

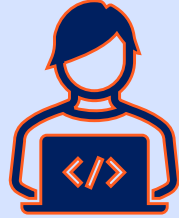
**DAY 1**

**ADVANCED  
NEGOTIABILITY:  
Agency Discretion,  
Laws & Regulations,  
& Management Rights**



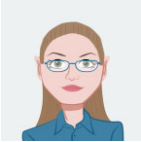





**Federal Labor  
Relations  
Authority**

Slide 2



**SOME HOUSEKEEPING ...**

# Presenter Team

 <p>Sarah Archer-Beck</p>	 <p>Joshua Brown</p>	 <p>Joseph Compagnone</p>
<p>Johnny Derogene</p> 	<p>Stefanie Parker</p> 	<p>Michael Wallace</p> 

3

# Participant Team



Slide 5



**Questions?**

5

# Day 1 Agenda



- Introduction
- Negotiability Refresher
- Management Discretion
- Rules & Regulations
- Federal Law
- Management Rights



Slide 7

# **NEGOTIABILITY REFRESHER**

Do we have  
a bargaining-  
obligation  
dispute or a  
negotiability  
dispute?





## Bargaining-Obligation Disputes

Not required to bargain under current circumstances because:

- (1) “covered by”
- (2) “de minimis”
- (3) trying to bargain at wrong level
- (4) proposal outside the scope of the change

9

- 5 C.F.R. § 2424.2(a)
- Covered by: e.g., 68 FLRA 1027, 1032; 68 FLRA 580, 582; 66 FLRA 213, 216
- De minimis: e.g., 64 FLRA 166, 173-74; 64 FLRA 85, 89-90; 60 FLRA 315,318; 60 FLRA 169, 175-76; 59 FLRA 728, 728-29; 59 FLRA 646, 654-55; 21 FLRA 580, 585-86
- Bargaining at wrong level: e.g., 62 FLRA 174, 182; 66 FLRA 978, 980-81
- See *also* FLRA Guide to Negotiability:  
<https://www.flra.gov/system/files/webfm/Authority/NG%20Forms,%20Guide,%20Other/Negotiability%20Guide%206-17-13.pdf>

## A negotiability dispute is ...

a disagreement between a union and an agency concerning the *legality* of a proposal or a provision.



- 5 C.F.R. § 2424.2(c)

**Examples of  
Negotiability  
Disputes**

- inconsistent with federal law
- inconsistent with government-wide regulation
- inconsistent with an agency rule for which there is a compelling need

11

- 5 C.F.R. § 2424.2(c)

## Subjects of Bargaining

### MANDATORY

Must bargain  
5 U.S.C. § 7106(b)(2)-(3)

### PERMISSIVE

May bargain  
5 U.S.C. § 7106(b)(1)  
(where no exception)

### PROHIBITED

Cannot bargain  
5 U.S.C. § 7106(a)  
(where no exception)



## Federal-Sector Bargaining





# **Complete Federal-Sector Bargaining Steps**

15



- To find out more about CADRO and the services it provides, please visit: <https://www.flra.gov/components-offices/offices/collaboration-and-alternative-dispute-resolution-office-cadro-0>



## ② How Provisions Become Agreements

1	2	3	4	5
				
Agreement submitted for agency-head review (Provisions)	Agency head disapproves all or part of agreement	Union Files Negotiability Petition	Negotiability Question Resolved	Final Agreement

## Proposals & Provisions

**Proposal:** wording offered for bargaining that parties haven't agreed to, and agency alleged is outside the duty to bargain

**Provision:** contract wording that union and agency negotiators have executed as part of their CBA or that FSIP has imposed, and agency head disapproved

18

- Proposal: 5 C.F.R. § 2424.2(e)
- Provision: 5 C.F.R. § 2424.2(f)

## Proposals vs. Provisions

Proposal	Provision
Agency representative declares proposal nonnegotiable	Agency head disapproves provision
Can declare a proposal nonnegotiable at any time	Must disapprove within 30 days
At the bargaining table	Executed agreement or FSIP-imposed wording
Agency chooses whether to bargain over permissive subjects	Cannot disapprove permissive subjects






**MANAGEMENT DISCRETION**

## The Underlying Rule

Does Agency have discretion over a matter?

- If yes, must bargain
- Unless “Sole and Exclusive” or “Specifically Provided For”



22

- Sole and exclusive: 71 FLRA 1135 (Member DuBester concurring); 71 FLRA 410 (Member DuBester concurring); 59 FLRA 815 (Member Pope dissenting)
- Specifically provided for: 71 FLRA 317 (Member DuBester concurring); 55 FLRA 892 (Member Cabaniss and Member Wasserman dissenting in part); 50 FLRA 677

## **“Sole and Exclusive”?**



- Law or regulation indicates an intent to give the agency “unfettered discretion” over the matter.
- If discretion is “Sole and Exclusive,” requiring bargaining would be contrary to law.

23

- Sole and exclusive: 71 FLRA 1135 (Member DuBester concurring); 71 FLRA 410 (Member DuBester concurring); 59 FLRA 815 (Member Pope dissenting)

## Determining Whether Discretion is “Sole and Exclusive”

- Authority examines the plain wording and legislative history of the statute or regulation


- e.g., “without regard to the provisions of any other law”; or “notwithstanding any other provision of law”

24

- Sole and exclusive: 71 FLRA 1135 (Member DuBester concurring); 71 FLRA 410 (Member DuBester concurring); 59 FLRA 815 (Member Pope dissenting)



## Specific Words Not Required



D.C. Circuit held that a statute need not contain “phrases like ‘notwithstanding any law’ to place a subject outside an agency’s duty to bargain.”

25

- 844 F.3d 957 (stating that neither the Authority, nor the D.C. Circuit, “has ever held that a statute must contain phrases like ‘notwithstanding any law’ to place a subject outside an agency’s duty to bargain”)

## Does the statute grant Sole and Exclusive discretion? = sole & exclusive; = not sole & exclusive

**Proposal:** The Rating of Record, which is used throughout the reduction in force (RIF) policy for retaining employees primarily based on performance, shall be modified to recognize long-term performance.

