



# Federal Labor Relations Authority

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***BARGAINING OVER  
5 U.S.C. §7106(B)(1)  
MATTERS***

# Two Types of Disputes

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- “Bargaining obligation dispute” (5 C.F.R. 2424.2(a)) = whether parties have to bargain in the particular circumstances. Examples:
  - “Covered by” the contract
  - Wrong representative
- “Negotiability dispute” (5 C.F.R. 2424.2(c)) = dispute over the legality of proposed contract language. Examples:
  - Contrary to law
  - Violates management rights

# 3 Subjects of Bargaining

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- **Mandatory**
  - Those an agency must bargain over
- **Permissive**
  - Those an agency may, but are not required to bargain over
- **Other**
  - Those that an agency cannot bargain over

# The substantive scope of bargaining

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- **Part I:**
  - “Conditions of employment” (broad)
- **Part II:**
  - Limited by exceptions to conditions of employment
  - Limited by management rights, law, rule and regulation
- **Part III:**
  - Expanded by exceptions to management rights

# It's Like Math

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## Conditions of Employment

- exceptions to conditions of employment
- matters inconsistent with law, rule, and regulation
- management rights
- + exceptions to management rights

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**Mandatory Subjects of Bargaining**

# “Conditions of Employment”

5 U.S.C. 7103(a)(14)

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- **Broad: “Personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions”**
- **Ask:**
  - (1) **Does it concern bargaining unit employees?**  
**and**
  - (2) **Does it directly affect their work situation or employment relationship?**

# Exceptions to Conditions of Employment

5 U.S.C. 7103(a)(14)

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- Hatch Act political activity (5 U.S.C. 7321 et. seq.)
- Classification matters
- Matters “specifically provided for by Federal statute”

# “Specifically Provided For” 5 U.S.C. 7103(a)(14)(C)

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- Reference to a matter is not enough
- Agency has no discretion
- Examples:
  - wage rates paid to GS employees. *See, e.g., Fraternal Order of Police Lodge #1F, 57 FLRA 373, 382-82 (2001) (Proposal 8)* (proposal requiring agency to pay employees at GS-7 level excluded from conditions of employment by § 7103(a)(14)(B)).



# Inconsistent With Law -- 5 U.S.C. 7117(a)

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- If bargaining over it would be inconsistent with law, cannot bargain
- Agency has no obligation to bargain where law gives it “sole & exclusive” discretion

# Inconsistent with an agency regulation

5 U.S.C. 7117(a)(2)

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- The duty to bargain extends to agency regulations unless there is a compelling need for the regulation
  - Compelling need criteria (5 C.F.R. 2424.50)
    - ✦ Essential, not just helpful or desirable, to accomplishment of the agency's mission or execution of its functions in a manner that is consistent with the requirements of an effective and efficient government
    - ✦ Necessary to ensure maintenance of basic merit principles
    - ✦ Implements an essentially nondiscretionary mandate to agency, under law or other outside authority

# Management Rights -- 5 U.S.C. 7106(a)

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5 U.S.C. § 7106(a) provides that nothing in the Statute, including the right to bargain, shall affect an agency's right:

- (1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency;
- (2) in accordance with applicable laws—
  - (A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
  - (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
  - (C) with respect to filing positions, to make selections for appointments from—
    - (i) among properly ranked and certified candidates for promotion; or
    - (ii) any other appropriate source; and
  - (D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

# Exceptions to Management Rights

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- 5 U.S.C. § 7106(b)(1):
  - Numbers, types and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty
  - Technology, methods, and means of performing work
- Permissive (an agency may, but is not required to bargain)
- Look to the case law

# Exceptions to Management Rights

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- 5 U.S.C. 7106(b)(2): The “procedures which management officials of the agency will observe in exercising” any management rights under 7106
- Mandatory (agency must bargain)
- Look to the case law

# Exceptions to Management Rights

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- 5 U.S.C. 7106(b)(3): “Appropriate arrangements for employees adversely affected by the exercise of” any management right under 7106
- Mandatory (agency must bargain)
- Look to the case law

