**Negotiability**

**Overview**

Negotiability is a term used to describe the determination of whether a specific proposal is a mandatory, permissive, or prohibited subject for bargaining. This determination requires the application of several "tests" or standards that have evolved through decisions rendered by the Federal Labor Relations Authority and the courts. Note that this guide provides information on how negotiability is determined, not upon the negotiability of any specific topics. This guide uses the terms "proposal" and "provision." A proposal is a matter offered for bargaining that has not been agreed to by the parties. A provision is a matter agreed to by the parties and either subject to agency head review under 5 USC 7114 (c) or already contained in an approved negotiated agreement.

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**Key Points**

These key-point summaries cannot reflect every fact or point of law contained within a source document. For the full text, follow the link to the cited source. The references to ***Broida*** in this Quick Start Guide are to federal employment law expert Peter Broida's treatise, *A* *Guide to Federal Labor Relations Authority Law and Practice* (Dewey Publishing Inc.), to which ***cyber*FEDS®** has exclusive Web rights.

**The basics**

* A proposal does not qualify as a procedure if it directly interferes with the exercise of a management right. *Social Security Administration*, 94 FLRR 1-1146, 49 FLRA 1408 (FLRA 1994); *Wright-Patterson AFB*, [80 FLRR 1-1199](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=80+FLRR+1-1199), 2 FLRA 604 (FLRA 1980).
* Two types of arguments may be raised in negotiability proceedings: negotiability disputes concerning the legality of a proposal, and bargain obligation disputes concerning whether a party must bargain over a proposal that may be otherwise negotiable (whether a matter is already covered by an existing agreement, for example). However, a bargaining obligation question, standing alone, is not resolved in a negotiability proceeding. *Federal Aviation Administration*, 107 LRP 59207, 62 FLRA 174 (FLRA 2007).
* If a union fails to dispute an agency's claim that a proposal impacts the exercise of a management right, and fails to support a claim that the proposal is subject to an exception to management's rights, the FLRA will find the proposal outside the duty to bargain. *Federal Correctional Institution, Waseca, Minn.*, 109 LRP 59945, 64 FLRA 62 (FLRA 2009); *Federal Aviation Administration*, 108 LRP 5004, 62 FLRA 337 (FLRA 2008).
* If the FLRA honors a party's request to group proposals because they concern the same subject matter, and it finds one of the proposals outside the duty to bargain, it will declare all proposals in the grouping also outside the duty to bargain. *Federal Aviation Administration*, 107 LRP 59207, 62 FLRA 174 (FLRA 2007).
* The FLRA will adopt the union's interpretation of its proposals where that interpretation is consistent with the wording of the proposals. *Environmental Protection Agency*, 107 LRP 6280, 62 FLRA 1 (FLRA 2007).
* The FLRA dismisses petitions for review where it is unable to determine from the wording of the proposal, and the union's explanation, exactly how the proposal would work, so as to be able to assess it under applicable law and regulation. *Immigration and Naturalization Service*, 91 FLRR 1-1432, 42 FLRA 599 (FLRA 1991).

**Negotiability procedures**

* ***Broida:*** The parties bear the burden of creating a factual record sufficient for the FLRA to resolve the negotiability dispute. Although the primary responsibility for explaining proposals and their legal implications rests on the parties, the FLRA is not limited to considering only the arguments of the parties. It must apply all relevant provisions of the statute in resolving negotiability appeals. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Development of Factual Record](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+04:+Subjects+of+Bargaining:+Procedures+For+Negotiability+Determinations,+Subchapter+04:+Framework+For+Negotiability+Appeals,+Section+B:+Development+of+Factual+Record), *citing* *Norfolk Naval Shipyard*, 88 FLRR 1-1180, 32 FLRA 98 (FLRA 1988).
* After an agency makes an allegation of nonnegotiability, each party has the opportunity to argue its case in two submissions. [5 CFR Part 2424, Subpart C](http://www.cyberfeds.com/CF3/servlet/GenPrintable?format=html&pdfbox=doc_id%3D500%26chunk_id%3D4062&pdfbox=doc_id%3D500%26chunk_id%3D4063&pdfbox=doc_id%3D500%26chunk_id%3D4064&pdfbox=doc_id%3D500%26chunk_id%3D4065&pdfbox=doc_id%3D500%26chunk_id%3D4066&pdfbox=doc_id%3D500%26chunk_id%3D4067&pdfbox=doc_id%3D500%26chunk_id%3D4068&pdfbox=doc_id%3D500%26chunk_id%3D4069).
* The union's initial petition for review must set forth the exact wording of the proposal, along with an explanation of its meaning and how it is intended to work. [5 CFR 2424.22](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+CFR+2424.22).
* The agency must file a statement of position setting forth its specific objections to the proposal with appropriate explanation and citations. [5 CFR 2424.24](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+CFR+2424.24).
* The union must respond to the agency's statement of position stating any disagreements with the agency's position with citations. The response is specifically limited to matters raised by the agency in its statement of position. [5 CFR 2424.25](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+CFR+2424.25).
* The agency may reply to the union's response. The reply is limited to arguments made for the first time in the union's response. [5 CFR 2424.26](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+CFR+2424.26).
* The FLRA will not consider arguments raised by a party that appear in the wrong submission. *Customs and Border Protection*, 104 LRP 52957, 60 FLRA 367 (FLRA 2004).
* Failure by a party to address any assertion made by the other party will be deemed a concession to that assertion.*Army Air Defense Center and School, Fort Bliss, Texas*, 106 LRP 54331, 61 FLRA 777 (FLRA 2006).
* Either party may request a hearing, but a hearing will be granted only when the request or the record raises factual issues that must be resolved in order to determine the negotiability of the proposal. *Professional Airways Systems Specialists*, 103 LRP 37584, 59 FLRA 25 (FLRA 2003).
* In its response to an agency's statement of position, the union's failure to address the agency's contention that a proposal affected the exercise of management rights constituted acceptance of that assertion. *National Labor Relations Board*, 108 LRP 29065, 62 FLRA 397 (FLRA 2008).