**10 U.S.C. § 1597(e):** The Secretary of Defense shall establish procedures to provide that, in implementing any RIF for civilian positions, the determination of which employees shall be separated from employment in the Department shall, among other factors as determined by the Secretary, account for employee performance, as determined under any applicable performance management system.

## **Held Not “Sole and Exclusive”**

**Case: 71 FLRA 1135 (2020)**

- **Plain language does not indicate Sole and Exclusive.**
- **Statute does not prohibit agency from establishing procedures for using performance as primary factor in RIF.**

## **“Specifically Provided For”**

✓ If the subject matter of a proposal is already “Specifically Provided For” or established by a statute, it is not negotiable.

! Agency must have no discretion.

28

- 71 FLRA 317 (specifically provided for when no discretion)
- 45 FLRA 1185 (same)
- 38 FLRA 295 (same)

## Is this “Specifically Provided For”?

1

**Yes = specifically provided for;**

**No = not specifically provided for**

**Proposal:** When travel to a temporary duty station is to be accomplished on a workday, then the employee earns Compensatory Time Off for the travel outside of the employee’s usual workday schedule.

**The Federal Workforce Flexibility Act (Act):** “[E]ach hour spent by an employee in travel status away from the official duty station of the employee, that is not otherwise compensable, shall be treated as an hour of work or employment for purposes of calculating compensatory time off.”

**Held  
“Specifically  
Provided For”**

Case: 71 FLRA 317 (2019). The Authority reasoned that:

The Act “provides that each hour spent by an employee in travel status away from the official duty station of the employee, that is not otherwise compensable, *shall* be treated as an hour of work or employment for purposes of calculating compensatory time off.”

## Is this “Specifically Provided For”?

2

**Yes = specifically provided for;**

**No = not specifically provided for**

**Proposal:** Retain the past practice of the automatic granting of indefinite pay retention to employees who are placed in lower graded jobs through the Disabled Employees' Placement Program.

**Federal Employees Compensation Act (FECA), 5 U.S.C. § 8106:** If the disability is partial, the United States shall pay the employee during the disability monthly monetary compensation equal to 66 <sup>2</sup>/<sub>3</sub> percent of the difference between his monthly pay and his monthly wage-earning capacity after the beginning of the partial disability.

**Held “Not  
Specifically  
Provided  
For”**

Case: 45 FLRA 1264 (1992). The Authority found that:

- The proposal only requires employees who are reassigned to a lower-paid position because of disability to continue receiving the level of pay that they were receiving prior to the reassignments.
- The proposal does not address the pay that will be provided to a partially disabled employee who is accommodated by reassignment to a different position.
- The pay determination is a separate or discrete issue from that of compensation for disability.





**BREAK**

10 minutes (approx.)



# **RULES & REGULATIONS**

**Effect of Agency and Government-wide  
Regulations on Negotiability**

# Agency Rules & Regulations

5 U.S.C. § 7117(a)(2)

**Inconsistency with agency regulation does not remove proposal/provision from duty to bargain**

**unless Authority finds compelling need for regulation**



36

- *E.g.*, 49 FLRA 534, 542-43 (no compelling need)  
730 F.2d 1534, 1545-47 (compelling need)
- The compelling-need exception does not apply if the union “represents . . . a majority of employees in the issuing agency or . . . subdivision” to whom the agency rule/reg applies. 5 U.S.C. § 7117(a)(3); see 68 FLRA 407, 408-09.

## “Compelling Need” Standard

5 C.F.R. § 2424.50

1. Issued by an agency or “primary national subdivision”

2. Necessary to:

- Accomplish mission
- Maintain basic merit principles
- Implement nondiscretionary mandate

37

- 5 C.F.R. § 2424.30(a) (compelling-need claims must be resolved in a negotiability proceeding)
- 56 FLRA 236, 241 (“[A]n agency must: (1) identify a specific agency-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 within the meaning of section 2424.50.”)
- 67 FLRA 85, 89-90 (“An agency must demonstrate that its regulation is essential, as distinguished from helpful or desirable, to the accomplishment of its mission or execution of its functions in a manner that is consistent with the requirements of an effective and efficient Government.”)

## Government-wide Rules & Regulations

5 U.S.C. § 7117(a)(1)

**No duty to bargain**  
where proposal/provision is  
inconsistent with a  
government-wide rule or  
regulation

38



- *E.g.*, 67 FLRA 654, 657 (provision not contrary to reg) (Member Pizzella dissenting); 65 FLRA 911, 916 (proposal contrary to reg).
- NOTE: Slightly different rule applies in arbitration/ULP cases. Outside of negotiability setting, under 5 U.S.C. § 7116(a)(7), government-wide regulations, other than concerning prohibited personnel practices, do not control over conflicting provisions in an agreement that was in effect before the date the regulation was prescribed. See 65 FLRA 817, 819.

## Meaning of “Government-wide”

1. Applies to most government employees and
2. Binds federal agencies and officials

### Examples:

- Office of Personnel Management Regulations
- General Services Administration Regulations

39

- 73 FLRA 637, 647 (discussion of when regulation is government-wide; OPM notice in *Federal Register* approving agency’s demonstration project was not government-wide)
- 26 FLRA 284, 285-86 (“The Federal Travel Regulations are Government-wide regulations within the meaning of section 7117(a)(1) of the Statute.”)
- 22 FLRA 351, 354 (“[A] regulation is a Government-wide regulation under section 7117 if it is generally applicable throughout the Federal Government as opposed to applying to every Federal employee.”)