# “Appropriate Arrangements”

## 5 U.S.C. § 7106(b)(3)

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- The proposal must:

- (1) Be intended to be an “arrangement” for employees adversely affected by the exercise of a management right

- ✦ Identify effects or reasonably foreseeable effects on employees
- ✦ Identify how effects are adverse
  - Not a speculative or hypothetical concern
  - Must be related to management’s exercise of its rights
- ✦ Identify how the proposal is tailored
  - must compensate only those employees suffering adverse effects attributable to the exercise management’s rights

- (2) Be “appropriate”

- ✦ Does it “excessively interfere” with the relevant management right(s)?
  - Ask if the degree of intrusion on management rights outweighs the benefit to employees?

# Framework for Resolving Negotiability Disputes under § 7106(a) and (b)

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- Where a union disputes an agency's assertion that a proposal affects a § 7106(a) right and claims that the proposal is negotiable under § 7106(b)(2) or (b)(3), and § 7106(b)(1), the Authority asks:
  - Does the proposal affect a § 7106(a) right?
  - If so, is the proposal negotiable under § 7106(b)(2) or (b)(3)?
  - If not, is the proposal electively negotiable under § 7106(b)(1)?

*See AFGE, Local 3354, 54 FLRA 807, 811-12 (1998);  
AFGE HUD Council of Locals 222 Local 2910, 54 FLRA 171, 178 (1998)*



# Framework for Resolving Negotiability Disputes under § 7106(a) and (b)

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- Where an agency argues that a proposal is outside the duty to bargain because it is permissively negotiable under § 7106(b)(1), but does not argue that the proposal affects a management right under § 7106(a), and the union claims that the proposal is negotiable under § 7106(b)(2) or (b)(3), the Authority asks:
  - Does the proposal affect a § 7106(b)(1) right?
  - If so, is the proposal negotiable under § 7106(b)(2) or (b)(3)?

*See AFGE, Local 1501, 64 FLRA 802, 803-06 (2010)*

# Two Categories of § 7106(b)(1) Matters

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1. Numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty
2. Technology, methods, and means of performing work

# “Numbers, Types, and Grades”

- The terms “numbers, types, and grades” in § 7106(b)(1) include:
  - 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).*
  - 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. *See AFGE Local 3354, 54 FLRA at 816.*
  - The numbers, types and grades of employees assigned to tours of duty. *See Fraternal Order of Police, Lodge 1 F (R.I.) Fed., 32 FLRA 944, 959 (1988).*

# “Technology, methods, and means”

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- Authority 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).

# “Technology, methods, and means”

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- There are two prongs to the Authority’s current test used to determine whether a proposal concerns the “methods” or “means” of performing work:
  - First, the proposal must concern a “method” or “means” as defined by the Authority.
    - ✦ The Authority construes the term “method” to refer to the way in which an agency performs its work.
    - ✦ 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.
    - ✦ The legislative history of the Statute indicates that the term “methods” was intended to mean *how* work is performed and the term “means” was intended to mean *with what*.
  - Second, it must be shown that:
    - ✦ (1) there is a direct and integral relationship between the particular methods or means the agency has chosen and the accomplishment of the agency’s mission; and
    - ✦ (2) the proposal would directly interfere with the mission-related purpose for which the method or means was adopted.

See GSA, 54 FLRA 1582, 1589-90 & n.6 (1998).

# “Technology, methods, and means”

- **Proposals the Authority has found concern the “technology, methods, and means of performing work” include:**
  - Proposals concerning the forms, documents, or electronic systems that an agency uses in accomplishing its mission. *See AFGE, Local 3529, 57 FLRA 172, 175-76 (2001).*
  - Proposals concerning the introduction of new technologies that will assist the agency in fulfilling its mission more efficiently. *See AFGE, Local 3129 SSA Gen. Comm., 58 FLRA 273, 275 (2002).*
  - Proposals concerning the requirement that employees wear a prescribed uniform while performing work. *See AFGE, Local 1869, 63 FLRA 598 (2009); NAGE, Locals R12-122, R12-222, 38 FLRA 295, 304 (1990). But see NTEU, 61 FLRA 48, 52 (2005) (where agency did not explain how the uniform related to how work was done, proposal concerning uniform requirement did not “involve the methods and means of performing work”).*

