NEGOTIABILITY

Negotiability disputes occur where unions and agencies disagree over the legality of specific contract proposals or provisions. These disputes involve agency claims that a contract proposal made during bargaining involves a subject that is outside the duty to bargain under all circumstances. They also occur where an agency head disapproves negotiated contract language on the ground that it is contrary to law.

CONDITIONS OF EMPLOYMENT

Under the Statute, agencies are required to bargain only over bargaining-unit employees' "conditions of employment." So, an agency is not required to bargain over a matter unless that matter "directly affects" the conditions of employment of bargaining-unit employees. Section 7103(a)(14) of the Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions." However, that section provides that the following matters are not "conditions of employment":

(1) matters relating to political activities prohibited under the Hatch Act,

(2) matters relating to classification;260 and

(3) matters that are "specifically provided for by federal statute." With respect to the third exception, the Authority has held, for example, that a proposal "requiring employees to be paid at the General Schedule (GS)-7 level" concerned a matter "specifically provided for by statute." 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. 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."

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 those employees. As to the first factor, as discussed further

below, a proposal that focuses principally on non-bargaining-unit positions or employees does not directly affect bargaining-unit employees' work situations or employment relationships. As to the second factor, the record must establish a direct connection between the proposal and the bargaining-unit employees' work situations or employment relationships. For example, the Authority found that a proposal concerning the off-duty activities of employees did not concern bargaining-unit employees' work situations or employment relationships.

Moreover, Authority and judicial precedent differentiate among proposals concerning the working conditions of four groups of non-unit individuals:

(1) employees in other bargaining units.

(2) supervisory personnel.

(3) non-supervisory employees not in any bargaining unit; and

(4) non-employees.

Regarding the first group, a proposal that directly determines conditions of employment of employees in other bargaining units is outside the duty to bargain. This is because permitting an agency to negotiate with one union over the conditions of employment for employees represented by another union would violate "the principle of exclusive representation." For example, the Authority has held that a union's proposal requiring an agency to assign employees from a unit represented by another union to a particular facility was outside the duty to bargain. 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.

Concerning the second group, proposals that directly determine the conditions of employment of supervisors are outside the duty to bargain. However, matters pertaining to managers' and supervisors' conditions of employment are permissive subjects of bargaining. Thus, an agency may bargain over, and agree to, contract proposals that directly implicate its supervisors' and managers' working conditions. As with other permissive subjects, if an agency and a union reach such an agreement, and the agreement is otherwise consistent with law, then the agency head cannot disapprove it, and it is enforceable in arbitration. And proposals that relate principally to unit employees' conditions of employment are not removed from the mandatory scope of bargaining simply because they indirectly affect supervisors.

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 matter that "vitally affect" bargaining-unit employees' conditions of employment. "In determining whether or not a proposal vitally affects bargaining-unit employees, the Authority looks to whether 'the effect of that proposal upon unit employees' conditions of employment is significant and material, as opposed to indirect or incidental.'" For example, the Authority has 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 "related to unit employees' significant and material interest in eliminating discrimination in the unit," and, thus "vitally affected the conditions of employment of unit employees."

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. These "procedures" are mandatory subjects of bargaining: Agencies must bargain over them, even if they affect management rights under § 7106(a) or § 7106(b)(1).

If a union argues that a proposal or provision is a procedure under § 7106(b)(2), and an agency does not dispute that claim, then the Authority will find the proposal or provision to be a procedure. If the agency does dispute the union's claim, then the union must demonstrate that the proposal or provision is a procedure. To determine whether a particular proposal or provision is (or is not) a procedure, parties should research Authority precedent to find proposals and provisions (similar to the one in dispute) that the Authority has analyzed under § 7106(b)(2).

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;

- prescribed how management would select employees for assignments, as long as management preserved the right to determine that the available employees were equally qualified;

- 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.

- established advisory committees involving union participation where those committees were not an integral part of management's decision-making process relating to the exercise of its rights under § 7106.

- required management to delay exercising its rights pending the completion of bargaining or applicable appellate processes.

- established the procedures that management would observe in developing and implementing performance standards.

- set forth the procedures that management would use in announcing or filling vacancies.

- required management to maintain, or show to employees, certain documentation.

- required an agency to complete disciplinary processes 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 matters);

- required management to evaluate employees' work products at the completion of each assignment.

- 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.