## Regulations Group Activity

- See exercise handout page 1 for the provision and OPM regulation
- Breakout Rooms
  - Odd-numbered rooms = Agency
  - Even-numbered rooms = Union
- Brainstorm arguments about provision's consistency with regulation

40



<p><b>Provision 1:</b></p> <p>Sick leave of more than three consecutive workdays should be supported by a medical certificate. <b>When for justifiable reasons a medical certificate is unnecessary, the employer may accept an employee's certificate showing incapacitation . . . .</b></p> <p><b>Note:</b> The parties agreed the first sentence forbids the Agency from requiring a medical certificate for leave requests of less than three days <u>unless the employee is on sick-leave restriction.</u></p>	<p><b>OPM Reg - 5 C.F.R. § 630.405(a):</b></p> <p>An agency may grant sick leave only when the need for sick leave is supported by administratively acceptable evidence. An agency may consider an employee's self-certification . . . as administratively acceptable evidence, regardless of the duration of the absence. <b>An agency may also require a medical certificate or other administratively acceptable evidence . . . for an absence in excess of 3 workdays, or for a lesser period when the agency determines it is necessary.</b></p> <p>40</p>
---	---

- 67 FLRA 654, 656-57 (Member Pizzella dissenting)



# FEDERAL LAW

## Effect of Federal Laws on Negotiability

# Federal Law

5 U.S.C. § 7117(a)(1)

**No duty to bargain where  
proposal/provision is  
inconsistent with a federal  
law**





# MANAGEMENT RIGHTS

**5 U.S.C. § 7106(a)**

## Management Rights Pop Quiz!

1

**T or F:**

**If a proposal/provision affects a management right, then the Authority must find that it is nonnegotiable.**

47

- Whether a management right is affected is often just the first step in the process because of the exceptions to management rights.
- The Authority will only consider the rights – and the arguments – that are raised by the parties.

## Management Rights Pop Quiz!

2

**T or F:**

If a proposal/provision allegedly affects management rights and is just like one in a published Authority case, then the outcome will be the same.

48

- The Authority looks carefully at the specific facts and details in negotiability cases.



## Management Rights Pop Quiz!

3

**T or F:**

**A proposal/provision that affects a management right and is not an appropriate arrangement may be negotiable.**

49

- Procedures under § 7106(b)(2), or the enforcement of an “applicable law” for the management rights listed in § 7106(a)(2), may affect negotiability.

4

## Management Rights Pop Quiz!

**T or F:**

**You can find helpful management rights arguments in the Authority's arbitration cases.**

50

- Management rights issues come up in arbitration cases, and can be helpful for identifying whether a management right may be affected.
- But, in the past forty years, the Authority has used different tests to determine whether an arbitration award excessively interferes with a management right. So old arbitration cases may be less useful for determining excessive interference.
  - However, a recent revision to the Authority's test for assessing management-rights exceptions to arbitration awards that enforce collective-bargaining agreements should bring the Authority's arbitration decisions into closer alignment with how excessive interference is determined in the Authority's negotiability decisions. See 73 FLRA 670 (recently revised arbitration test).

**5**

## Management Rights Pop Quiz!

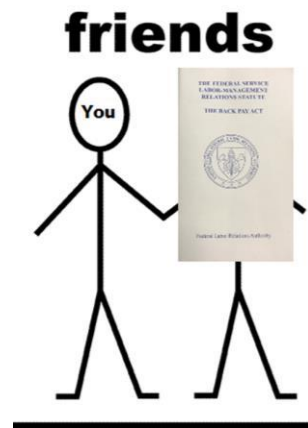
**T or F:**  
A management right can include the right not to act.

51

- The Authority has held that deciding not to act is management's prerogative.

**Where successful  
management rights  
arguments begin:**

52



**§ 7106(a)(1)  
Rights**

**Not Limited by  
“Applicable Laws”**

53

- All management rights, not just those in (a)(1), include the right to not act. 36 FLRA 618, 632 (“Management’s rights under [§ ]7106 include not only the right to act, but also the right not to act.”)
- Proposal/provision may involve more than one right; Authority addresses only those raised.

## (a)(1) - Mission

<p style="color: #E67E22; font-weight: bold;">Case-by-Case Evaluation</p> <p style="color: #002060; font-weight: bold;">What the agency's mission includes and doesn't include</p>	<p style="color: #E67E22; font-weight: bold;">Generally Not How Mission Is Carried Out</p> <ul style="list-style-type: none"> <li style="color: #002060; font-weight: bold;">➤ But when part of mission is serving public, proposals/provisions regarding office hours may affect</li> </ul>
--	--

54

- 58 FLRA 341, 342 (proposal: *Twelve months after the November 1, 2001 CHIP implementation date, the Parties will meet to review and identify concerns surrounding the Impact and Implementation of CHIP. The Parties will negotiate remedies and/or procedures for addressing these concerns and thereby enable all employees to successfully perform their job while providing world-class service to our customers.* “[T]he agency asserts that the proposal imposes limitations on how and when it can implement a program intended to better serve the public. However, nothing in the proposal limits or conflicts with the agency’s decision to implement the CHIP program. Indeed, the proposal indicates that it is intended to permit a return to the bargaining table for the purpose of addressing problems that might arise in the first 12 months of its use, and the parties agreed at the post-petition conference that the proposal does not affect the agency’s determination to implement the CHIP program. Accordingly, we conclude that the agency has failed to establish that the proposal affects its right to determine its mission under § 7106(a)(1).”); 59 FLRA 159, 163 (finding an award does not affect an agency’s right to determine what its mission will be where it merely “relates to how [its] mission will be carried out”)
- 49 FLRA 333, 349 (proposal: *The work day shall consist of seven hours and thirty minutes without additional compensation.* “[T]he work day that is defined in Proposal 6 is set forth for the purpose of establishing compensation. Under this proposal, the agency remains free to extend the work day beyond seven hours and thirty minutes, but must provide additional compensation if it does so. Thus . . . Proposal 6 . . . does not prevent the agency from determining when and for how long it will provide mission-related, that is, instructional, services each day. Consequently, we reject the agency’s argument that this proposal directly interferes with management’s rights to determine the mission of the agency under [§ 7106(a)(1).”)
- 36 FLRA 853, 857-58 (“The mission of the agency in this case is to resolve labor disputes brought to it by members of the public, whether individual employees, unions, or employers. The decision by the management of the regional office as to when that office will be open to the public for the purpose of conducting business is directly linked to the agency’s mission.”)

