other proceeding." *Id.* § 2424.32(c)(ii).

1.20 Severance

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

Id. § 2424.2(h).

A union may request severance in its petition for review or in its response. *Id.* §§ 2424.22(c) & 2424.25(d). But regardless of when the union makes its request, it must explain how each severed portion of the proposal or provision may stand alone and how each severed portion would operate. *Id.* §§ 2424.22(c) & 2424.25(d). It must also meet the requirements for specific information set forth in § 2424.22(b) (for requests made in petitions), *see id.* § 2424.22(c), and § 2424.25(c) (for requests made in responses), *see id.* § 2424.25(d).

If a union has requested severance, and the agency opposes the union's request, then the agency must explain with specificity why it believes that severance is not appropriate. *Id.* §§ 2424.24(d), 2424.26(a) & 2424.26(d). If the agency's statement of position opposes severance, then the union's response must respond to the agency's arguments. *Id.* § 2424.25(d).

1.21 Hearing Requests and Other Factfinding Procedures

Under § 2424.31 of the Authority's Regulations, the Authority may engage in various factfinding procedures in a negotiability case, including: directing the parties to

provide specific documentary evidence, *id.* § 2424.31(a); directing the parties to provide answers to specific factual questions, *id.* § 2424.31(b); referring the matter to a hearing, *id.* § 2424.31(c); or taking “any other appropriate action,” *id.* § 2424.31(d). Either party may request a hearing, but the requesting party must give the reasons for its request. *Id.* §§ 2424.22(b)(4); 2424.24(c)(4). And the standard for granting a hearing request is high: The Authority will do so only “[w]hen necessary to resolve *disputed* issues of *material fact*.” *Id.* § 2424.31 (emphasis added); *see also, e.g., NAIL, Local 7*, 64 FLRA 1194, 1194 (2010); *AFGE, Local 2280, Iron Mountain, Mich.*, 57 FLRA 742, 742 n.1 (2002). Absent a hearing or other factfinding procedure, the Authority bases its decision on the documents in the record.

1.22 Other Avenues for Resolving Negotiability Issues

Section 7105(a)(2)(E) of the Statute authorizes the Authority to “resolve issues relating to the duty to bargain in good faith.” 5 U.S.C. § 7105(a)(2)(E). The Authority has held that, consistent with § 7105(a)(2)(E), only the Authority may resolve negotiability disputes that arise under § 7117(c). *E.g., U.S. DOD, Def. Logistics Agency, Def. Distrib. Depot, New Cumberland, Pa.*, 58 FLRA 750, 755 (2003).

Consistent with these principles, the Authority has held that the FSIP and interest arbitrators may not make negotiability determinations in order to resolve questions concerning the duty to bargain, unless the Authority previously has resolved “substantively identical” duty-to-bargain issues. *E.g., Commander, Carswell Air Force Base, Tex.*, 31 FLRA 620, 624; *AFGE, AFL-CIO, Dep’t of Educ. Council of AFGE Locals*, 42 FLRA 1351, 1353-55 (1991) (*AFGE Locals*). However, the Authority also has held that grievance arbitrators and the FLRA’s administrative-law judges may resolve negotiability issues in the course of resolving duty-to-bargain questions. *See NTEU*, 64 FLRA at 446-47 (involving alleged ULPs); *GSA*, 54 FLRA 1582, 1587-89 (1998) (involving alleged contractual-bargaining obligation). But their decisions must be consistent with the Statute and Authority precedent. *E.g., AFGE Locals*, 42 FLRA at 1353; *Louis A. Johnson Veterans Admin. Med. Ctr., Clarksburg, W. Va.*, 15 FLRA 347, 351 (1984).

§ 2 THE AUTHORITY PROCESS

2.1 Union Files Petition for Review

As stated previously, a union's petition for review initiates the negotiability process with the Authority. 5 C.F.R. § 2424.22(a). Only the union may file a petition; neither the agency nor any individual other than a union representative may file the petition. *Id.* § 2420.20.

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*

When a union puts forward a proposal for bargaining, and an agency responds *in writing* that it's outside the duty to bargain, the union may start the negotiability-appeals process by filing its petition with the Authority. *Id.* § 2424.11(a). As explained 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 an allegation" of nonnegotiability, 5 U.S.C. § 7117(c)(2), and the Authority may not extend or waive this time limit, 5 C.F.R. § 2429.23(d); *AFGE, Local 3407*, 41 FLRA 265, 270 (1991). 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. *AFGE, Local 3529*, 58 FLRA 151, 151-53 (2002) (*AFGE 3529*) (denying reconsideration of Authority order dismissing petition as untimely where it was filed more than fifteen days after union received agency's written allegation of nonnegotiability).

1. *Union requests a written allegation of nonnegotiability, and the agency responds*

If a union asks an agency, *in writing*, to provide the union with a *written* allegation of nonnegotiability, 5 C.F.R. § 2424.11(a), and the agency provides such a *written* allegation, *id.* § 2424.11(b), then the union *must* file its petition with the Authority within fifteen days after the date of service of the written allegation, *id.* § 2424.21(a). *See also* 63 Fed. Reg. 66,405-07 (1998) (stating Authority's intention, in revising negotiability regulations, to retain procedure of both requesting and providing allegations of nonnegotiability in writing). As discussed further below, in cases where a union requests a written allegation and the agency provides one, the union must

include with its petition: (1) a copy of the agency's written allegation; and (2) evidence that the union requested the allegation. Otherwise, the Authority will consider the petition premature – filed too early – and will dismiss it “without prejudice” to the union's right to refile at a later, appropriate time.

2. *Union requests an allegation of nonnegotiability, and the agency does not respond*

If a union asks an agency, *in writing*, to provide the union with a *written* allegation of nonnegotiability, *id.* § 2424.11(a), and the agency *does not respond* in writing within ten days of receipt of the union's request, then the union may do one of two things: (1) ignore the agency's silence and not file a petition; or (2) file a petition *at any time* after the ten-day period for the agency's written response has expired. *Id.* § 2424.21(b).

As discussed further below, if the union chooses to file a petition in these circumstances, then the union must include with its petition evidence that it requested a written allegation of nonnegotiability from the agency. Otherwise, the Authority will consider the petition premature, and will dismiss it without prejudice to the union's right to refile at a later, appropriate time. The Authority also will consider the petition premature, and dismiss it without prejudice, if the union submits evidence of its written request, but the request indicates that ten days have not yet passed since the date of that request. In that situation, if the ten-day period ends and the agency still has not responded, then the union may refile its petition at any time.

3. *Agency provides a written, unrequested allegation of nonnegotiability*

Where the union has not asked the agency to give it a written allegation of nonnegotiability, but the agency does so anyway, this is called an “an unsolicited (or unrequested)” allegation of nonnegotiability. 5 C.F.R. § 2424.11(c). Upon receiving such an unsolicited allegation, the union has two options.

The union's first option is to file its petition. *Id.*; *AFGE, Local 3928*, 66 FLRA 175, 175 (2011) (*Local 3928*). If it chooses this option, then it must file its petition (including a copy of the agency's written allegation) within fifteen days of receiving the allegation. If it fails to file within fifteen days, then the petition will be dismissed, with prejudice, as untimely. 5 C.F.R. §§ 2424.11(c), 2424.21(a); *Local 3928*, 66 FLRA at 175.

The union's second option is to ignore the unsolicited allegation, continue bargaining with the agency (if it so chooses), and later request, in writing, a written allegation of nonnegotiability from the agency. 5 C.F.R. § 2424.11(c); *Local 3928*, 66 FLRA at 175. If the union chooses this option, then the time limit for filing its petition depends on what the agency does. If the agency gives the union a written

allegation of nonnegotiability, then the union *must* file its petition (including a copy of the agency's written allegation) within fifteen days of receiving that allegation. 5 C.F.R. § 2424.21(a). But if the agency does not provide a written allegation within ten days of being served with the union's request, then, as discussed above, the union may file its petition *at any time* after the ten-day period expires. *Id.* § 2424.21(b).

Moreover, if an agency serves a union with an unsolicited allegation of nonnegotiability while the parties are before the FSIP, then the union has the same two options: (1) respond to the unsolicited allegation of nonnegotiability and timely file a petition (including a copy of the agency's written allegation) with the Authority; or (2) ignore the unsolicited allegation of nonnegotiability made before the Panel, make a written request for a written allegation of nonnegotiability from the agency, and timely file its petition with the Authority. *See, e.g., NFFE, Local 422*, 50 FLRA 121, 122 (1995); *AFGE, Nat'l Border Patrol Council & Nat'l INS Council*, 40 FLRA 521, 523-24 (1991), *rev'd on other grounds sub nom., AFGE, Nat'l Border Patrol Council & Nat'l INS Council v. U.S. DOJ, INS*, 975 F.2d 218 (5th Cir. 1992).

4. *Allegations of nonnegotiability must be in writing*

If the agency says only orally, and not in writing, that a proposal is outside the duty to bargain, then the union may not file a petition. But a union may trigger its ability to file a petition by asking the agency, in writing, for a written allegation of nonnegotiability. And, as set forth above, as long as the union gives the agency ten days to respond to its request before filing its petition, the petition will not be considered prematurely filed.

(b) *Filing a petition for review of provisions that have been disapproved on agency-head review*

As stated previously, if a union and an agency reach a written agreement, or the FSIP imposes one on them, then that agreement must be reviewed by the agency head. 5 U.S.C. § 7114(c). If the agency head timely disapproves the agreement within thirty days of the agreement's execution, *see id.*, then the union *must* file its petition for review with the Authority within fifteen days of service of the disapproval letter, 5 C.F.R. § 2424.21(a)(2). 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, absent a timely agency-head disapproval, the agreement automatically goes into effect, and there is no negotiability dispute that the Authority may address under § 7117 of the Statute. *See, e.g., AFGE, Local 1770*, 64 FLRA 953, 953 (2010); *AFGE, Local 1301*, 51 FLRA 1294, 1297 (1996).

(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), 5 C.F.R. § 2424.21(a)(1); or service of an agency head's disapproval (in provision cases), *id.* § 2424.21(a)(2). 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 tendered to the delivery service; transmitted by facsimile (fax), where fax equipment is available; or transmitted by email (where the receiving party has agreed to be served by email). *Id.* §§ 2429.27(d), 2429.27(b)(5), & 2429.26(b)(6). If the allegation or disapproval is served by mail or commercial delivery, then five days are added to the period for filing the petition. *Id.* § 2429.22. As noted above, the Authority may not extend or waive the time limit for filing a petition for review. *Id.* § 2429.23(d).