- required consistency between position descriptions and performance standards, if management retained discretion to amend the position descriptions; 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.

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.
- delayed implementation of management actions that were "necessary for the functioning of the agencies;"
- conditioned the exercise of management rights on the agreement of employees or a union.
- required agencies to give advance notice of investigative interviews when the decisions not to do so were part of the agencies' investigative techniques.
- prevented agencies from determining employee qualifications.
- prescribed or precluded assignments to particular individuals identified by name or title.
- required management to assign employees certain duties, at the employees' option.
- precluded management from assigning employees certain duties.
- required management to reassign employees to sites designated by the employees.
- 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.
- limited the evidence agencies could use to support disciplinary actions.
- limited agencies' discretion to decide whether to restrict overtime assignments to unit employees.
- substantively limited management's right to determine the content of performance standards.
- prevented management from holding employees accountable for the performance of assigned work.
- required agencies to fill positions.
- prevented agencies from controlling which particular individuals would have access to their facilities.

- established restrictions on management action under § 7106 based on the results of studies.

- precluded management from using particular methods of monitoring employees' work performance.

- precluded management from rating and ranking candidates until after a preliminary placement process for currently employed unit employees was completed; and

- required management "ordinarily" to approve employees' requests to receive and use advanced sick leave.

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. 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).

What is an arrangement?

To determine whether a proposal or a 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. If an agency does not dispute a union's claim that a proposal or provision is an arrangement, then the Authority will find that the agency has conceded that the proposal or provision is an arrangement. 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. To establish that a proposal or a provision is an arrangement, a union must identify:

(1) the effects or reasonably foreseeable effects on employees that flow from the exercise of management's rights; and

(2) how those effects are adverse. Proposals and provisions that address speculative or hypothetical concerns are not arrangements. The alleged arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights. But the Authority has held that proposals and provisions intended to eliminate the possibility of an adverse effect may be appropriate arrangements. 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.

When is an arrangement "appropriate"?

If a proposal or a provision is an arrangement, then the Authority determines whether it is appropriate. 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. 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. If the case involves a provision, however, then the Authority does not apply the excessive-interference test. Instead, in NTEU, the Authority held that it will assess whether the arrangement "abrogates" – i.e., waives – the affected management right. In determining whether a provision abrogates a management right, the Authority assesses whether the provision "precludes" the agency from exercising the affected management right. 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.

<u>7106(a)(2) – "Applicable Laws"</u>

As discussed previously, agencies must exercise their management rights under § 7106(a)(2) – but not their rights under § 7106(a)(1) – in a manner that complies with "applicable laws." Applicable laws include not only statutes, but also the U.S. Constitution, judicial decisions, executive orders, and regulations having the force and effect of law. 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.

Proposals or provisions that require agencies to comply with applicable laws when they exercise their § 7106(a)(2) rights are negotiable. But proposals or provisions that require agencies to comply with applicable laws when they exercise their § 7106(a)(1) rights are not negotiable (unless they are procedures under § 7106(b)(2) or appropriate arrangements under § 7106(b)(3)).

Matters Related to Negotiability Determinations

A proposal is any matter offered for bargaining that the parties have not yet agreed to. A proposal is the subject of a negotiability appeal when an agency has declared, during bargaining or FSIP proceedings, that the proposal is outside the duty to bargain.

Before the Authority can determine whether a proposal is within the duty to bargain, or whether a provision is consistent with law, the Authority must determine what the proposal or provision means. If the parties do not dispute the meaning of a proposal or provision, and that meaning is consistent with the proposal's or provision's wording, then the Authority bases its negotiability determination on the undisputed meaning. In negotiability cases involving provisions, the Authority defers to the meaning that the agency and union negotiators ascribe to it; the Authority does not defer to the agency head's interpretation of it.

Where the parties dispute the meaning of a proposal or provision, the Authority looks to the proposal's or provision's plain wording and the union's explanation of the proposal's or provision's meaning. If the union's explanation is consistent with the plain wording, then the Authority adopts that explanation for the purpose of assessing the proposal's or the provision's negotiability. But when a union's explanation is inconsistent with the plain wording, the Authority does not adopt that explanation and, instead, bases the negotiability decision on the wording.

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

Mandatory subjects of bargaining are subjects that, upon request, a party must bargain over. These subjects include, among other things, procedures under § 7106(b) (2) of the

Statute and appropriate arrangements under § 7106(b)(3) of the Statute unless those procedures or appropriate arrangements are contrary to some other law.