- 22 FLRA 868, 869-70 (“Since a part of the mission of the agency in this case is to provide services to the public, a decision regarding the particular hours when a Social Security field office is to be open to the public is mission-related.”)

## (a)(1) - Budget

<p style="text-align: center;"><b>Question 1</b></p> <p><b>Proposal/Provision:</b> Prescribes specific programs to include, or amount to allocate, in budget?</p>	<div style="background-color: #e67e22; color: white; padding: 5px; font-weight: bold;">Either or</div>	<p style="text-align: center;"><b>Question 2</b></p> <p><b>Agency:</b> Substantially demonstrates significant, unavoidable cost increase that's not offset by compensating benefits?</p>	<p style="text-align: center;"><b>⓪ Cost Increase</b></p> <p>Not enough, by itself, to establish effect.</p>
---	--	--	--

55

- 66 FLRA 124, 124-25 (Proposal concerning a new work location's office-space design for passport adjudicators: ***Proximity of printers, copiers and fax machines:*** *The design will make it possible for these machines to be distributed evenly and liberally throughout the desk adjudication area by making passageways wide enough to accommodate them and power sources/phone lines available for them. Each adjudicator's desk will be situated within [fifty] feet of a printer, copier and fax machine. "Here, the agency does not allege that the proposal prescribes particular programs to be included in the agency's budget or the amount to be allocated in the agency's budget. Further, although the agency claims that the proposal would require the agency to purchase office machines, the agency does not claim or demonstrate that the proposal would entail significant and unavoidable costs that would not be offset by compensating benefits. Accordingly, we find that the agency has not demonstrated that the proposal affects management's right to determine its budget."*)
  
- 61 FLRA 113, 116 (concerning exceptions to an arbitration award that required the agency to provide grievants with all-day, quarterly firearms training: "Applying the first part of the . . . test, there is no contention that the provision in this case 'prescribes particular programs, operations, or amounts to be included in an agency's budget.' Applying the second part of the test, the agency has argued that article 24(C), as interpreted by the arbitrator, will result in increased costs. However, the agency has failed to establish that this increase in costs 'is significant and unavoidable and is not offset by compensating benefits.' In this respect, the agency has neither shown how much this award will cost the agency nor has it set forth how much of its overall budget would be impacted by this award. As such, given that the agency must make 'a substantial demonstration that an increase in costs is significant and unavoidable,' in the absence of such showing we find that the agency has failed to establish that the award affects its right to determine its budget." (citations omitted))
  
- Second part of test considers only "compensating benefits" of a tangible, monetary nature – not intangible, non-monetary benefits like improved employee morale, 47 FLRA 980, 998, and looks at the proposal or provision relative to organizational level to which it applies, 44 FLRA 18, 30.



## (a)(1) - Organization


<p><b>Administrative &amp; Functional Structure</b></p> <ul style="list-style-type: none"><li>• Relationship of personnel through lines of authority</li><li>• Distribution of responsibilities for delegated and assigned duties</li></ul>	<p><b>Determinations Included</b></p> <ul style="list-style-type: none"><li>• How to divide into sections</li><li>• Where, geographically, agency will operate</li></ul>
---	--

56

- 72 FLRA 752, 755 (finding a proposal that allows employees to work remotely from their current locations *indefinitely* affects management’s right to determine its organization); see also 72 FLRA at 758 (separate opinion of Chairman DuBester) (providing a different analysis for why the proposal affects management’s right to determine its organization)
- 72 FLRA 377, 378 (“[B]y prohibiting the agency from structuring its organization to have civilian police officers under military personnel in the chain of command, the proposal affects the ‘relationship of personnel through lines of authority.’”)
- 70 FLRA 932, 933-34 (Member DuBester dissenting) (concerning exceptions to an arbitration award that required the agency to allow a grievant to telework full-time from Las Vegas, when her duty station was in Ogden, Utah: “[A]s part of the agency’s ‘right to determine [its] administrative and functional structure,’ the agency has the right to determine ‘where[,] organizationally[,] certain functions shall be established and where the duty stations of the positions providing those functions shall be maintained.’” (citations omitted))
- 63 FLRA 530, 532 (finding no effect on the right to determine the agency’s organization because the award did not require the agency to assign any employees to supervisor-in-charge positions, but merely required the agency to properly compensate employees who had already performed supervisor-in-charge duties)
- 58 FLRA 175, 178 (finding an award affected the right to determine the agency’s organization because the award required the agency “on the midnight shift, to maintain each operational area that is established on the other two existing shifts, assign a supervisor to each such area, and assign a [supervisor-in-charge] in each area when a supervisor is not available. The arbitrator’s order is determinative of the organization of the midnight shift because it specifies the nature and scope of the supervisory relationships, or lines of authority, on that shift.”)