2.3 Format and Content of the Petition

A union may file its petition by using either: (1) an Authority form, available at www.flra.gov/authority_forms (or through the eFiling system on the FLRA's website); or (2) plain paper, and providing the same information that the Authority form requests. Although unions are not required to use the Authority form, its use is encouraged because it serves as a useful guide and reminds unions to provide all of the required information in their petitions. If a union fails to provide all of the required information, then the Authority may dismiss the petition.

As noted previously, you must include with your petition: (1) a copy of the Agency's written allegation of nonnegotiability, in cases where the Agency has provided one; and (2) evidence that you requested such an allegation, in cases that do not involve an unrequested allegation. And petitions must contain the following:

- The exact wording of the proposal(s) or provision(s) that has been declared nonnegotiable, and an explanation of the proposal's or the provision's meaning. *Id.* § 2424.22(b)(1). If there are any special terms that would not be familiar to people who don't work at the agency where the union represents employees, then the union must explain those terms. *Id.* The union is also required to explain how the proposal works and what impact it would have. *Id.*
- Any laws, regulations, or decisions that support the union's arguments. *Id.* § 2424.22(b)(2). Although the union is not required to provide copies of materials that are easily available to the Authority, it should provide

copies of materials that may not be easily available to the Authority, such as internal agency regulations, orders, or directives. *Id.*

- A statement as to whether the disputed wording is also involved in a ULP proceeding, a grievance, an impasse procedure, or another negotiability petition. *Id.* § 2424.22(b)(3).
- A statement as to whether the union is requesting a hearing before the Authority. *Id.* § 2424.22(b)(4).
- A statement as to whether the union is requesting severance of any proposal or provision, and, if so, a statement of the wording, meaning, and operation of the severed portions, *id.* § 2424.22(c) (although, as noted previously, the union may wait until its response to request severance, *e.g.*, *id.* § 2424.25(d)).
- The names, addresses, telephone numbers, and fax numbers of the union and agency representatives – both the agency’s principal bargaining representative and the agency head (or his or her designee). *See* FLRA Form 208, *Petition for Review of Negotiability Issues – Proposals*; FLRA Form 207, *Petition for Review of Negotiability Issues – Provisions*.
- 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). 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).

2.4 CADR and the Post-Petition Conference

Generally, after the union files its petition – and corrects any procedural deficiencies in the petition – a representative of the Authority’s CADR office will contact the parties to determine whether they are interested in resolving their dispute using interest-based mediation and facilitation. But parties also may call the CADR office at (202) 218-7969, or email the CADR office at CADRO@flra.gov. This process is voluntary for both parties. *Id.* § 2424.10. If both parties agree to use the CADR process, then the negotiability process will be held in abeyance, and any deadlines for filing additional documents in the formal negotiability process will be suspended. *See, e.g., AFGE, Council of Prison Locals 33*, 65 FLRA 142, 142 (2010) (*Locals 33*). If the parties do

not successfully resolve their dispute in the CADR process (or resolve only part of it), then the negotiability process resumes. *See, e.g., id.* (resolving remaining dispute that parties had not resolved through CADR process).

In addition, almost immediately after the petition is filed – assuming that there are no procedural deficiencies in the petition – the Authority schedules the post-petition conference, which is defined previously in this Guide. In this connection, the Authority will fax and mail to the parties a notice of the conference, which will set forth a specific date and time for the conference – usually within ten days after the Authority receives the union’s petition. 5 C.F.R. § 2424.23. Post-petition conferences are normally held by telephone, so the notice of the post-petition conference typically includes a toll-free number and instructions on how to make the call. The parties *must* participate in the conference. *Id.* § 2424.32(d). If a union fails to participate, then the Authority may, in its discretion, dismiss the union’s petition. *Id.* 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). *Id.*; *see also Fed. Educ. Ass’n, Stateside Region*, 56 FLRA 473, 473-74 (2000) (finding that, in the circumstances of the case, union’s failure to participate in post-petition conference not “so egregious as to warrant dismissal of the petition for review”).

If the designated union or agency representative is not available, then the union or agency should designate another person to participate in the conference. The Authority will reschedule conferences only on very rare occasions. But, on very rare occasions, a conference can be rescheduled. In those unusual circumstances where a change is needed, 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. *See id.* § 2429.23. The request may be submitted by fax to (202) 482-6657. *See id.* § 2429.24(g)(1). Absent extraordinary circumstances, the Authority will not consider requests to reschedule that are received fewer than five calendar days before the scheduled conference date. *Id.* § 2429.23. The party requesting the change must contact the other party and seek its position on the postponement, and must notify the Authority of that position. If the union and the agency agree about a postponement, then the written request should set forth alternate dates and times on which both parties are available. If the parties do not agree, then one side may still ask for a postponement. But the Authority may deny a request for a postponement, even if both sides agree, if there is not a good reason to postpone the conference. *Id.*

The purpose of the conference is to: (1) ensure that the parties have a common understanding of the meaning and impact of the proposal(s) or provision(s) at issue; (2) determine whether there are factual disputes concerning the proposal or provision; and (3) discuss other relevant matters. *See id.* § 2424.23(b). To those ends, the parties’ representatives to the conference must be prepared to discuss, clarify, and resolve matters including:

- The meaning of the proposal(s) or provision(s) in dispute;
- Any disputed factual issues;
- Negotiability-dispute objections and bargaining-obligation claims regarding the proposal(s) or provision(s);
- Whether the proposal(s) or provision(s) is, or has been, the subject of: (1) a ULP charge under part 2423 of the Authority's Regulations; (2) a grievance under the parties' negotiated grievance procedure; (3) an impasse procedure under part 2470 of the Authority's Regulations; or (4) any other proceeding; and
- Whether an extension of time for filing the agency's statement of position and any subsequent filings is requested.

Id.

The primary role of the Authority representative during the conference is to obtain facts regarding all of the above matters. The representative will also discuss whether the parties wish to receive assistance from the Authority's CADR office. (Even if the CADR office already has contacted the parties, and the parties have declined CADR's services, the Authority representative will likely ask them again, in order to ascertain whether they have changed their minds.) Additionally, the Authority representative also will facilitate the discussion between the parties and seek out areas of possible agreement – including ascertaining whether the wording of proposals or provisions may be modified to remove the agency's objection to the wording. *See, e.g., Local 3928*, 66 FLRA at 176. And although the Authority representative will discuss the agency's objections to the proposal or provision, the agency is not bound by those arguments and, instead, must raise any and all of its arguments in its statement of position, as discussed further below. 5 C.F.R. § 2424.24(a). Further, the written record of the post-petition conference (discussed below) will not contain the agency's objections to the proposal or provision.

Also please note that although the Authority representative may decide procedural issues and grant extensions of time, he or she may not agree to waive expired time limits. Instead, any request for a waiver of expired time limits must be submitted to the Authority in writing and 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. *Id.* § 2429.23(b).

After the conference, the Authority representative will prepare a written record of the conference, which the Authority will serve on the parties. *Id.* § 2424.23(c). This record becomes one of the official documents in the case.

2.5 Agency's Statement of Position

In most cases, the agency's statement of position is due after the post-petition conference has been held. *Id.* § 2424.24. An agency may file its statement of position by using either: (1) an Authority form, available at www.flra.gov/authority_forms (or through the eFiling system on the FLRA's website); or (2) 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. *Id.* § 2424.24(b).

In the statement, the agency must make all of its arguments as to why a proposal is outside the duty to bargain or why a provision is contrary to law. *Id.* § 2424.24(a). In addressing a proposal's or a provision's negotiability, the Authority generally will address only the arguments that the agency makes in its statement of position – not the claims that it made in its allegation of nonnegotiability, *cf. Prof'l Airways Sys. Specialists*, 61 FLRA 97, 98 (2005) (*PASS*) (agency required to make claims in statement of position), or the arguments that the agency made during the post-petition conference. In addition, if the agency disagrees with the union's statements as to the meaning or impact of a proposal or provision, then the agency must state its views as to the meaning or impact of the contract language. Further, if the agency disagrees with the union's request for severance, then it should give all the reasons for its position. 5 C.F.R. § 2424.24(d). As discussed previously, if the agency fails in its statement to respond to any of the claims in the union's petition, then the failure to respond may be deemed a concession to those claims. *Id.* § 2424.32(c)(2); *NAIL, Local 5*, 67 FLRA 85, 89 (2012).

Although agencies are not required to use the Authority forms, their use is encouraged because they serve as useful guides and remind agencies to provide all of the required information in their statements.

2.6 Union's Response

If the union wants to dispute any of the claims in the agency's statement of position, then the union must file a response within fifteen days of receiving the agency's statement. *Id.* § 2424.25. The union may file its response by using either: (1) an Authority form, available at www.flra.gov/authority_forms (or through the eFiling system on the FLRA's website); or (2) plain paper, and providing the same information that the Authority form requests. *Id.* § 2424.25(c). If the union fails to

respond to claims in the agency's statement, then the failure to respond may be deemed a concession to the agency's claims. *Id.* § 2424.32(c)(2); *see also Local 1938*, 66 FLRA at 1040. 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 should argue that the proposal or provision does not affect the cited rights, is a negotiable procedure under § 7106(b)(2), or is an appropriate arrangement under § 7106(b)(3); otherwise, the Union may be deemed to have conceded that the proposal or provision is nonnegotiable on management-rights grounds. *E.g., id.* Further, if the union has not already requested severance in its petition, or wishes to modify its existing request, then it may do so in its response. 5 C.F.R. § 2424.25(d).

Although unions are not required to use the Authority forms, their use is encouraged because they serve as useful guides and remind unions to provide all of the required information in their responses.

2.7 Agency's Reply

The agency may file a reply to the union's response within fifteen days after the agency receives a copy of the response. *Id.* § 2424.26. As noted previously, although § 7117(c) of the Statute does not expressly provide for agency replies, 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. *NTEU*, 66 FLRA at 899. So the agency's reply is limited to "any facts or arguments made for the first time" in the response. 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). For example, if the union's response argues 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. *Id.* § 2424.26(c)(1)(ii)-(iii). Or if the union requests severance for the first time in its response, or modifies a severance request from its petition, and the agency opposes the request, then the agency must explain with specificity why severance is not appropriate. *Id.* § 2424.26(d). But an 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. *Id.* § 2424.26(a); *see also id.* § 2424.26(c) (an agency "must limit" its reply to matters that the union raised for the "first time" in its response); *NTEU*, 66 FLRA at 899.