# “Technology, methods, and means”

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- **Proposals the Authority has found do *not* concern the “technology, methods, and means of performing work” include:**
  - **Proposals concerning contracting out.** *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[.]”).
  - **Proposals concerning the assignment of duties to particular employees.** *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)).
  - **Proposals concerning the location at which work will be performed.** *See PASS, 56 FLRA 798, 803 (2000).*
  - **Proposals concerning performance standards and rating levels.** *See U.S. EPA, Chi., Ill., 62 FLRA 350, 352 (2008)* (“such proposals . . . concern[] ‘how an agency evaluates’ the work, rather than ‘how employees will do their work,’ which is the concern of § 7106(b)(1).” (quoting *AFGE, Council of GSA Locals Council 236, 55 FLRA 449, 452 (1999)*)).

# Bargaining Permissive Subjects Under the Statute

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- Not required to bargain over a permissive subject of bargaining, i.e., those matters which are either outside the scope of bargaining required of the parties or are negotiable at the election of an agency pursuant to § 7106(b)(1). *See FDIC, Headquarters*, 18 FLRA 768, 771 (1985).
  - Applies to both proposals advanced by management and union
- Parties cannot insist on bargaining to impasse over a permissive subject of bargaining
- If management at the local level exercises its discretion to bargain on a § 7106(b)(1) matter and reaches an agreement, then agency head may not subsequently disapprove that provision under § 7114(c) simply because it relates to § 7106(b)(1) matters. *See NATCA*, 61 FLRA 336 (2005).
- If parties reach an agreement to bargain over § 7106(b)(1) matters, then that agreement is enforceable. *See SSA, Balt., Md.*, 55 FLRA 1063, 1069 (1999); *U.S. Dept. of Commerce, PTO*, 54 FLRA 360, 387 n.27 (1998).



# Bargaining Permissive Subjects Under the Statute

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- Where the parties have elected to bargain over permissive subjects of bargaining and have reached agreement thereon, both parties are required to adhere to those terms during the life of the parties' agreement. *See FAA, Nw. Mountain Region Seattle, Wash.*, 14 FLRA 644, 648-49 (1984).
- Where parties' agreement includes matters covered by § 7106(b)(1), upon the expiration of that negotiated agreement, either party retains the right to unilaterally terminate the practice embodied in such a provision. *See FAA, Nw. Mountain Region Seattle, Wash.*, 14 FLRA at 648-49.
- Prior bargaining over permissive subjects does not make mandatory future bargaining over those subjects. *See NATCA, Rochester Local*, 56 FLRA 288, 291-92 (2000).

# 5 U.S.C. § 7106 (b) (1) Matters Under Executive Order 13522

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- **Agencies must:**
  - Allow employees and unions to have “pre-decisional involvement” in all workplace matters to fullest extent practicable, *without regard* to whether the matters are negotiable subjects of bargaining under § 7106
  - Provide adequate information
  - Make good faith attempt through discussions in their forums to resolve issues concerning changes in conditions of employment involving § 7106(b) (1) matters

# 5 U.S.C. § 7106(b)(1) Matters Under Executive Order 13522

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- **No obligation to bargain § 7106(b)(1) matters**
  - If you do, and reach agreement, it is enforceable for the life of agreement
- **Executive Order does not modify principles regarding § 7106(b)(1) under the Statute**

# 5 U.S.C. § 7106(b)(1) Matters Pilots Under Executive Order 13522

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- Bargaining over some or all of the subjects in § 7106(b)(1)
- Must waive any objection to participating in impasse procedures set forth in 5 U.S.C. § 7119 that is based on the subjects being permissive
- Results evaluated
- Council recommends next steps with respect to agency bargaining over § 7106(b)(1) matters