- 56 FLRA 444, 449 (“As more specifically discussed above, the Northeast Sector has been organized to be supported solely by full-time military personnel. Nevertheless, if adopted, section 5 of the supplemental agreement proposed by the union would precipitate a change in the agency’s organization. In particular, building upon the preceding sections, section 5 would effectively require the agency to convert full-time military positions in the Northeast Sector to positions that can be filled either by civilian technicians. . . . By imposing such a requirement, the agreement dictates how the agency will be structured to accomplish its mission and functions.”)
- 52 FLRA 813, 819 (“By establishing organizational subdivisions, Proposal 1 prescribes how the agency will divide itself into organizational units and, concomitantly, how the agency will be structured to accomplish its mission and functions. Therefore, the proposal impermissibly affects the exercise of management’s right to determine its organization under [§ ]7106(a)(1).”)
- 8 FLRA 144 (proposal requiring agency to assign bargaining-unit employees “to only one first line or immediate supervisor” would “require the agency to adopt a certain organizational structure and to organize its workforce in a particular way” and would, thereby, affect the right to determine organization)

## (a)(1) - Number of Employees

<p style="text-align: center;"><b>Total Number of Employees</b></p> <p style="text-align: center;">Actually employed</p> 	<p style="text-align: center;"><b>Different from (b)(1)</b></p> <p style="text-align: center;">(b)(1): “Numbers” of employees assigned to organizational subdivisions, work projects, or tours of duty</p>
--	--

57

- 46 FLRA 298, 316 (“We conclude that the placement program does not implicate the right to determine the number of employees under [§ ]7106(a)(1) of the Statute. That management right relates to the number of employees actually employed by an agency. The placement program, in contrast, operates within the total employee complement that has been established by the agency. Thus, an employee who possesses a security clearance is counted among the employee complement in the same manner as an employee who loses or is denied a security clearance and is then reassigned by virtue of the placement program’s operation. There is no effect on the actual number of employees. For this reason, the placement program is not determinative of, and does not implicate, the number of employees employed by the agency.”)
- 53 FLRA 427, 431 (§ 7106(a) vs. § 7106(b)(1): “Because this proposal concerns the numbers of employees and positions assigned to an organizational subdivision, we find that it comes within the terms of [§ ]7106(b)(1). Cf. 46 FLRA 298, 316 (right to determine number of employees under [§ ]7106(a)(1) relates to the number of employees actually employed by an agency; ‘the numbers . . . of employees . . . assigned to any organizational subdivision’ under [§ ]7106(b)(1) encompasses the number of employees who are assigned to the various components within the agency)”)

<h2 style="margin: 0;">(a)(1) - Internal-Security Practices</h2>		
<p style="color: #e67e22; margin: 0;"><b>Plan to Secure or Safeguard</b></p> <ul style="list-style-type: none"> <li>• Policies/practices concerning personnel, property, operations, or the public</li> <li>• Against internal and external risks</li> </ul>	<p style="color: #e67e22; margin: 0;"><b>Reasonable Connection</b></p> <ul style="list-style-type: none"> <li>• Link between security objective and policy or practice to implement it</li> </ul>	<p style="color: #e67e22; margin: 0;"><b>Conflict, but No Merits Review</b></p> <ul style="list-style-type: none"> <li>• Proposal/provision must conflict with policy or practice</li> <li>• Authority won't judge policy or practice's merits</li> </ul>

- 66 FLRA 929, 931 (“[T]he union contends that, if the [officer-in-charge] was the only officer able to communicate with the agency during emergencies, then other officers and the public would be in jeopardy. Moreover, the union asserts that providing a communications device with GPS to all officers would assist them in deviating from a pre-established route when necessary and would not increase the likelihood of a breach in the confidentiality of the escort team’s movement times and routes. These arguments concern the merits of the agency’s chosen policy. As noted above, the Authority does not review the merits of an agency’s policy once it has established a reasonable link between its policy and its internal security objectives.” (citation omitted))
  
- 64 FLRA 949, 950-51 (noting that internal-security practices may also include “safeguarding the public”; finding that a proposal that would allow health care providers to opt out of mandatory flu vaccinations for “personal reasons” would affect the agency’s right to determine its internal-security practices); *id.* at 951 (“The agency has established the requisite link between its internal security objectives and its mandatory vaccination policy. The agency has implemented its mandatory vaccination policy to prevent the occurrence and spread of influenza among its staff and those with whom its staff comes in contact. The agency has determined that by vaccinating all health care personnel who have direct patient contact, it will reduce the frequency with which those individuals contract influenza. This in turn will reduce employee absences and the risk of transmission of the virus to patients, including military personnel. The agency’s policy is reasoned and supportable. Further, there is a clear and logical connection between immunization through vaccination and the agency’s objective of safeguarding the public, and its personnel, property, and operations. For these reasons, the agency has established a reasonable link between its mandatory vaccination policy and its internal security objectives. The union’s claims challenging the efficacy of the agency’s vaccination policy do not require a different result. . . . Finally, it is undisputed that the union’s proposal conflicts with the agency’s mandatory vaccination policy by making the policy optional for all affected employees.”)

- 64 FLRA 161, 163 (finding that the agency established a link between its objectives of securing or safeguarding its personnel, property, or operations and its practice of prohibiting employees from carrying wireless communication devices while on duty in operational areas when the agency demonstrated that prohibiting employees from carrying and using such devices prevented the disruption of air traffic communications)



# BREAK

15 minutes (approx.)



## **§ 7106(a)(2) Rights**

**Management Rights Subject to  
“Applicable Laws”**



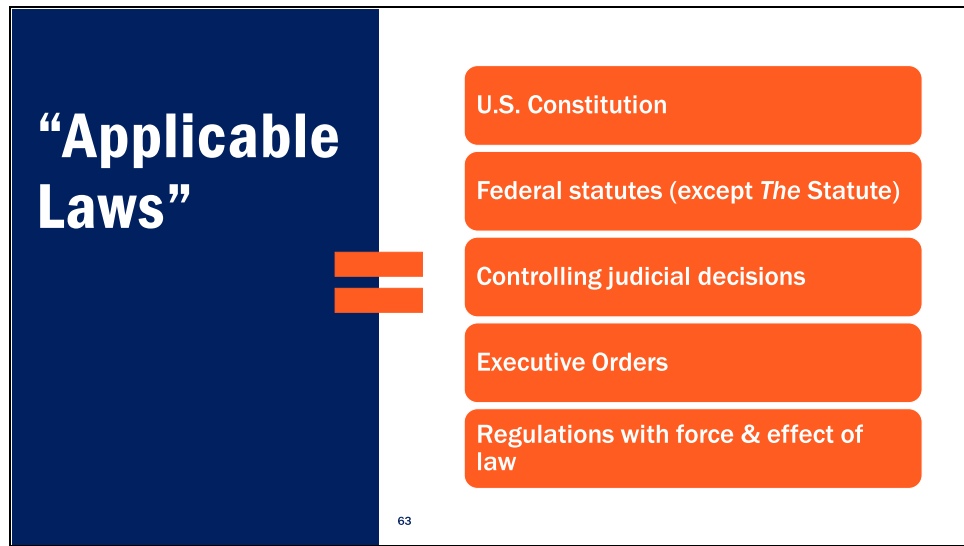
## **“Applicable Laws” Caveat**

Under the Statute,  
agencies must  
exercise § 7106(a)(2)  
rights “in accordance  
with applicable laws.”