The agency may file its reply by using either: (1) an Authority form, available at www.flra.gov/authority_forms (or through the eFiling system on the FLRA's website); or (2) plain paper, and providing the same information that the Authority form requests. Although agencies are not required to use the Authority form, its use is encouraged because it serves as a useful guide and reminds agencies to provide all of the required information in their statements.

2.8 Other Filings

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 authorized to file under the Authority’s Regulations. But if either party makes a written request and shows “extraordinary circumstances” for filing a supplemental document other than those four filings, then the Authority may consider it. 5 C.F.R. § 2424.27. Parties are encouraged to actually submit the supplemental submission that it wishes the Authority to consider at the same time that it submits its written request to file the submission.

2.9 Where and How to File

All of the documents discussed above may be filed with the Authority: in person, *id.* § 2429.24(e); by commercial delivery, *id.*; by first-class mail, *id.*; by certified mail, *id.*, or electronically through the Authority’s eFiling system at www.flra.gov/eFiling, *id.* § 2429.24(f).

With the exception of documents that are filed electronically through the FLRA’s eFiling system, all documents filed with the Authority should be submitted to the Chief, Case Intake and Publication (CIP), Federal Labor Relations Authority, Docket Room, Suite 200, 1400 K Street NW., Washington, DC 20424-0001. *Id.* § 2429.24(a). CIP’s telephone number is (202) 218-7740, and it is open between 9 a.m. and 5 p.m. Eastern Time (E.T.), Monday through Friday (except federal holidays).

If you file documents by hand delivery, then you must present those documents in the Docket Room no later than 5 p.m. E.T., if you want the Authority to accept those documents for filing on that day. *Id.*

If you file documents electronically through the FLRA’s eFiling system, then you may file those documents on any calendar day – including Saturdays, Sundays, and federal legal holidays. *Id.* The Authority will consider those documents filed on a particular day if you file them at any time up until midnight E.T. on that day. *Id.* Please note that even though you *may* eFile documents on Saturdays, Sundays, and federal legal holidays, you are *not required* to do so. *Id.*

You may *not file any documents with the Authority by email.* *Id.* And you may *not* file petitions for review, statements of position, responses, and replies with the Authority by fax. *Id.* § 2429.24(g).

2.10 “Service” Required

The parties must deliver – or “serve” – a copy of everything they file with the Authority on each other’s principal bargaining representatives. *Id.* §§ 2424.2(g), 2424.22(d), 2424.24(e), 2424.25(e), 2424.26(e), 2429.27. In addition, unions also must serve the agency head (or his or her designee). *Id.* § 2424.2(g); *see also id.* §§ 2424.22(d), 2424.24(e), 2424.25(e), 2424.26(e). Failure to properly serve each other’s representatives will result in the Authority issuing deficiency orders, which will slow down the processing of the case.

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 e-mail service). *Id.* § 2429.27(b). Fax is *not* an acceptable method of service for petitions, statements of position, responses, or replies. *Id.* But it is an acceptable method of service for motions (for example, motions for extensions of time, requests to reschedule the post-petition conference(, where fax equipment is available. *Id.* §§ 2429.24(g), 2429.27.

2.11 Additional Procedural Requirements

In addition to the requirements discussed above, petitions for review, statements of position, responses, and replies must comply with, and parties should consult, the requirements set forth in:

- *Id.* § 2429.25 (must submit one original plus four copies of anything filed, with certain exceptions, such as eFiled documents);
- *Id.* § 2429.27 (must serve all counsel of record and submit signed statement of service or, for eFiled documents, certify in the Authority’s eFiling system that you have completed such service); and
- *Id.* § 2429.29 (must submit table of contents if document exceeds ten double-spaced pages, with the exception of fillable forms in the eFiling system).

2.12 Noncompliance with Procedural Requirements

If a party’s noncompliance with the Authority’s Regulations or requirements is minor or technical, then the Authority may provide a party an opportunity to correct the mistake. Some examples are: failure to serve the agency head or agency head’s designee; failure to set forth the exact wording of the disputed proposals or provisions; failure to provide a copy of the allegation of nonnegotiability; failure to indicate whether the disputed language is directly related to another proceeding; and failure to provide a statement of service.

But, as discussed previously, if a union fails to file its petition in a timely manner, then the Authority will dismiss the petition with prejudice. *E.g.*, *AFGE 3529*, 58 FLRA at 151-53. And if a union or an agency fails to respond at all to an Authority order, then that noncompliance may adversely affect the noncomplying party. *Id.* § 2424.32(d). In this regard, if a union doesn't comply, then the Authority may dismiss its petition; if an agency doesn't comply, then the Authority may order it to bargain over a disputed proposal or withdraw its disapproval of a disputed provision. *Id.*

2.13 Authority's Decision and Order

The Authority will issue a written decision that explains the specific reasons for its ruling. *Id.* § 2424.40(a). The decision will also include an order that varies depending on whether the case concerns proposals or provisions. *Id.*

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. *Id.* § 2424.40(b). In doing so, the Authority makes no judgments as to the proposal's merits. *E.g.*, *Local 5*, 67 FLRA at 92 at n.11. If the Authority finds that a proposal is bargainable only at an agency's election under § 7106(b)(1) of the Statute, then it will issue an order stating that the proposal is only electively negotiable. *Id.* If the Authority finds that there is no duty to bargain over a proposal, then it will dismiss the petition for review. *Id.*

In cases involving provisions, if the Authority finds either that a provision is not contrary to law or that it is bargainable at an agency's election under § 7106(b)(1) of the Statute, then it will order the agency head to rescind his or her disapproval of the provision. 5 C.F.R. § 2424.40(c). In doing so, the Authority makes no judgments as to the provision's merits. *E.g.*, *NTEU*, 66 FLRA at 813 n.11. If the Authority determines that a provision is contrary to law, then it will dismiss the petition for review.

2.14 After the Authority's Decision and Order

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

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

Second, a party could timely move for reconsideration of the Authority's order -- within ten days after service of that order. 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 United States court of appeals. 5 U.S.C. § 7123(a)(2). A party has sixty days to file such an appeal, beginning on the date on which the Authority's

order was issued. *Id.* 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.” *Id.* § 7123(c).

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. 5 C.F.R. § 2424.41. The union must report such failure within a reasonable period of time following expiration of the sixty-day appeal period under 5 U.S.C. § 7123(a), which begins on the date of issuance of the Authority order. *Id.* 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 United States court of appeals. *Id.*; *see also id.* § 7123(b).

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§ 3 BASES FOR DISMISSING PETITIONS

3.1 Introduction

There are numerous bases on which the Authority may dismiss a union's negotiability petition. We discuss the most common bases below.

3.2 Proposal or Provision Nonnegotiable

If the Authority finds that the proposals or provisions in a union's petition are nonnegotiable, then the Authority dismisses the petition. 5 C.F.R. § 2424.40(b). 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. *See, e.g., AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 819, 834 (2012) (*Prison Locals 33*).

3.3 Failure to Comply with Procedural Requirements

As discussed previously, if a union fails to file its petition in a timely manner, or fails to respond at all to an Authority order, then the Authority will dismiss its petition. 5 C.F.R. § 2424.32(d).

3.4 No Negotiability Dispute

Where only a negotiability dispute exists, the Authority will resolve the petition for review. *Id.* § 2424.30(b)(1). And where a petition raises both a bargaining-obligation dispute and a negotiability dispute, the Authority may resolve both disputes. *See id.* § 2424.30(b)(2). But where a petition for review involves *only* a bargaining-obligation dispute, that dispute *may not be resolved* in a negotiability proceeding. *Id.* § 2424.2(d). Please note that, as discussed earlier, 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. *E.g., Local ZHU*, 65 FLRA at 740-41.

3.5 Mootness

Section 2429.10 of the Authority's Regulations states that the Authority will not issue advisory opinions. *See* 5 C.F.R. § 2429.10. 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." *E.g., AFGE, Local 3937*, 66 FLRA 393, 393 (2011). Some examples of cases where the

Authority has found petitions to be moot have included circumstances in which: a union's 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, *e.g.*, *NTEU, Chapter 207*, 58 FLRA 409, 410 (2003); or the parties had reached a valid, binding agreement about the subject matter of the proposals within the petition, *e.g.*, *Int'l Org. of Masters, Mates & Pilots, Marine Div., Pan. Canal Pilots Branch*, 52 FLRA 251, 254 (1996).

In contrast, some examples of cases where the Authority has found petitions *not* to be moot have involved circumstances in which: a proposal did not refer to any particular event, or require any action to occur by a date that had already passed, *e.g.*, *Local 3928*, 66 FLRA at 176; or parties continued to have a legally cognizable interest in the outcome of the negotiability appeal because the proposal at issue could benefit employees prospectively, *e.g.*, *NAGE, Local R1-109*, 64 FLRA 132, 133 (2009) (*Local R1-109*).

Mootness is a threshold jurisdictional issue. *See AFGE, Council 238*, 64 FLRA 223, 225 (2009) (*Council 238*). The burden of demonstrating mootness is heavy and falls on the party urging mootness. *Id.*

3.6 Petition is "Directly Related" to ULP or Grievance

Except for proposals or provisions that are the subject of an agency's compelling-need claim under 5 U.S.C. § 7117(a)(2), where 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, the Authority will dismiss the petition for review. 5 C.F.R. § 2424.30(a). The dismissal will be without prejudice to the union's right to refile the petition for review after the ULP charge or grievance has been resolved administratively, including resolution pursuant to an arbitration award that has become final and binding. *Id.* The union may refile the petition no later than thirty days after 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. *Id.*; *see also, e.g., Council 238*, 64 FLRA at 224-26 (untimely petition for review dismissed with prejudice).

For examples of cases dealing with the "directly-related" issue, see: *Local 1938*, 66 FLRA at 1038-39 (grievance not directly related to petition for review); *NAGE, Local R5-168*, 56 FLRA 796, 797 (2000) (grievance concerned issue directly related to petition for review).