Prohibited subjects of bargaining are subjects that parties cannot agree to, even if they want to, because the law prohibits them from doing so. For example, parties cannot agree to matters that affect a management right under § 7106(a) of the Statute unless those matters fit within an exception to management's rights.

Sometimes parties are permitted to bargain over matters even though they are not required to do so. These matters are called "permissive" subjects of bargaining. Some common examples are matters set forth in § 7106(b)(1) of the Statute, supervisors' and managers' conditions of employment, and agreements to bargain below the level of the agency at which bargaining between the agency and the union is required – also known as the "level of recognition."

A negotiability dispute is a disagreement between a union and an agency "concerning the legality of a proposal or provision." 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." A negotiability dispute concerning a proposal may arise during bargaining, or when an agency claims, during FSIP proceedings, that the proposal is outside the duty to bargain and negotiability disputes concerning provisions arise when a union "disagrees with an agency head's disapproval of a provision as contrary to law."

The Statute requires agencies to bargain only over "conditions of employment" of bargaining-unit employees, so one type of negotiability dispute may involve a claim that a proposal does not concern such a condition of employment. In addition, parties cannot reach agreements that are "inconsistent with any federal law or any government-wide rule or regulation." Therefore, some examples of negotiability disputes include claims that proposals or provisions are inconsistent with the Statute; a federal statute other than the Statute; an executive order; or a government-wide regulation. Further, agencies are not required to bargain over proposals that conflict with an agency rule or regulation for which there is a "compelling need," so a negotiability dispute may involve a claim that a proposal is inconsistent with such a rule or regulation.

Agencies often rely on § 7106 of the Statute to claim that a proposal or provision is nonnegotiable. 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);

(3) is a negotiable procedure under § 7106(b)(2); or

(4) is a negotiable, appropriate arrangement under § 7106(b)(3).

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. 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. Then the Authority will not resolve whether that proposal is within the duty to bargain. Instead, the Authority will "dismiss" the union's petition as to that proposal.

A bargaining-obligation dispute is a disagreement between a union and an agency concerning whether, in the specific circumstances of a particular case, the parties must bargain over a proposal that otherwise may be negotiable. Bargaining-obligation disputes involve claims regarding whether the Statute requires bargaining – not claims regarding whether the parties' collective-bargaining agreement requires bargaining. Examples of bargaining-obligation disputes include agency claims that:

(1) a proposal concerns a matter that is "covered by" a collective-bargaining agreement;

(2) bargaining is not required over a change in bargaining-unit employees' conditions of employment because the effect of the change is "de minimis"; and

(3) the union is attempting to bargain at the wrong level of the agency.

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 negotiability proceeding. If the Authority resolves the bargaining-obligation dispute, then its decision will include an order to bargain, but will not include 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.

If a case involves only a bargaining-obligation dispute, then the Authority will not resolve that dispute in a negotiability proceeding. Instead, the Authority will dismiss the petition, or the portion of the petition that presents only a bargaining-obligation dispute. Any resolution of those disputes would need to occur in other proceedings, such as ULP or grievance proceedings.

In the past, the Authority used the term "nonnegotiable" to refer to both prohibited and permissive subjects of bargaining. In AFGE, Local 32, the Authority stated that, consistent with the wording of the Statute, it would begin to describe bargaining proposals as either "within or outside the duty to bargain."

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. 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. However, neither the Statute nor the Authority's Regulations requires that an allegation of nonnegotiability be made with any particular degree of specificity.

Collaboration and Alternative Dispute Resolution Office (CADRO)

