

# Federal Labor Relations Authority

## 5 U.S.C. § 7106(b)(1) Case Outline

### I. Terminology Defined

- a. Section 7106(b)(1) of the Federal Service Labor-Management Relations Statute (the Statute):
  - i. “Nothing in this section shall preclude any agency and any labor organization from negotiating . . . at the election of the agency, on the **numbers, types, and grades** of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the **technology, methods, and means of performing work[.]**” 5 U.S.C. § 7106(b)(1) (emphasis added).
- b. “Types”
  - i. In construing § 7106(b)(1), 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.” *NAGE, Local R5-184*, 52 FLRA 1024, 1031 (1997) (Member Armendariz dissenting in part).
- c. “Technology”
  - i. The Authority has defined the “technology . . . of performing work” as the technical method that will be used in accomplishing or furthering the performance of the agency’s work. *See NTEU*, 62 FLRA 321, 326 (2007) (Chairman Cabaniss dissenting).
- d. “Method”
  - i. The Authority construes the term “method” to refer to the way in which an agency performs its work. *See GSA*, 54 FLRA 1582, 1589-90 & n.6 (1998) (legislative history of the Statute indicates that the term “method” was intended to mean “how” the work is performed).
    1. *See Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 854 (1999) (Chair Segal concurring) (the decision for foreman to account for inmates outside, next to the metal detector, rather than inside at their work stations, concerns the “method” by which the agency’s work will be carried out).

e. “Means”

- i. The term “means” refers to any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work. *See GSA, 54 FLRA 1582, 1589-90 & n.6 (1998)* (legislative history of the Statute indicates that the term “means” was intended to mean “with what” work is performed).
  1. *See NTEU, Chapter 26, 22 FLRA 314, 319 (1986)* (the choice of the mode of transportation to be used for accomplishing an agency’s mission is a decision as to the “means” to be used for its accomplishment). *See also AFGE, Local 3807, 54 FLRA 642, 652 (1998)*.

II. Framework for Resolving Negotiability Disputes under § 7106(a) and (b):

- a. Where a union disputes an agency’s assertion that a proposal affects management’s rights under § 7106(a) and/or claims that the proposal is within the duty to bargain under § 7106(b)(2) and/or (3), as well as being electively negotiable under § 7106(b)(1):
  - i. The Authority will first address whether the proposal affects a § 7106(a) right. If it does not, the Authority will direct the parties to bargain over that proposal.
  - ii. If the proposal affects a § 7106(a) right, the Authority will next determine whether the proposal constitutes a procedure or appropriate arrangement within the meaning of § 7106(b)(2) or (3) respectively. If the proposal is negotiable pursuant to § 7106(b)(2) or (3), the Authority will direct the parties to bargain over that proposal.
  - iii. If the proposal affects a § 7106(a) right, but is not a procedure or an appropriate arrangement, and the union has argued that it concerns matters encompassed within § 7106(b)(1), the Authority will address whether the proposal is electively negotiable pursuant to that section.
    1. *See AFGE, Local 3354, 54 FLRA 807, 811-12 (1998); AFGE HUD Council of Locals 222 Local 2910, 54 FLRA 171, 178 (1998)*. *See, e.g., Marine Eng’rs Beneficial Ass’n, Dist. No. 1 - PCD, 60 FLRA 828, 830-32 (2005)*.

- b. Where an agency argues that a proposal is outside the duty to bargain because it is permissively negotiable under § 7106(b)(1), and the agency does not argue that the proposal affects a management right under § 7106(a):
  - i. The Authority will first address whether the proposal affects a § 7106(b)(1) right. If it does not, the Authority will direct the parties to bargain over that proposal.
  - ii. If the proposal affects a § 7106(b)(1) right, and the union argues that the proposal constitutes a procedure or appropriate arrangement within the meaning of § 7106(b)(2) or (3) respectively, the Authority will next determine whether the proposal is negotiable pursuant to those sections. If the proposal is negotiable pursuant to § 7106(b)(2) or (3), the Authority will direct the parties to bargain over that proposal. If the proposal is not a procedure or appropriate arrangement within the meaning of § 7106(b)(2) or (3), the Authority will find that the proposal is negotiable at the election of the agency, pursuant to § 7106(b)(1).
    - 1. *See, e.g., AFGE, Local 1501*, 64 FLRA 802, 803-06 (2010).