3.7 Proposal or Provision Barred By Previously Filed Petition

The Authority has held that where a petition seeks review of a proposal or provision that is not “substantively changed” from a proposal or provision that was in a petition that the union previously filed – and where the Authority did not dismiss the previous petition without prejudice to the union’s right to refile, *see, e.g.*, 5 C.F.R. § 2424.30(a) – “the effect of the [new] petition is to seek review of the previous allegation,” *NFFE, Local 422*, 50 FLRA 541, 542 (1995) (citations omitted). In that situation, the Authority will dismiss the new petition. *E.g., id.* 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. *E.g., Ass’n of Civilian Technicians, Inc., Heartland Chapter*, 56 FLRA 236, 237-38 (2000) (citations omitted).

§ 4 SUBSTANTIVE ISSUES

4.1 Introduction

As discussed earlier in this Guide, negotiability disputes can present a wide range of substantive issues, and agencies may 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 frequently raised or are more complex.

4.2 Conditions of Employment

As noted above, agencies are required to bargain only over bargaining-unit employees' "conditions of employment." 5 U.S.C. § 7102(2). Consistent with this principle, under the Statute, a matter is outside the duty to bargain unless it "directly affects" the conditions of employment of bargaining-unit employees. *Antilles Consol. Educ. Ass'n*, 22 FLRA 235, 236 (1986) (*Antilles*). "Conditions of employment" are defined as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." 5 U.S.C. § 7103(a)(14). However, § 7103(a)(14) excepts from the definition of "conditions of employment" matters: (1) relating to political activities prohibited under the Hatch Act, *id.* §§ 7321-7326; (2) relating to classification; or (3) "specifically provided for by [f]ederal statute." *Id.* § 7103(a)(14). With respect to the third exception, the Authority held, for example, that a proposal "requiring employees to be paid at the [General Schedule]-7 level" concerned a matter "specifically provided for by statute." *Fraternal Order of Police, Lodge #1F*, 57 FLRA 373, 383 (2001). 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. *Id.* 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." *Antilles Consol. Educ. Ass'n*, 56 FLRA 664, 665-66 (2000).

In deciding whether a proposal involves a condition of employment of bargaining-unit employees, the Authority considers two basic factors: (1) whether the matter pertains to bargaining-unit employees; and (2) whether there is a direct connection between the proposal and the work situation or employment relationship of bargaining-unit employees. *Antilles*, 22 FLRA at 236-37. As to the first factor, as discussed further below, a proposal that is principally focused on non-bargaining-unit positions or employees does not directly affect the work situation or employment relationship of bargaining-unit employees. *Id.* at 237. As to the second factor, the

record must establish a direct connection between the proposal and the work situation or employment relationship of bargaining-unit employees in order to involve a condition of employment within the meaning of the Statute. *Id.* at 238. For example, the Authority found that a proposal concerning the off-duty activities of employees did not concern the work situation or employment relationship of bargaining-unit employees. *Int'l Ass'n of Fire Fighters, AFL-CIO, CLC, Local F-116*, 7 FLRA 123, 123-25 (1981).

Moreover, Authority and judicial precedent differentiate among proposals concerning the working conditions of four groups of non-unit personnel: (1) employees in other bargaining units; (2) supervisory personnel; (3) non-supervisory employees not in any bargaining unit; and (4) non-employees. *U.S. Dep't of the Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA*, 952 F.2d 1434, 1442 (D.C. Cir. 1992) (*Cherry Point*); *AFGE, Local 2879, AFL-CIO*, 49 FLRA 1074, 1087 (1994) (*Local 2879*); *AFGE, Local 1923*, 44 FLRA 1405, 1416-17 (1992) (*Local 1923*).

Regarding the first group, the Authority has held that a proposal that *directly determines* conditions of employment of employees in other bargaining units is outside the duty to bargain. *See, e.g., Local 5*, 67 FLRA at 92; *NAGE, Local R1-109*, 61 FLRA 593, 597 (2006) (*NAGE*); *Local 2879*, 49 FLRA at 1089; *see also Cherry Point*, 952 F.2d at 1442-43. This is because permitting an agency to negotiate with one exclusive representative to regulate the conditions of employment for a unit represented by another union “would run afoul of the principle of exclusive representation.” *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, 65 FLRA 1052, 1054 (2010) (*Newport News*). For example, the Authority 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. *NAGE*, 61 FLRA at 597. 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. *See AFGE, Local 32 v. FLRA*, 110 F.3d 810, 814-15 (D.C. Cir. 1997); *Cherry Point*, 952 F.2d at 1441 & n.8. *Compare Newport News*, 65 FLRA at 1055 (unlawful provision “directly define[d]” the parking privileges of employees in another bargaining unit), *with AFSCME, Local 2910*, 53 FLRA 1334, 1338-39 (1998) (proposal requiring agency to grant unit members certain percentage of parking spaces negotiable because it “would not directly determine the allocation of parking spaces to non-unit employees”).

Concerning the second group, the Authority has held that proposals that directly implicate the conditions of employment of supervisors are outside the duty to bargain. *See, e.g., Local 32*, 51 FLRA at 513; *Local 2879*, 49 FLRA at 1088. But proposals that principally relate to the conditions of employment of unit employees are not removed from the mandatory scope of bargaining simply because they indirectly affect supervisors. *See, e.g., NATCA*, 66 FLRA 658, 660-61 (2012). Moreover, as stated earlier in this Guide, matters pertaining to managers’ and supervisors’ conditions of

employment are permissive subjects of bargaining. *NATCA, Rochester Local*, 56 FLRA 288, 291 (2000) (citing *AFGE, Local 33022*, 52 FLRA 677, 682 (1996) (*AFGE*)). Thus, an agency is fully empowered to bargain over, and to choose to agree to, a contract proposal that directly implicates the working conditions of its supervisors and managers. *AFGE*, 52 FLRA at 681-82. As with other permissive subjects, if an agency and a union reach such an agreement, and the agreement is otherwise consistent with law, then it cannot be disapproved on agency-head review, e.g., *NATCA*, 61 FLRA 336, 339 (2005), and it is enforceable in arbitration, e.g., *AFGE*, 52 FLRA at 682.

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 “vitaly affect” bargaining-unit employees’ conditions of employment. *Cherry Point*, 952 F.2d at 1442-43; *Local R-109*, 66 FLRA at 279, 281; *Local 32*, 51 FLRA at 502; *Local 2879*, 49 FLRA at 1087; *Local 1923*, 44 FLRA at 1417. “In determining whether or not a proposal vitaly 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.’” *NTEU, Chapter 83*, 64 FLRA 723, 727 (2010) (*Chapter 83*) (quoting *AFGE, Local 1827*, 58 FLRA 344, 348 (2003)). For example, the Authority held that a proposal prohibiting discrimination in the hiring process – which would directly affect non-employee applicants – was within the duty to bargain because it “relate[d] to unit employees’ significant and material interest in eliminating discrimination in the unit,” and, thus “vitaly affect[ed] the conditions of employment of unit employees.” *Local 1923*, 44 FLRA at 1420.

4.3 Management Rights

(a) Introduction and General Principles

Frequently, agencies 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. A proposal or provision may involve more than one management right, but if a party raises only one management right, then the Authority will address only that right. See, e.g., *Nat’l Ass’n of Agric. Emps., Branch 11*, 57 FLRA 424, 425-26 (2001) (in finding that proposal affected right to assign work, Authority distinguished *AFGE, Local 1940*, 37 FLRA 1058 (1990), which had addressed a different management right). Thus, the Authority decision should not be construed as addressing any other right.

There are management rights contained in both § 7106(a) and § 7106(b)(1) of the Statute. See, e.g., *Chapter 83*, 64 FLRA at 725-26. This Guide discusses those rights separately below.

(b) Section 7106(a)

Consistent with the principles regarding concession discussed 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. *E.g.*, *NATCA*, 66 FLRA at 216; *Nat'l Weather Serv. Employees Org.*, 63 FLRA 450, 452 (2009) (*NWSEO*). If the union does dispute the agency's claim, but 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). *E.g.*, *AFGE, Local 997*, 66 FLRA 499, 502 (2012).

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,” *e.g.*, *NWSEO*, 63 FLRA at 452, the rights under § 7106(a)(1) do not contain that limitation, *e.g.*, *Local 723*, 66 FLRA at 644. The meaning of “applicable laws” is discussed further below.

For all management rights, agencies retain not only the right to exercise them, but also the right *not* to exercise them. *E.g.*, *Prison Locals 33*, 66 FLRA at 822. And for all of these rights, there are exceptions, which are discussed further below. Consequently, a proposal or provision that affects a management right is not necessarily nonnegotiable; if it fits within an exception to a management right, then it is negotiable despite that effect. *E.g.*, *id.* at 822-23.

The § 7106(a) rights are as follows.

1. *Mission*

Management has the right “to determine the mission . . . of the agency.” 5 U.S.C. § 7106(a)(1). This right involves the right to determine what the agency's mission will or will not include. *E.g.*, *U.S. Dep't of Energy, Rocky Flat Field Office, Golden, Colo.*, 59 FLRA 159, 163 (2003). But it generally does not involve the right to determine how the agency's mission will be carried out. *Id.* Where, for example, part of an agency's mission is to provide services to the public, a proposal or provision establishing the hours that certain agency offices would be open to the public affects this right. *E.g.*, *U.S. DOD, Fort Bragg Dependents Sch., Fort Bragg, N.C.*, 49 FLRA 333, 349 (1994); *AFGE, Local 3231*, 22 FLRA 868, 869 (1986).

2. *Budget*

Management has the right “to determine the . . . budget . . . of the agency.” 5 U.S.C. § 7106(a)(1). A proposal or provision affects this right if: (1) the proposal or

provision prescribes either the particular programs to be included in the agency's budget, or the amount to be allocated in the budget; or (2) the agency "makes a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits." *E.g., U.S. DHS, U.S. CBP*, 61 FLRA 113, 116 (2005). But "an assertion that a proposal [or provision] would increase an agency's costs does not, by itself, establish" that the proposal or provision affects this management right. *E.g., Local 1998*, 66 FLRA at 125.