## **Practical Consequence**

Proposals or provisions  
requiring exercise of  
§ 7106(a)(2)  
management rights in  
accordance with  
applicable laws are within  
the duty to bargain.



- 61 FLRA 201, 206 (“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 conformance with any procedure requirements imposed by Congress.”)
- 494 U.S. 922 (discussing the meaning of “applicable laws”)
- 43 FLRA 385, 390 (listing types of “applicable laws” and finding that congressional committee reports were not included)
- 42 FLRA 377, 389-90 (“[I]n enacting section 7106(a)(2) of the Statute, Congress intended to require management officials to exercise their enumerated rights in a manner that complies with law in its generic sense; that is, ‘the rules of action or conduct duly prescribed by controlling authority, and having binding legal effect.’ It is commonly recognized that statutes are not the only form of binding law. For example, it is clear that the United States Constitution is law that controls Government action. It also is commonly recognized that controlling judicial decisions, judgments, and decrees constitute binding law. Further, Presidential executive orders that are issued pursuant to express statutory authorization may constitute relevant federal law. Consistent with this view, we believe that the term ‘applicable laws’ in section 7106(a)(2) of the Statute includes rules and regulations having the force and effect of law.” (citations omitted))

## (a)(2)(A) - Assign Employees

- ✓ Assign employees to positions
- ! Includes both initial hiring and post-hiring, such as reassignments, temporary assignments, or details
- ✓ Determine the duration of assignments
- ✓ Determine qualifications and skills needed for positions; and judge whether particular employees possess them

64

- Assign to positions: 25 FLRA 113, 115-16 (Member Frazier concurring in part and dissenting in part) (provision did not affect agency's right to assign employees because there was no indication in the record that employees would perform duties other than those which the agency had already assigned to their positions); 41 FLRA 618, 624-25 (subsections 3, 4, 5, and 6 did not affect right to assign employees because they applied only to employees whom agency had determined possessed the required qualifications)
- Initial hiring and post-hiring: 65 FLRA 911, 913 (Member Beck dissenting in part) ("Proposal 1 does not affect management's right to assign employees because it does not require the assignment or reassignment of employees to any position. Proposal 1 only requires that when certain conditions are met, management will convert . . . appointments with a two-year probationary term to appointments with a term of less than two years. Proposal 1 does not affect what position the employee occupies.")
- Duration of assignments: 61 FLRA 209, 218 (Member Pope concurring in part and dissenting in part) (finding a proposal that limits the duration of a detail to three months is contrary to § 7106(a)(2)(A))
- Determination qualifications: 59 FLRA 481, 482-83 (Chairman Cabaniss dissenting) (proposal requiring selection based on seniority can affect management's right to assign work under § 7106(a)(2)(B) in certain circumstances); 61 FLRA 97, 99 (Member Pope dissenting in part) ("As the proposals require the [a]gency to assign the prescribed training only to those employees who are certified instructors and as the proposals prevent the [a]gency from assigning the . . . duties to employees who do not meet the requirements of Article 28, we find that the proposals affect management's rights to assign employees and assign work.")

## (a)(2)(A) - Hire Employees

- ✓ Includes the right to decide whether to fill positions



65

- 54 FLRA 807, 812-13 (“In the instant case, the plain wording of the substantive proposal requires the [a]gency to fill vacant positions only when the [a]gency has sufficient appropriations to do so. Thus, this case is distinguishable from the above-cited cases, in that the proposals and provisions involved in those cases provided no exceptions to the agencies’ duties to fill vacancies. Nevertheless, the substantive proposal in the instant case would require the [a]gency to fill vacancies in all situations other than where budgetary insufficiency exists.”)
- 62 FLRA 93, 94-95 (finding a proposal was contrary to § 7106(a)(2)(A) when it required the agency to hire an additional two employees)

## (a)(2)(A) - Layoff & Retain Employees

- ! They are separate rights.
- ✓ Layoff: Includes the right to conduct a reduction in force and decide what positions to abolish & retain
- ✓ Retain: Includes the right to establish policies or practices that encourage or discourage employees from remaining employed

66

- Separate rights: 58 FLRA 344, 345 (“Nevertheless, § 7106(a)(2)(A) of the Statute refers to the two rights separately, providing that management retains the right to “hire, assign, direct, layoff, and retain employees.”)
- Layoff: 65 FLRA 911, 913 (Member Beck dissenting in part) (“Management’s right to layoff employees under § 7106(a)(2)(A) of the Statute includes the right to conduct a RIF and to exercise discretion in determining which positions will be abolished and which retained. Proposal 1 does not involve determining which positions will be abolished and which retained in a RIF. The proposal only operates ‘[w]hen the [e]mployer determines that a [c]ompetitive service employee will be displaced by RIF[.]’”)
- Retain: voluntary-separation-incentive pay, e.g., 67 FLRA 85, 87 (“The offer of [voluntary separation incentive pay], a lump-sum payment to leave the [a]gency, discourages at least some employees from remaining employed by the [a]gency. Accordingly, we find that Proposal 1 affects management’s right to retain employees.”)