III. The Authority has interpreted “numbers, types, and grades” in § 7106(b)(1) to include:

- a. The establishment of staffing patterns, or the allocation of staff, for the purpose of an agency’s organization and the accomplishment of the agency’s work.  
*See AFGE, Local 3354*, 54 FLRA 807, 816 (1998).
  - i. *See AFGE, Local 3807*, 54 FLRA 642, 650-51 (1998) (proposal requiring agency to employ two pilots at two locations, rather than consolidating those positions, would “effectively require bilateral agreement concerning the allocation of some of the [a]gency’s staff” and concerned the numbers, types, and grades of employees assigned to a tour of duty).
- b. The numbers of employees and positions assigned to an organizational subdivision and the determination as to whether, and which, vacant positions assigned to an organizational subdivision will be filled.
  - i. *See AFGE, Local 3354*, 54 FLRA 807, 816 (1998) (“A proposal requiring an agency to fill an existing vacant position at an organizational subdivision concerns the number of employees assigned to that organizational subdivision, within the meaning of [§] 7106(b)(1)[.]”)

- ii. *But see AFGE, Local 1336*, 52 FLRA 794, 802 (1996) (Member Armendariz concurring) (proposal concerning establishment of a new organizational entity “[did] not equate to the staffing of that entity” and consequently did not concern numbers, types of grades of employees or positions assigned to the organizational subdivision established).
  - c. The numbers, types and grades of employees assigned to tours of duty. *See Fraternal Order of Police, Lodge 1F (R.I.) Fed.*, 32 FLRA 944, 959 (1988).
  - d. The numbers, types and grades of employees assigned to a work project, including temporary employees. *See NAGE, Local R5-184*, 52 FLRA 1024, 1034 (1997).
  - e. The number of employees or positions assigned to an organizational subdivision, work project or tour of duty “regardless of whether the proposal would increase, decrease or maintain the number that the agency proposes to assign or has assigned.” *See NAGE Local R5-184*, 52 FLRA at 1034-35.
- IV. Proposals the Authority has found *do* concern the “technology, methods, and means of performing work” include:
- a. Proposals concerning the requirement that employees wear a prescribed uniform while performing work.
    - i. *See AFGE, Local 1501*, 64 FLRA 802, 804 (2010) (where an agency requires dual-status technicians to wear the military uniform “‘to foster military discipline, promote uniformity, encourage *esprit de corps*, increase the readiness of the military forces for early deployment and enhance identification of the [agency] as a military organization[,]’ the Authority has held that ‘the type of uniform, i.e., a military uniform, is critical to achieving the purpose for which the [a]gency has adopted the uniform requirement’”) (quoting *NAGE, SEIU, AFL-CIO*, 23 FLRA 730, 732 (1986)).
      - 1. *But see NTEU*, 61 FLRA 48, 52 (2005) (Member Armendariz dissenting) (where agency did not explain how prohibiting officers from wearing shorts related to how work was done, proposal concerning uniform requirement did not involve the methods and means of performing work).

- b. Proposals requiring agency to provide a secure storage area for agency-issued property.
  - i. *See AFGE, Local 1917*, 4 FLRA 150, 154 (1980) (“insofar as the disputed proposal is intended to require the [agency] to provide a secure storage area for the official weapons which unit employees are authorized to wear in the performance of their duties, it concerns the ‘technology . . . of performing work’ within the meaning of section 7106(b)(1) of the Statute”).
  - ii. *But see NTEU*, 62 FLRA 321, 326 (2004) (Chairman Cabaniss dissenting) (where agency had already exercised its discretion under § 7106(b)(1) to require a lockbox or a secure alternative for employee storage of their agency-authorized firearms while on-duty, proposal concerning use of these secured storage facilities during off duty hours “merely involve[d] bargaining over the implementation of the [a]gency’s choice of a particular technology, method, or means”).
- c. Proposals concerning workspace design that an agency uses in accomplishing its mission.
  - i. *See AFGE, Local 1812*, 59 FLRA 447, 450 (2003) (Chairman Cabaniss concurring) (where agency demonstrated that its use of low partitions between cubicles “facilitate[d] the supervision of, and the rapid communication required by, its news broadcast operations[,]” proposal regarding partition height concerned the methods and means of performing work).
- d. Proposals concerning the forms, documents, or electronic systems that an agency uses in accomplishing its mission.
  - i. *See AFGE, Local 3529*, 57 FLRA 172, 175-76 (2001) (Member Wasserman dissenting in part) (where agency required the use of software to facilitate its mission of performing audits, proposal making use of software optional concerned methods and means of performing work).