3. *Organization*

Management has the right "to determine the . . . organization . . . of the agency." 5 U.S.C. § 7106(a)(1). This right involves management's authority to determine the agency's administrative and functional structure, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties. *E.g., U.S. Dep't of Transp., FAA*, 63 FLRA 530, 532 (2009). For example, it includes the rights to determine how the agency will be divided into organizational entities such as sections, *U.S. Dep't of Transp., FAA*, 58 FLRA 175, 178 (2002); to determine the agency's grade-level structure, *e.g., U.S. DOD, Marine Corps Logistics Base*, 57 FLRA 275, 278 (2001); and to determine where, geographically, the agency will provide services or otherwise conduct its operations, *e.g., Ass'n of Civilian Technicians, N.Y. State Council*, 56 FLRA 444, 449 (2000). Although this right includes the right to determine where duty stations of positions will be maintained, *e.g., Local 3928*, 66 FLRA at 179, that an agency labels an employee's work location an "official duty station" is not, by itself, sufficient to demonstrate that this labeling involves an exercise of the right to determine the agency's organization, *e.g., U.S. Dep't of Educ., Wash., D.C.*, 61 FLRA 307, 310 (2005) (Chairman Cabaniss concurring). Instead, the agency must establish that the asserted duty station has "a direct and substantive relationship to the [a]gency's administrative or functional structure, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties." *E.g., id.*

4. *Number of Employees of the Agency*

Management has the right to determine the "number of employees . . . of the agency." 5 U.S.C. § 7106(a)(1). This right relates to "the number of employees actually employed by an agency." *E.g., U.S. DOD, Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 46 FLRA 298, 316 (1992) (*DMA St. Louis*). 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. *E.g., id.* 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 further below. *E.g., id.* at 316-17; *NFFE, Local 2148*, 53 FLRA 427, 431 (1997).

5. *Internal Security*

Management has the right to determine the “internal[-]security practices of the agency.” 5 U.S.C. § 7106(a)(1). The right to determine internal-security practices includes the authority to determine the policies and practices that are part of an agency’s plan to secure or safeguard its personnel, physical property, or operations against internal and external risks. *E.g., Local 506*, 66 FLRA at 931.

To demonstrate that a proposal or provision affects this right, an agency must both show a link, or reasonable connection, between its security objective and an agency policy or practice designed to implement that objective, and show that the proposal or provision conflicts with the policy or practice. *E.g., id.* As long as the agency shows the required link or reasonable connection, the Authority will not review the merits of the agency’s plan in the course of resolving a negotiability dispute. *E.g., id.* Thus, the Authority will not examine the extent to which the plan will actually facilitate the accomplishment of the agency’s security objectives. *E.g., AFGE, Local 1712*, 62 FLRA 15, 17 (2007) (*Local 1712*). Also, it is not necessary to show that the proposal or provision conflicts with or “defeats 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. *E.g., NTEU*, 62 FLRA 267, 270 (2007), *review granted in part on other grounds sub nom., NTEU v. FLRA*, 550 F.3d 1148 (D.C. Cir. 2008).

The Authority has found that agencies made the required showing 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, *e.g., AFGE, Nat’l Border Patrol Council*, 66 FLRA 96, 99 (2011); the implementation of agencies’ drug-testing programs, *Local 723*, 66 FLRA at 643-44; locked doors in the workplace, *e.g., AFGE, Local 2145*, 64 FLRA 231, 234 (2009); and the actions that management would take to ensure the security of their computer systems, *e.g., Local 1712*, 62 FLRA at 17.

Please note that the Authority has recognized that federal correctional facilities are different from other types of facilities and that, at a correctional facility, internal-security practices are “of paramount importance.” *E.g., Local 506*, 66 FLRA at 931.

6. *Hire*

Management has the right to “hire . . . employees in the agency.” 5 U.S.C. § 7106(a)(2)(A). The Authority has not specifically defined the right to hire, *NAGE, Local R5-184*, 52 FLRA 1024, 1026 n.5 (1997) (*Local R5-184*), but has found that it includes the right to decide whether to fill positions, *e.g., AFGE, Local 2755*, 62 FLRA 93, 94-95 (2007). So proposals or provisions requiring agencies to fill vacancies affect this right. *E.g., AFGE, Local 3354*, 54 FLRA 807, 812-13 (1998) (*Local 3354*).

7. *Assign Employees*

Management has the right to “assign . . . employees in the agency.” 5 U.S.C. § 7106(a)(2)(A). This right concerns the right to assign employees to positions. *E.g.*, *U.S. Dep’t of VA, St. Cloud VA Med. Ctr., St. Cloud, Mo.*, 62 FLRA 508, 510 (2008) (*VAMC St. Cloud*). It is involved not only in the initial hiring of an individual and assignment to a position, but also in post-hiring situations, *e.g.*, *U.S. DOJ, Fed. BOP, Fed. Corr. Inst.*, 56 FLRA 467, 469 (2000), such as reassignment of employees to different positions, and temporary assignments or details, *e.g.*, *Local 1547*, 65 FLRA at 913. It also includes the right to decide when an assignment should begin and end. *E.g.*, *AFGE, Local 12*, 61 FLRA 209, 218 (2005) (*Local 12*). 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. *E.g.*, *VAMC St. Cloud*, 62 FLRA at 510. 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. *E.g.*, *AFGE, Local 3584, Council of Prison Locals C-33*, 64 FLRA 316, 317 (2009).

8. *Direct Employees*

Management has the right to “direct . . . employees in the agency.” 5 U.S.C. § 7106(a)(2)(A). Management’s right to direct employees includes the right to supervise employees and to determine the quantity, quality, and timeliness of their work. *E.g.*, *NTEU*, 65 FLRA at 511. Thus, this right includes, among other things, the right to establish performance standards, *e.g.*, *NWSEO*, 63 FLRA at 453, to evaluate employees and hold them accountable under those standards, *NTEU*, 65 FLRA at 511, to select particular methods for supervising employees (such as by unannounced visits and spot-checking of their work), *e.g.*, *Local 1712*, 62 FLRA at 17, and to require employees to account for their duty time, *e.g.*, *AFGE, Council 224*, 60 FLRA 278, 279 (2004). But this right does *not* include the right to decide whether to reward performance that already has been evaluated. *E.g.*, *U.S. DHS, U.S. CBP*, 63 FLRA 505, 508 (2009) (*CBP*); *NAGE, Local R1-203*, 55 FLRA 1081, 1083 (1999) (*Local R1-203*).

9. *Layoff*

Management has the right to “layoff . . . employees in the agency.” 5 U.S.C. § 7106(a)(2)(A). This right includes, for example, the right to conduct a reduction in force (RIF) and to exercise discretion in determining which positions will be abolished and which will be retained. *E.g.*, *Local 1547*, 65 FLRA at 913; *AFGE, Local 1827*, 58 FLRA 344, 345 (2003) (*Local 1827*).

10. *Retain*

Management has the right to “retain employees in the agency.” 5 U.S.C. § 7106(a)(2)(A). This is the right to establish policies or practices that encourage or discourage employees from remaining employed by an agency. *Local 1827*, 58 FLRA at 346. The Authority has found that proposals and provisions affected this right where, for example, they required agencies to offer voluntary-separation-incentive pay (VSIP), *e.g.*, *Local 5*, 67 FLRA at 87, or required agencies to provide compensation that will encourage “special[-]rate” employees to remain employed with the agency, *e.g.*, *U.S. Dep’t of Commerce, PTO*, 60 FLRA 839, 841-42 (2005).

11. *Suspend*

Management has the right to “suspend . . . employees.” 5 U.S.C. § 7106(a)(2)(A).

12. *Remove*

Management has the right to “remove . . . employees.” 5 U.S.C. § 7106(a)(2)(A). The Authority has found that proposals and provisions affected this right where, for example, they: required an agency to sequentially separate particular classes of employees, *e.g.*, *AFGE, AFL-CIO, Local 1603*, 3 FLRA 3, 5-6 (1980); required an agency to vacate certain positions and make them available to certain categories of employees, *e.g.*, *Ass’n of Civilian Technicians, N.Y. State Council*, 11 FLRA 475, 482 (1983); required an agency, in a RIF, to first remove employees who were not union officials or stewards, *e.g.*, *Fed. Union of Scientists & Eng’rs, NAGE, Local R1-144*, 23 FLRA 804, 805-06 (1986); *AFGE, Local 2612, AFL-CIO*, 19 FLRA 1012, 1014 (1985); or precluded management from taking actions against an employee for a particular “offense,” including unacceptable performance, *e.g.*, *NTEU*, 53 FLRA 539, 579 (1997); *see also NFFE, Local 1214*, 40 FLRA 1181, 1200-01 (1991) (*Local 1214*).

13. *Reduce in grade or pay*

Management has the right to “reduce in grade or pay . . . employees.” 5 U.S.C. § 7106(a)(2)(A). 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, *e.g.*, *NTEU*, 53 FLRA at 579; 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, *Local 1214*, 40 FLRA at 1200-01.

14. *Discipline*

In addition to having the rights to suspend, remove, and reduce in grade or pay, management has the right to “take other disciplinary action against . . . employees.” 5 U.S.C. § 7106(a)(2)(A). This right includes the right to discipline employees for both performance-related and nonperformance-related conduct. *E.g., Locals 33*, 65 FLRA at 145. It also includes the rights to investigate, and determine appropriate investigative techniques, in connection with deciding whether discipline is justified, *e.g., AFSCME, Local 2830*, 60 FLRA 124, 127 (2004); the right to decide which evidence or information (including prior offenses) to use to decide to take, or to support, disciplinary actions, *e.g., NATCA*, 61 FLRA 341, 346 (2005); *NTEU, Chapter 243*, 49 FLRA 176, 202-03 (1994); and the right to determine what disciplinary penalty to impose, *e.g., POPA*, 53 FLRA 625, 679 (1997), including placing employees in a restricted-leave category, *e.g., NTEU*, 66 FLRA at 812.

15. *Assign Work*

Management has the right to “assign work.” 5 U.S.C. § 7106(a)(2)(B). This right encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *E.g., Prison Locals 33*, 66 FLRA at 823. It also includes the right to establish the qualifications and skills needed for positions and duties, and to judge whether particular employees meet those qualifications and skills. *E.g., PASS*, 61 FLRA at 99. Additionally, it includes the rights to: establish job requirements for various levels of performance, *e.g., AFGE, Local 225*, 56 FLRA 686, 687 (2000); determine the content of performance standards and elements, *e.g., NWSEO*, 63 FLRA at 453; supervise employees and determine the quantity, quality, and timeliness of their work, *e.g., NTEU*, 65 FLRA at 511; determine the particular measures of supervising employees’ work (*e.g.*, through unannounced spot checks), *e.g., Local 1712*, 62 FLRA at 17; enforce established performance standards, *e.g., NTEU*, 65 FLRA at 511; and evaluate employees and hold them accountable for their work, *e.g., id.*

A proposal or provision does not affect the right to assign work merely because it requires the agency to take some action. *E.g., NTEU*, 64 FLRA 443, 447 (2010). A proposal or provision requiring management to use seniority to select employees for assignments also does not affect the right, as long as management retains the right to determine that the eligible employees are equally qualified for the assignments. *E.g., AFGE, Local 1174*, 60 FLRA 785, 787 (2005). In addition, the right to assign work does not include the right to determine whether to reward performance, *e.g., CBP*, 63 FLRA at 508, including, for example, decisions as to whether to grant performance awards, *e.g., Local R1-203*, 55 FLRA at 1083, or to determine eligibility for “incentive pay bonus[es],” *e.g., FDIC*, 64 FLRA 79, 81 (2009).