## (a)(2)(A) - Direct Employees

- ✓ Supervise and guide employees and determine quantity, quality, and timeliness of work
- ✓ Establish performance standards and evaluate/hold employees accountable under those standards
- ✓ Select particular methods of supervision (e.g., spot checks)
- ⊘ NOT the right to decide whether to reward performance already evaluated

67

- Supervise & guide: 65 FLRA 509, 511 (“Here, the provisions would prohibit the [a]gency from holding an employee responsible for his or her performance expectations if those expectations have not been communicated to the employee in writing. As the provisions would prohibit management from holding employees accountable for work performance in these circumstances, we find that the provisions affect management’s rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.”)
- Perf. Standards: 63 FLRA 450, 453 (finding a proposal was contrary to management’s right to direct employees where it “would require the [a]gency to base its assessment of employee performance with respect to the customer service element on the factors and definition listed in Provision 4”)
- Methods of supervision: 62 FLRA 15, 17 (“The [u]nion’s proposal would prevent unannounced visits, spot checking of employees’ work and, for the most part, any supervisory oversight of the IT staff whatsoever. Thus, the proposal affects management’s right to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute and is outside the duty to bargain.”)
- Not rewards: 793 F.3d 371, 374 (finding that the terms “‘assign work’ and ‘direct employees’ were not meant to be so expansive” as to include the “right to reward [the] performance of what has been assigned”)

## (a)(2)(A) - Suspend, Remove, Reduce in Grade or Pay

- ✓ **Suspend:** Includes the right to suspend employees
- ✓ **Remove:** Includes the right to determine which positions to vacate or order in which positions are vacated
- ✓ **Reduce in grade or pay:** Includes the right to take actions against employees for particular offenses

68

- Suspend: e.g., 19 FLRA 647, 650 (finding that a proposal affected this right when the proposal gave employees the option of canceling their own previously imposed suspensions)
- Which positions to vacate: 11 FLRA 475, 482 (proposal affected this right when it required an agency to vacate certain positions and make them available to certain categories of employees)
- Sequence of vacating positions: 3 FLRA 3, 5-6 (finding a proposal affected this right where it required agencies to separate particular groups of employees before they separated other groups of employees)
- Right to take actions against employee for particular offense: 53 FLRA 539, 579 (finding a proposal negotiable where it requires the employee be given the option to resign before a RIF or removal); 58 FLRA 605, 606 (“Under the provision, the [a]gency would normally not be able to discipline an employee for acts which result from the use of illegal drugs or alcohol if the employee voluntarily enters and successfully completes a rehabilitation program. That is, the [a]gency would be precluded not only from imposing disciplinary action for the use or possession of illegal drugs, but also for conduct related to the use or possession of illegal drugs or alcohol. We conclude, therefore, that the provision affects management’s right to discipline under § 7106(a)(2)(A) of the Statute.”)

## (a)(2)(A) - Discipline

- ✓ Investigate and determine appropriate investigative techniques
- ✓ Decide which evidence to rely on
- ✓ Select penalty
- ! Includes both performance and nonperformance related conduct

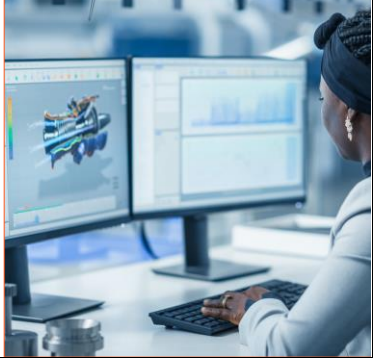
69

- Perf. & non-perf.: 65 FLRA 142, 145 (“As previously noted, the proposal is intended only to reduce the likelihood that an employee will fail to wear the vest at work, not to restrict management’s right to take disciplinary action when such action occurs.”)
- Investigate & techniques: 60 FLRA 124, 127 (“Because the proposal would preclude the [a]gency from monitoring telephone and computer usage as a means of investigating employee conduct, the proposal affects management’s right to discipline.”)
- Which evidence: 61 FLRA 341, 346 (Member Armendariz dissenting) (finding a proposal was contrary to § 7106(a)(2)(A) because it prevented the agency from relying on certain data for discipline); 69 FLRA 626, 632 (Member Pizzella dissenting) (“Here, there is no dispute that Proposal 8 would immunize employees from discipline or performance-based action for issuing ‘passport frauds’ when one of the inquiries identified in Proposal 8 either resulted in -- or should have resulted, but did not result in -- a fraud indicator. Therefore, Proposal 8 affects management’s right to discipline employees under § 7106(a)(2)(A).”)
- Penalty: 53 FLRA 625, 679 (“Proposal 17 prevents removal of an examiner for a conflict of interest resulting from a financial interest that existed prior to employment or due to an [a]gency initiated change or work assignment, except when the examiner knowingly conceals the conflict. Because the proposal would preclude the [a]gency’s choice of removal as the discipline to impose except as noted, it affects the exercise of the right to discipline.”)



## (a)(2)(B) - Assign Work

- ✓ Determine assigned duties, when assignments will occur, and to whom or what positions assigned
- ✓ Establish qualifications and skills, decide whether employees meet them
- ⊘ NOT whether to reward performance
- ⊘ NOT mere requirement for Agency to take some action




70

- Particular duties: 72 FLRA 63, 67 (Member Abbott concurring) (specific duties); 72 FLRA 377, 378-79 (military supervisory assignment)
- When assignments occur: 69 FLRA 586, 591-92 (when assignments occur; employee deciding when to perform certain tasks)
- Changing starting & quitting times affects: 57 FLRA 424, 426
- Qualifications/Training: 61 FLRA 97, 99 (Member Pope dissenting in part) (“specific knowledge, skills, and abilities to do the work of a position, as well as job-related individual characteristics such as judgment and reliability”); *id.* (training)
- Rewards not included in right: 63 FLRA 505, 508 (“[P]roposals requiring that employees participate in making recommendations regarding performance awards do not affect management’s rights to assign work.”)
- Not affected because requires some action: 64 FLRA 443, 447 (Member Beck dissenting)