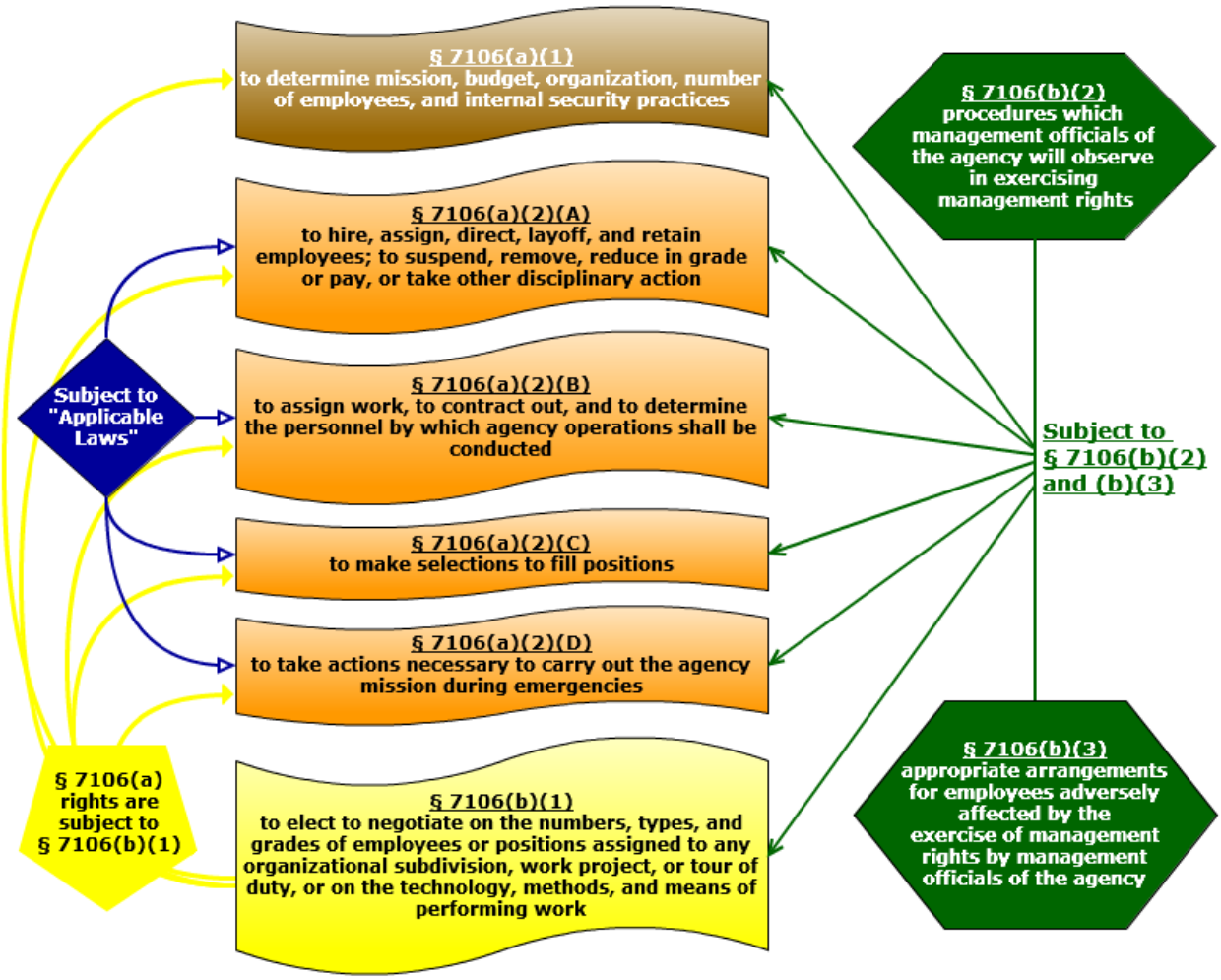
CADRO, an office within the Authority, "assists parties in reaching agreements to resolve disputes." CADRO engages in interest-based mediation and facilitation to help parties resolve cases outside of the formal, litigative process. Participation is fully voluntary: Parties are not required to use CADRO's services. However, CADRO is often successful at helping parties resolve or at least narrow their disputes, so the Authority encourages parties to consider using CADRO's services.

Management has the right "to determine the . . . organization . . . of the agency.

Management has the right "to determine the . . . organization . . . of the agency." 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. For example, it includes the rights to determine how the agency will be divided into organizational entities such as sections; the agency's grade-level structure; and where, geographically, the agency will provide services or otherwise conduct its operations. Although it includes the right to determine where duty stations of positions will be maintained 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. Instead, the agency must establish that the asserted duty station has "a direct and substantive relationship to the agency's administrative or functional structure, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties."

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." This includes the rights to discipline employees for both performance-related and nonperformance-related conduct; investigate and determine appropriate investigative techniques in connection with deciding whether discipline is justified; decide which evidence or information (including prior offenses) to use to take, or support, disciplinary actions; and determine what disciplinary penalty to impose.



An agency is not required to bargain over a change that has only a "de minimis" effect on conditions of employment. 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. The number of employees affected by a change is not dispositive of whether the change is de minimis.