- e. Proposals concerning the introduction of new technologies that will assist the agency in fulfilling its mission more efficiently.
    - i. *See AFGE, Local 3129 SSA Gen. Comm.*, 58 FLRA 273, 275 (2002) (Chairman Cabaniss concurring) (where agency implemented pilot e-mail program at a central location to fulfill its mission of responding to public inquiries more efficiently, proposal requiring that the program also be distributed among field offices concerned technology of performing work).
    - ii. *See AFGE, Local 644*, 40 FLRA 831, 835-36 (1991) (where agency had determined that beepers would further the performance of the agency's mission by enhancing response time, proposal making beeper use voluntary affected the methods and means of performing work).
  - f. Proposals requiring management to provide specific equipment to employees for their use in performing the agency's work.
    - i. *See AFGE, Nat'l Border Patrol Council, Local 2544*, 46 FLRA 930, 959 (1992), *motion to vacate denied, AFGE, Nat'l Border Patrol Council, Local 2544*, 49 FLRA 545 (1994) (proposal requiring agency to provide "specific types of telephone lines to employees for use in performing the work of their positions" affects management's rights to determine the technology and means of performing work under section 7106(b)(1) of the Statute).
    - ii. *See Fraternal Order of Police, Lodge 1F (R.I.) Fed.*, 32 FLRA 944, 958 (1988) (proposal requiring agency to provide radios – a particular type of communications technology – for use in agency work affected management's right to determine technology).
- V. Proposals the Authority has found do *not* concern the "technology, methods, and means of performing work" include:
- a. Proposals concerning performance standards, evaluations and rating levels.
    - i. *See AFGE, Council of GSA Locals Council 236*, 55 FLRA 449, 452 (1999) ("Proposals concerning the number and designation of rating levels do not concern how any agency performs its work or what an agency uses

to accomplish its work. Rather such proposals concern how an agency evaluates the manner in which its employees perform the work to which they have been assigned.”)

- ii. *See U.S. EPA, Chi., Ill.*, 62 FLRA 350, 352 (2008) (provision concerning the number of tiers of a performance evaluation system is not a method or means of performing work under § 7106(b)(1)).
  - iii. *See AFGE, Local 3529*, 57 FLRA 172, 177-78 (2001) (Member Wasserman concurring in part, dissenting in part) (proposal precluding agency from lowering an employee’s performance evaluation due to his or her decision not to use official software in performing audits did not concern methods or means of performing work).
- b. Proposals concerning storage of personal property.
- i. *See NFFE, Local 2050*, 35 FLRA 706, 715 (1990) (proposal “solely address[ing] security for employees’ personal property, and ha[ving] nothing to do with safeguarding agency property” did not concern technology, methods or means of performing work).
- c. Proposals concerning use of telephone during official time.
- i. *See AFGE, Council 214*, 31 FLRA 1259, 1261 (1988) (“[t]elephone use by union officials in conducting labor-management relations activities under the Statute is distinguishable from telephone use by employees in performing the official duties of their positions”).
- d. Proposals concerning contracting out.
- i. *See GSA*, 54 FLRA 1582, 1590 (1998) (“[P]roposals concerning contracting out do not relate to the way in which an agency performs its work or the tools or devices that may be used in accomplishing it. Rather, such proposals relate to an agency’s decision-making process concerning by whom the work is best performed[.]”).
- e. Proposals concerning the assignment of duties to particular employees.
- i. *See AFGE, Local 1985*, 55 FLRA 1145, 1148 (1999) (proposals involving “who will perform work, not the way in which the work is performed” are not electively negotiable under § 7106(b)(1)).

- f. Proposals concerning the location at which work will be performed.
  - i. *See PASS*, 56 FLRA 798, 803 (2000) (proposal “relat[ing] only to the location at which . . . work will be performed, and in no way concern[ing] the way in which . . . work will be performed, or with what tools and devices” does not concern a method or means of performing work).
  
- g. Proposals concerning access restrictions.
  - i. *See NFFE, Local 1482*, 44 FLRA 637, 647 (1992) (proposal “only concern[ing] the control and restriction of access by unauthorized employees to personal and classified information contained in [the system]” did not preclude the agency from using the system to carry out its mission, and, therefore did not affect right to determine the technology, methods and means of performing work).
  
  - ii. *See AFGE, Nat’l Veterans Admin. Council*, 40 FLRA 1052, 1066 (1991) (proposal restricting use of outdoor smoking shelters to employees only did not affect agency’s ability to carry out its smoke-free mission).