## (a)(2)(B) - Contract Out

- ✓ Decide when to contract out work and the terms of a contract
- ! Affected by proposals/provisions that delay or require cost study of contracting out work




71

- Prohibiting contracting out (even greater effect than delay): 60 FLRA 595, 597
- Contracting out cost study: 48 FLRA 168, 204 (proposal requiring “cost study that takes into account savings obtainable from specified alternative procedures” was “substantive criteria governing the exercise” of right to contract out)
- No violation: 64 FLRA 474, 479 (proposal “does not establish conditions for the [a]gency to contract out the education of employees’ dependents, nor does it dictate the terms of the [a]gency’s contract with DoD”)
- No violation: 64 FLRA 266 (delay caused by negotiation over proposal is ok as procedure)

## (a)(2)(B) - Determine Personnel

- ✓ Decide which employees will do specific work assignments
- ! Includes determining the particular employees to whom work is assigned



72

- 61 FLRA 371, 373 (to whom or what positions duties will be assigned; the particular employees to whom work will be assigned)
- 72 FLRA 606, 607-08 (right affected by remedy requiring that union rep escort must not be management official); *id.* at 610 (Dissenting Opinion of Chairman DuBester) (same)

## (a)(2)(C) - Make Selections to Fill Positions


- ✓ Select from: (1) among properly certified candidates for promotion; or (2) any other appropriate source
- ✓ Decide qualifications, skills, and abilities needed for position and determine whether applicants have those
- ! Affected by proposals that limit sources of selection
- ⊘ NOT affected by proposals that expand an agency's selection options

73

- Decide qualifications, determine whether applicants have: 61 FLRA 618, 622 (“It is well-established that management’s right to make selections under § 7106(a)(2)(C) of the Statute includes the right to determine the qualifications, skills, and abilities needed to do the work of a position and to determine whether applicants possess such qualifications, skills, and abilities. In this regard, the Authority has found that management’s right to make selections includes the right to determine the selective factors that apply to a position. Parties’ agreement precludes the [a]gency from using the five-knowledges requirement as a minimum qualification requirement. It is undisputed that the five-knowledges requirement is a selective placement factor.”)
- Affected by limitations on sources: 56 FLRA 1046, 1048 (“A proposal requiring an agency to use competitive procedures to fill vacant positions affects management’s right to select under section 7106(a)(2)(C), even where the proposal provides management with an exception in certain circumstances. . . . [T]he provision in this case would preclude the [a]gency from selecting an individual for a vacant position unless that individual is available for selection through competitive procedures. As such, the provision would not preserve management’s right to ultimately select from a different source, including noncompetitive reassignment. In these circumstances, we conclude that the provision affects management’s right to select from any appropriate source.”)
- Expanding sources don’t affect: 61 FLRA 226, 229 (Member Armendariz dissenting) (“Authority has held that a requirement that expands, rather than limits, an agency’s selection options does not affect the right to select. Further, while a requirement that management actually select candidates for positions affects management’s right to select under § 7106(a)(2)(C), a requirement that management merely consider certain candidates does not affect that right.”)

## (a)(2)(D) - Carry Out Mission in Emergencies

- ✓ Independently assess whether emergency exists
- ✓ Decide actions to address emergency
- ! Affected by requirement that declarations of emergency be made by a particular person



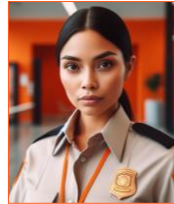
74

- Independently assess & decide what actions needed: 58 FLRA 549, 551 (Member Pope concurring)
  - But subject to arbitrator's review: *id.* (“[W]here such claims are not supported by the record, they will not be sustained.”)
- Requiring particular individual to declare: 31 FLRA 131, 132
- Define emergency: 49 FLRA 874, 876
- Proposal to define “emergency” as broad as Statute, no effect: 55 FLRA 243, 245



## § 7106(a) Group Activity

See exercise handout  
page 2 for the fact  
pattern for  
this exercise.



## Practice - § 7106(a)

1

- **Proposal:** If an irate claimant or potentially dangerous claimant requires interviewing, the employee and claimant will be escorted to the private interviewing room or to an alternative interviewing room or more controllable interview area, and they will not be left alone.
- Please read exercise handout page 2 for a summary of the proposal's background.
- Split into breakout rooms for ten minutes to discuss which § 7106(a) rights are affected by the union's proposal.

77

- **Background:** The Union claimed the proposal protects employees before and during interviews from persons who pose a health and safety threat. The Union also stated the proposal does not allow employees to refuse work. Rather, it only delays interviews until safer circumstances are arranged. Under the proposal, such arrangements would include assigning another employee to accompany the employee conducting the interview or providing for the interview to be conducted in an area where assistance could be provided to the employee if it were necessary.
- Does the proposal affect any of the Agency's § 7106(a) management rights? Be prepared to individually answer in the chat when you return.



## Practice - § 7106(a)

2

- **Proposal:** If an irate claimant or potentially dangerous claimant requires interviewing, the employee and claimant will be escorted to the private interviewing room or to an alternative interviewing room or more controllable interview area, and they will not be left alone.
- **Answer in the chat:** What § 7106(a) rights were affected by the union's proposal?



# Wrap Up

Appendix 1

**5 U.S.C. § 7106 - MANAGEMENT RIGHTS & EXCEPTIONS**

**(a)** Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency –

**(1)** to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

**(2)** in accordance with applicable laws –

**(A)** to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary 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 filling positions, to make selections for appointments from –

**(i)** among properly ranked and certified candidates for promotion; or

**(ii)** any other appropriate source; and

**(D)** to take whatever actions may be necessary to carry out the agency mission during emergencies.

**(b)** Nothing in this section shall preclude any agency and any labor organization from negotiating –

**(1)** at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

**(2)** procedures which management officials of the agency will observe in exercising any authority under this section; or

**(3)** appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