16. *Contract Out*

Management has the right to “make determinations with respect to contracting out.” 5 U.S.C. § 7106(a)(2)(B). 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, *e.g.*, *Local 12*, 61 FLRA at 210; required an agency to delay contracting-out decisions, *e.g.*, *U.S. Dep’t of the Army, Corps of Eng’rs, Nw. Div. & Portland Dist.*, 60 FLRA 595, 597 (2005); or required an agency to conduct a cost study before contracting out, *e.g.*, *AFGE, Local 1345*, 48 FLRA 168, 204 (1993).

17. *Determine Personnel*

Management has the right to “determine the personnel by which agency operations shall be conducted.” 5 U.S.C. § 7106(a)(2)(B). This includes the right to determine the particular employees to whom work will be assigned. *E.g.*, *U.S. Dep’t of VA, Med. Ctr., Detroit, Mich.*, 61 FLRA 371, 373 (2005). So proposals and provisions that require an agency to assign particular duties to a particular individual affect this right. *E.g.*, *id.* at 373-74.

18. *Select*

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 . . .”

5 U.S.C. § 7106(a)(2)(C).

This “right to select” includes the right 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. *E.g.*, *NTEU*, 61 FLRA 618, 622 (2006).

The right to select also includes the right to fill positions by selecting candidates from any appropriate source without restriction. *E.g.*, *Ass’n of Civilian Technicians, Pa. State Council*, 54 FLRA 552, 558 (1998). So proposals and provisions that limit the sources from which management can select affect this right. *E.g.*, *Ass’n of Civilian Technicians, Treasure State Chapter #57*, 56 FLRA 1046, 1048 (2001) (requiring use of competitive procedures to fill vacant positions, except in certain circumstances); *NAGE, Local R4-45*, 54 FLRA 218, 225 (1998) (discussing proposals requiring management to fill vacancies from a single source). But a requirement that expands, rather than limits, an agency’s selection options does not affect this right. *E.g.*, *U.S. Dep’t of the Treasury, IRS, Wash., D.C.*, 61 FLRA 226, 229 (2005) (Member Armendariz dissenting).

19. Emergencies

Management has the right to “take whatever actions may be necessary to carry out the agency mission during emergencies.” 5 U.S.C. § 7106(a)(2)(D). This right includes the right to: (1) independently assess whether an emergency exists, and (2) decide what actions are needed to address the emergency. *E.g., U.S. Dep’t of VA, VA Reg’l Office, St. Petersburg, Fla.*, 58 FLRA 549, 551 (2003). Proposals and provisions that define what constitutes an “emergency” affect this right, without regard to the content of the definition. *E.g., Local 350*, 55 FLRA at 245. So do proposals and provisions that condition the exercise of management’s right to act on the declaration of an emergency by a particular individual. *E.g., Tidewater Va. Fed. Employees Metal Trades Council, AFL-CIO*, 31 FLRA 131, 132 (1988).

(c) Section 7106(b)

All of the rights set forth in § 7106(a) are “[s]ubject to” § 7106(b) of the Statute. 5 U.S.C. § 7106(a). Section 7106(b) provides that “[n]othing in [§ 7106] shall preclude any agency and any labor organization from negotiating” several types of matters. 5 U.S.C. § 7106(b). 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.” 5 U.S.C. § 7106(b)(1). In other words, those matters are permissive subjects of bargaining: Agencies may, but are not legally required to, bargain over them. *E.g., U.S. Dep’t of Transp., FAA, Alaskan Region*, 62 FLRA 90, 92 (2007) (*FAA Alaska*). Thus, as with other permissive subjects, agency heads may not disapprove agreement concerning such matters unless they are otherwise unlawful, *e.g., NTEU*, 65 FLRA at 512, and any such agreements are enforceable in arbitration, *e.g., FAA Alaska*, 62 FLRA at 92. And even if a proposal concerns a § 7106(b)(1) matter, it is within the duty to bargain if it also concerns a § 7106(b)(2) or § 7106(b)(3) matter. *E.g., U.S. GSA*, 62 FLRA 341, 343 (2008). A discussion of the individual portions of § 7106(b)(1) follows.

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

Section 7106(b)(1) provides that an agency may elect to negotiate on the “numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty.” 5 U.S.C. § 7106(b)(1). In determining whether a proposal or provision is within the scope of this portion of § 7106(b)(1), the

Authority assesses whether the proposal concerns: (1) the numbers, types, and grades; (2) of employees or positions; (3) assigned to any organizational subdivision, work project, or tour of duty. *E.g.*, *Local 723*, 66 FLRA at 645. 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. *E.g.*, *id.*; *Local R5-184*, 52 FLRA at 1030-31. 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 proposes to assign, concerns the "numbers" of employees or positions within the meaning of § 7106(b)(1). *E.g.*, *Nat'l Ass'n of Agric. Emps., Branch 11*, 57 FLRA 424, 426 (2001) (*Branch 11*). As noted previously, the § 7106(b)(1) right to determine the number of employees assigned to a particular organizational subdivision, work project, or tour of duty under 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 employed by the agency, *see DMA St. Louis*, 46 FLRA at 316-17.

Types. The Authority interprets "types" as referring to distinguishable classes, kinds, groups, or categories of employees or positions that are relevant to the establishment of staffing patterns. *E.g.*, *Local 723*, 66 FLRA at 645; *Local R5-184*, 52 FLRA at 1031. For example, the Authority has held that dental hygienists – who were in a separate classification series and are differentiated as a group or category based on a specialized line of work and qualifications requirements – were a type of employee or position. *Local R5-184*, 52 FLRA at 1031-32. And the Authority has found that where temporary employees were hired for a limited time to meet temporary employment needs, they were a "type" of employee because the characteristic of "limited tenure" identified them as a distinguishable class, kind, group, or category. *Id.* at 1034. The party claiming that a proposal or provision concerns "types" bears the burden of establishing a relationship between the claimed "type" and staffing patterns. *E.g.*, *Local 723*, 66 FLRA at 645; *Local R5-184*, 52 FLRA at 1031.

Grades. The Authority has not specifically defined "grades," but has found that cases involved the "grade level" of employees where, for example, they involved the level at which an employee or position was established within the General Schedule classification system. *E.g.*, *U.S. Dep't of HUD*, 65 FLRA 433, 435 (2011). 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). *E.g.*, *AFGE, Local 3529*, 55 FLRA 830, 832-33 (1999).

Organizational subdivision. The Authority has found that proposals and provisions that concern 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). *E.g.*, *NAGE, Local R14-23*, 54 FLRA 1302, 1306 (1998). Although proposals or provisions that merely establish organizational subdivisions do not affect management’s rights under § 7106(b)(1), proposals or provisions that prescribe the staffing of such organizational subdivisions do affect that right. *E.g.*, *AFGE, Local 1336*, 52 FLRA 794, 802 (1996).

Work project. The Authority has construed the term “work project” to mean a “particular job” or “task.” *E.g.*, *Fed. BOP, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 853 (1999) (*FCI Bastrop*) (quoting *AFGE, Local 3302*, 37 FLRA 350, 355 (1990)). For example, foremen’s duty to supervise inmates is a work project. *Id.* at 853-54.

Tour of duty. The Authority has defined the phrase “tour of duty” as 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. *E.g.*, *Branch 11*, 57 FLRA at 426.

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.” 5 U.S.C. § 7106(b)(1).

The Authority has defined the phrase “technology . . . of performing work” as “the technical method that will be used in accomplishing or furthering the performance of the [a]gency’s work.” *E.g.*, *NTEU*, 62 FLRA 321, 326 (2007) (quoting *AFSCME, AFL-CIO, Local 2477*, 7 FLRA 578, 582-83 (1982), *enforced sub nom., Library of Cong. v. FLRA*, 699 F.2d 1280 (D.C. Cir. 1983)). 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. *E.g.*, *AFGE, Local 3129, SSA Gen. Comm.*, 58 FLRA 273, 275 (2002). The Authority has found proposals to concern the technology of performing work where, for example, they required management to provide specific equipment to employees for their use in performing the agency’s work. *E.g.*, *Fraternal Order of Police, Lodge 1F (R.I.) Fed.*, 32 FLRA 944, 958-59 (1988).

The Authority has construed the term “method” to refer to the way in which an agency performs its work. *E.g.*, *Local 723*, 66 FLRA at 646. The Authority has construed the term “means” to refer 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. *E.g., id.* In essence, “methods” concern “how” an agency performs its work, and “means” concern “with what.” *Chapter 83*, 64 FLRA at 725.

If a proposal or provision concerns a method or means, then the Authority applies a two-part test to determine whether the proposal or provision affects management’s right to determine the methods or means of performing work. *E.g., Local 723*, 66 FLRA at 646. In this connection, it must be shown that: (1) there is a direct or integral relationship between the method or means the agency has chosen and the accomplishment of the agency’s mission; and (2) the proposal or provision would directly interfere with the mission-related purpose for which the method or means was adopted. *E.g., id.* The relative importance of a particular methods or means of performing work is irrelevant to a determination of whether a proposal or provision concerns the right to determine the methods and means of performing work. *E.g., AFGE, Local 1164*, 66 FLRA 112, 115 (2011). In this regard, the method or means need not be indispensable to the accomplishment of the agency’s mission; rather, it need only be a matter that is used to attain or make more likely the attainment of a desired end, or used by the agency to accomplish or further the performance of its work. *E.g., FCI Bastrop*, 55 FLRA at 854 (discussing means).

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. 5 U.S.C. § 7106(b)(2). These “procedures” are mandatory subjects of bargaining: Agencies must bargain over them, despite their effects on management rights under § 7106(a) or § 7106(b)(1). *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) (same)).

Consistent with the principles of concession discussed previously in this Guide, 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 negotiable procedure. *E.g., Local 5*, 67 FLRA at 91. If the agency does dispute the union’s claim, then the union must demonstrate that the proposal or provision is a procedure. *E.g., Local 723*, 66 FLRA at 644. To determine whether a particular proposal or provision is (or is not) a procedure, parties should research Authority precedent.

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

- Required advance notice of agency actions or specific events, *e.g.*, *Local 12*, 61 FLRA at 220;
- Prescribed how management would select employees for assignments, as long as management preserved the right to determine that the available employees were equally qualified, *e.g.*, *AFGE, Council 215*, 60 FLRA 461, 467 (2004); *U.S. Dep't of Transp., FAA*, 63 FLRA 502, 503 (2009); *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Gulf Coast, Pascagoula, Miss.*, 62 FLRA 328, 330 (2007); *SSA, Chi. N. Dist. Office*, 56 FLRA 274, 277 (2000);
- Required management to take certain actions, as long as the proposals or provisions did not specify the particular persons or positions who would take the actions, *e.g.*, *AFGE, Council 220*, 65 FLRA 726, 728 (2011) (*Council 220*); *NAIL*, 62 FLRA 1, 3 (2007); *NLRB, Wash., D.C.*, 61 FLRA 154, 161 (2005);
- Established advisory committees involving union participation that were outside, or were not an integral part of, management's decision-making process relating to the exercise of its rights under § 7106, *e.g.*, *NAIL*, 62 FLRA at 3;
- Required management to delay exercising its rights pending the completion of bargaining or applicable appellate processes, *e.g.*, *Antilles Consol. Educ. Ass'n*, 61 FLRA 327, 331-33 (2005) (Chairman Cabaniss dissenting in part) (*ACEA*);
- Established the procedures that management would observe in developing and implementing performance standards, *e.g.*, *Council 220*, 65 FLRA at 728-29; *POPA*, 47 FLRA 10, 65-66, 70-71 (1993);
- Set forth the procedures that management would use in announcing or filling vacancies, *e.g.*, *Local 3354*, 54 FLRA at 814-15;
- Required management to maintain, or show to employees, certain documentation, *e.g.*, *NTEU*, 47 FLRA 705, 718-20 (1993) (requiring agency to share documentation supporting performance appraisals and ratings); *POPA*, 48 FLRA 129, 154, 157-58 (1993) (requiring agency to maintain record of time employees spent doing certain work, and to provide union with detailed reports of certain employee errors);
- Required an agency to complete the disciplinary process in a timely manner, but did not prescribe the consequences for the agency's failure to do so (and did not

prevent the agency from acting on the underlying disciplinary matter), *e.g.*, *NFFE, Local 1438*, 47 FLRA 812, 816-18 (1993);

- Required management to evaluate employees' work products at the completion of each assignment, *e.g.*, *POPA*, 47 FLRA at 54;
- Established the procedures governing the imposition of drug tests on employees, if the procedures did not affect the agency's decision to require employees to undergo random or reasonable-suspicion drug tests, *e.g.*, *NTEU, Chapters 243 & 245*, 45 FLRA 270, 279-80 (1992);
- Required consistency between position descriptions and performance standards, if management retained discretion to amend the position descriptions, *e.g.*, *United Power Trades Org.*, 44 FLRA 1145, 1155-56 (1992); and
- Required an agency to refer a group of candidates from one source (for example, unit employees) to a selecting official for first consideration, but did not preclude the agency from concurrently soliciting, rating, and ranking applicants from another source, *e.g.*, *NTEU*, 43 FLRA 1279, 1287-88 (1992).

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

- Precluded agencies from exercising management rights unless or until other events (other than completion of bargaining or applicable appellate processes) occurred, *e.g.*, *ACEA*, 61 FLRA at 331-32;
- Delayed implementation of management actions that were "necessary for the functioning of the agenc[ies]," *e.g.*, *id.* at 332;
- Conditioned the exercise of management rights on the agreement of employees or a union, *e.g.*, *AFGE, Local 3529*, 57 FLRA 172, 175 (2001) (*Local 3529*);
- Required agencies to give advance notice of investigative interviews when the decisions not to do so were part of the agencies' investigative techniques, *e.g.*, *AFGE, Local 701, Council of Prison Locals 33*, 58 FLRA 128, 134 (2002);
- Prevented agencies from determining employee qualifications, *e.g.*, *Fed. Emps. Metal Trades Council*, 44 FLRA 683, 687-89 (1992);
- Prescribed or precluded assignments to particular individuals identified by name or title, *e.g.*, *Council 220*, 65 FLRA at 728-29;

- Required management to assign employees certain duties, at the employees' option, *e.g.*, *AFGE, Local 1020*, 47 FLRA 258, 263 (1993);
- Precluded management from assigning employees certain duties, *e.g.*, *U.S. DOD, Def. Contract Audit Agency, Cent. Region*, 47 FLRA 512, 520 (1993);
- Required management to reassign employees to sites designated by the employees, *e.g.*, *NLRB*, 60 FLRA 576, 579 (2005);
- Required agencies to use competitive procedures to fill vacancies where the requirements prevented management from considering other applicants or using any other appropriate source in actually filling such vacancies, *e.g.*, *U.S. DOD, Ala. Air Nat'l Guard, Montgomery, Ala.*, 58 FLRA 411, 413 (2003);
- Limited the evidence agencies could use to support disciplinary actions, *e.g.*, *Local 1827*, 58 FLRA at 352;
- Limited agencies' discretion to decide whether to restrict overtime assignments to unit employees, *e.g.*, *id.* at 353;
- Substantively limited management's right to determine the content of performance standards, *e.g.*, *AFGE, Local 1858*, 56 FLRA 1115, 1116 n.2 (2001);
- Prevented management from holding employees accountable for the performance of assigned work, *e.g.*, *Local 3529*, 57 FLRA at 179;
- Required agencies to fill positions, *e.g.*, *Local 3354*, 54 FLRA at 814-15;
- Prevented agencies from controlling which particular individuals would have access to their facilities, *e.g.*, *AFGE, AFL-CIO, Local 2782*, 49 FLRA 470, 474 (1994);
- Established restrictions on management action under § 7106 based on the results of studies, *e.g.*, *Local 1923*, 44 FLRA at 1437;
- Precluded management from using particular methods of monitoring employees' work performance, *NFFE, Local 1482*, 44 FLRA 637, 668-69 (1992);
- Precluded management from rating and ranking candidates until after a preliminary placement process for currently employed unit employees was completed, *e.g.*, *NTEU*, 43 FLRA at 1287; and

- Required management “ordinarily” to approve employees’ requests to receive and use advanced sick leave, *e.g.*, *NFFE, Local 405*, 42 FLRA 1112, 1127 (1991).

Please note that merely because a proposal or 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 still is negotiable if it is an appropriate arrangement under § 7106(b)(3), as discussed below.

5. Section 7106(b)(3) - Appropriate Arrangements

Section 7106(b)(3) of the Statute provides that nothing in § 7106 precludes agencies and unions from negotiating over “appropriate arrangements for employees adversely affected by the exercise of any authority under” § 7106. 5 U.S.C. § 7106(b)(3). 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). *E.g.*, *Local 506*, 66 FLRA at 940-41 (Authority assumed effect on right under § 7106(a) but found proposal within duty to bargain as appropriate arrangement); *POPA*, 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)).

To determine whether a proposal or provision is an appropriate arrangement under § 7106(b)(3), the Authority first determines whether the proposal or provision is intended to be an “arrangement” for employees adversely affected by the exercise of a management right. *E.g.*, *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*). Consistent with the principles of concession discussed previously in this Guide, 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 concedes that the proposal or provision is an arrangement. *E.g.*, *NTEU*, 66 FLRA at 812. But if an agency does dispute a union’s claim that a proposal or provision is an arrangement, then the union must demonstrate the following.

An arrangement must seek to mitigate adverse effects flowing from the exercise of a protected management right. *E.g.*, *Local 5*, 67 FLRA at 87. To establish that a proposal or provision is an arrangement, a union must identify the effects or reasonably foreseeable effects on employees that flow from the exercise of management’s rights and how those effects are adverse. *KANG*, 21 FLRA at 31. Proposals and provisions that address speculative or hypothetical concerns do not constitute arrangements. *E.g.*, *Local 5*, 67 FLRA at 87. The alleged arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management’s rights. *E.g.*, *id.* But the Authority has held that proposals and provisions intended to eliminate the possibility of an adverse effect may be appropriate

arrangements. *E.g., Prison Locals 33*, 66 FLRA at 822. 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. *E.g., id.*

If a proposal or provision is an arrangement, then the Authority determines whether it is appropriate. *E.g., KANG*, 21 FLRA at 31-33. The test that the Authority applies to determine whether an arrangement is appropriate depends on whether the case involves a proposal or a provision.

If the case involves a proposal, then the Authority applies an “excessive[-] interference” test. *E.g., NTEU*, 65 FLRA at 512. Specifically, the Authority weighs “the competing practical needs of employees and managers” to ascertain whether the benefit to employees flowing from the proposal outweighs the proposal’s burden on the exercise of the management right or rights involved. *KANG*, 21 FLRA at 31-32.

If the case involves a provision, however, then the Authority does not apply the excessive-interference test. *E.g., NTEU*, 65 FLRA at 511-15. Instead, the Authority assesses whether the arrangement “abrogates” – i.e., waives – the affected management right. *E.g., NTEU*, 66 FLRA at 812; *NTEU*, 65 FLRA at 513. In determining whether a provision abrogates a management right, the Authority assesses whether the provision “precludes” the agency from exercising the affected management right. *E.g., NTEU*, 66 FLRA at 812; *NTEU*, 65 FLRA at 515. If it does not, then the arrangement is appropriate, and the Authority will direct the agency head to rescind his or her disapproval of the provision. *E.g., NTEU*, 65 FLRA at 515, 519.

6. “Applicable Laws”

As discussed previously, agencies must exercise their management rights under § 7106(a)(2) – but not their rights under § 7106(a)(1) – in accordance with “applicable laws.” 5 U.S.C. § 7106(a)(2). Applicable laws include not only statutes, but also the United States Constitution, judicial decisions, executive orders, and regulations having the force and effect of law. *E.g., Fed. Prof’l Nurses Ass’n, Local 2707*, 43 FLRA 385, 390 (1991). 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. *E.g., AFGE, Local 1441*, 61 FLRA 201, 206 (2005). The Statute is *not* an “applicable law” within the meaning of § 7106(a)(2). *E.g., IRS v. FLRA*, 494 U.S. 922, 930 (1990).

Proposals or provisions that require agencies to exercise their § 7106(a)(2) rights in accordance with applicable laws are negotiable. *E.g., NWSEO*, 63 FLRA at 452. But

proposals or provisions that require agencies to exercise their § 7106(a)(1) rights in accordance with applicable laws are *not* negotiable. *E.g.*, *Local 723*, 66 FLRA at 644.

4.4 Agency Discretion and “Sole and Exclusive” Discretion

Generally, if a matter is within an agency’s discretion – and not outside the duty to bargain on some other ground, such as it being “covered by” an existing collective-bargaining agreement – then the agency must bargain over it. *E.g.*, *AFGE, Locals 3807 & 3824*, 55 FLRA 1, 4-5 (1998); *AFGE, Nat’l Border Patrol Council*, 51 FLRA 1308, 1335 (1996).

But where law or applicable regulation gives an agency “sole and exclusive discretion” over a matter, the Authority has found that it would be contrary to law to require that discretion to be exercised through collective bargaining. *E.g.*, *POPA*, 59 FLRA at 346, 351; *Ass’n of Civilian Technicians, Mile High Chapter*, 53 FLRA 1408, 1412 (1998) (*ACT*). In resolving an agency’s claim that a matter is not negotiable because the agency has sole and exclusive discretion, the Authority examines the plain wording and legislative history of the statute or regulation that the agency relies upon. *E.g.*, *U.S. Dep’t of the Interior, Bureau of Indian Affairs, Sw. Indian Polytechnic Inst., Albuquerque, N.M.*, 58 FLRA 246, 248-50 (2002) (*Indian Affairs*); *NAGE, Local R5-136*, 56 FLRA 346, 348-49 (2000); *ACT*, 53 FLRA at 1412-1416. When examining the plain wording of a law or regulation, the Authority has found that phrases such as “without regard to the provisions of other laws” and “notwithstanding any other provision of law” show that an agency has sole and exclusive discretion. *AFGE, Local 3295*, 47 FLRA 884, 895 (1993). But a law or regulation need not use any specific phrase or words in order to confer sole and exclusive discretion. *Indian Affairs*, 58 FLRA at 248; *see also Ass’n of Civilian Technicians, Tex. Lone Star Chapter 100*, 55 FLRA 1226, 1229 n.7, *reconsid. denied*, 56 FLRA 432 (2000), *pet. for review denied sub nom.*, *Ass’n of Civilian Technicians v. FLRA*, 250 F.3d 778 (D.C. Cir. 2001).

4.5 Agency Regulations – “Compelling Need”

Agencies may prescribe rules, regulations, and official declarations of policy that govern the resolution of matters within their particular agencies. *E.g.*, *U.S. Dep’t of the Army, Fort Campbell Dist., 3rd Region, Fort Campbell, Ky.*, 37 FLRA 186, 193-94 (1990). Generally, these agency regulations will not bar negotiations over proposals that conflict with the regulations. *See, e.g.*, 5 U.S.C. § 7117(c)(1); *AFGE, Local 3824*, 52 FLRA 332, 336 (1996) (*Local 3824*) (claim that proposal was contrary to agency regulation did not demonstrate that proposal was outside the duty to bargain).

But § 7117(a)(2) of the Statute provides, in pertinent part, that the duty to bargain “extend[s] to matters [that] are the subject of any agency rule or regulation . . . only if the Authority has determined under [§ 7117(b)] that no compelling need (as determined

under regulations prescribed by the Authority) exists for the rule or regulation.” 5 U.S.C. § 7117(a)(2). So an agency regulation will bar negotiations over a proposal if the agency can demonstrate a “compelling need” for the regulation under § 2424.11 of the Authority’s Regulations. *E.g., AFGE, Local 2139, Nat’l Council of Field Labor Locals*, 61 FLRA 654, 656 (2006).

In order to show that a proposal is outside the duty to bargain because it conflicts with an agency regulation for which there is a compelling need, an agency must:

- (1) identify a specific agency-wide or primary-national-subdivision-wide regulation;
- (2) show that there is a conflict between its regulation and the proposal; and
- (3) demonstrate that its regulation is supported by a compelling need with reference to the standards set forth in § 2424.50 of the Authority’s Regulations. *E.g., Local 5*, 67 FLRA at 89.

In turn, § 2424.50 of the Authority’s Regulations provides:

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

- (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of the 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.

5 C.F.R. § 2424.50.

If an agency alleges that a proposal is inconsistent with an agency 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. *E.g., AFGE, Local 1786*, 49 FLRA 534, 542 (1994); *FLRA v. Aberdeen Proving Ground, Dep’t of the Army*, 485 U.S. 409, 412-14 (1988).

4.6 Irrelevance of Prior Agreements and Existing Agency Requirements

The Authority has held that parties' prior agreement to a provision does not provide any basis for finding similar – or even identical – proposals negotiable. *See NTEU*, 61 FLRA 554, 557 (2006); *NATCA, Rochester Local*, 56 FLRA 288, 291-92 (2000) (*NATCA*) (citing *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Glass Co., Chemical Division*, 404 U.S. 157 (1971)). For example, prior bargaining over permissive subjects does not future bargaining over those subjects mandatory. *NATCA*, 56 FLRA at 291-92; *see also AFGE, Local 225*, 56 FLRA 686, 689 (2000). In addition, that an agency already follows a particular practice – for example, where that practice is embodied in an agency regulation – does not, by itself, make the practice negotiable. *E.g., Veterans Admin. Staff Nurses Council, Local 5032, WFNHP, AFT, AFL-CIO*, 29 FLRA 849, 861 (1987). But, as discussed above, agency regulations do not render proposals outside the duty to bargain unless there is a compelling need for those regulations. *E.g., Local 3824*, 52 FLRA at 336.

4.7 Common Bargaining-Obligation Disputes

As mentioned previously, when the Authority resolves negotiability disputes, the Authority may also resolve bargaining-obligation disputes. 5 C.F.R. § 2424.30(b)(2). Two common bargaining-obligation disputes are that the subject matter of a proposal is “covered by” a collective-bargaining agreement or that a union is attempting to bargain over changes in conditions of employment that are only “de minimis.” *Id.* § 2424.2(a)(1)-(2). We discuss these two examples in more detail here.

(a) “Covered By” Doctrine

Under the Authority's “covered by” doctrine, a party is not required to bargain over conditions of employment that already have been resolved by bargaining. *E.g., Local 1998*, 66 FLRA at 126. This doctrine applies to any collectively bargained agreement between the parties, including not only term agreements, *e.g., NATCA*, 66 FLRA at 216-17, but also other agreements such as memoranda of understanding, *e.g., Local R1-109*, 64 FLRA at 134. To assess whether a particular proposal is “covered by” the parties' agreement, the Authority applies a two-prong test. *Id.*

Under the first prong, the Authority examines whether the subject matter is expressly contained in the agreement. *E.g., NATCA*, 66 FLRA at 216. The Authority does not require an “exact congruence” between the matter proposed for bargaining and the text of the agreement. *Local 1998*, 66 FLRA at 126. If a reasonable reader would conclude that the provision settles the matter in dispute, then the matter is covered by the parties' agreement. *Id.* For example, the Authority has found that an agreement did not expressly contain the subject matter of a bargaining proposal where the agreement

concerned the same general range of matters as the proposal, but the proposal did not modify or conflict with the agreement's express terms. *E.g.*, *NATCA*, 66 FLRA at 216.

If the subject matter of the proposal is not expressly contained in the agreement, 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]." *Id.* (quoting *SSA*, 47 FLRA 1004, 1018 (1993)). In order to satisfy the second prong, a matter must be more than tangentially related to a contract provision. *Local 1998*, 66 FLRA at 126. 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 collective-bargaining agreement that the negotiations that resulted in that provision are presumed to have foreclosed further bargaining over the matter. *Id.*

A non-exhaustive list of Authority decisions finding matters to be covered by collective-bargaining agreements includes: *NATCA*, 66 FLRA at 218; *NATCA, AFL-CIO*, 62 FLRA at 178-79 (2007); *Prof'l Airways Sys. Specialists*, 56 FLRA 798, 803-05 (2000). A non-exhaustive list of Authority decisions finding matters *not* to be covered by collective-bargaining agreements includes: *NATCA*, 66 FLRA at 216-17; *Local 1998*, 66 FLRA at 126-27; *United Am. Nurses, D.C. Nurses Ass'n & United Am. Nurses, Local 203*, 64 FLRA 879, 882-83 (2010).

(b) "De Minimis" Doctrine

An agency is not required to bargain over a change that has only a "de minimis" effect on conditions of employment. *See, e.g.*, *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89 (2009) (*Davis-Monthan AFB*). When determining whether a change has only a de minimis effect, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining-unit employees' conditions of employment. *Id.* The number of employees affected by a change is not dispositive of whether the change is de minimis. *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) (*Kirtland AFB*).

For some examples of Authority decisions addressing this doctrine, see, for example: *Kirtland AFB*, 64 FLRA at 173-74; *Davis-Monthan AFB*, 64 FLRA at 89-90; *NLRB Union, NLRB Prof'l Ass'n*, 62 FLRA 397, 400 (2008); *Nat'l Weather Serv. Emps. Org., Branch 9-10*, 61 FLRA 779, 780 (2006); *U.S. Dep't of VA, Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 318 (2004); *U.S. DHS, Border & Transp. Sec. Directorate, U.S. CBP, Border Patrol, Tucson Sector, Tucson, Ariz.*, 60 FLRA 169, 175-76 (2004); *U.S. DHS, Border & Transp. Sec. Directorate, Bureau of CBP, Wash., D.C.*, 59 FLRA 728, 728-29 (2004); *SSA, Office of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646, 654-55 (2004), *pet. for review*

denied sub nom., Ass'n of Admin. Law Judges v. FLRA, 397 F.3d 957 (D.C. Cir. 2005); *POPA*, 21 FLRA 580, 585-86 (1986).

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AFTERWORD

We hope that this Guide has proved helpful. Though it is not an official interpretation of the Statute or the Authority'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 Authority's web site, at www.fra.gov, to access even more information and guidance, including the wording of the Statute and the Authority's Regulations, as well as the Authority's published decisions.

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