**Procedures for exercising management rights**

* Proposals placing a substantive limitation on an agency's ability to exercise management rights are not negotiable procedures. *Kansas National Guard*, 105 LRP 15668, 60 FLRA 835 (FLRA 2005).
* Proposals that require notice prior to the exercise of a management right, but that do not preclude an agency from exercising its rights, generally are negotiable procedures. *Bureau of* *Indian Affairs*, 109 LRP 48728, 63 FLRA 585 (FLRA 2009).
* When a union contends that a proposal constitutes a negotiable procedure, a bare assertion is not enough. The union must present argument or authority to support its claim. *National Labor Relations Board,* 108 LRP 29065, 62 FLRA 397 (FLRA 2008).
* Proposals to establish committees, with union participation, that are not an integral part of management's decision-making process relative to the exercise of management rights generally are negotiable procedures. *Environmental* *Protection Agency*, 107 LRP 6280, 62 FLRA 1 (FLRA 2007).

**Conditions of employment**

* Representatives of an agency and a union holding exclusive recognition for a bargaining unit are required to bargain in good faith on the conditions of employment of such employees. [5 USC 7114](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7114)(b).
* Conditions of employment include the personnel policies, practices, and other matters affecting the working conditions of bargaining unit employees. [5 USC 7103](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7103)(a)(14).
* A majority of the FLRA has refused to consider the term "working conditions" outside the context of the term "conditions of employment." The courts and the FLRA, ruling on issues concerning working conditions, have accorded the term a broad interpretation that encapsulates a wide range of subjects that is effectively synonymous with conditions of employment. The FLRA concluded there is no substantive difference between working conditions and conditions of employment as those terms are practically applied. *Davis-Monthan AFB*, 109 LRP 61687, 64 FLRA 85 (FLRA 2009).
* To determine whether a proposal concerns a condition of employment, the FLRA applies a two-part test: 1) whether the proposal pertains to bargaining unit employees; 2) whether there is a nexus between the proposal and the work situation or employment relationship of bargaining unit employees. *Broadcasting Board of Governors*, 103 LRP 53112, 59 FLRA 447 (FLRA 2003); *Antilles Consolidated Education Association*, 86 FLRR 1-1640, 22 FLRA 235 (FLRA 1986).
* Administrative leave involves conditions of employment without regard to the purpose for which the leave is granted. *Internal Revenue Service*, 108 LRP 29053, 62 FLRA 411 (FLRA 2008); *AFGE Local 2761 v. FLRA*, 89 FLRR 1-8002, 866 F.2d 1443 (D.C. Cir. 1989).
* A proposal requiring the agency to maintain an employee fitness center concerned a condition of employment where a written policy of the agency identified a link between fitness and productivity. *Department of Labor*, 105 LRP 42839, 61 FLRA 209 (FLRA 2005).
* Excluded from the definition of conditions of employment are policies, practices or matters related to prohibited political activities, the classification of any position, or other matters specifically provided for in federal statute. [5 USC 7103](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7103)(a)(14).
* Parties are required to bargain only to the extent that a proposal is not inconsistent with federal law, governmentwide rule or regulation, or agency regulations for which a compelling need exists. [5 USC 7117](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7117)(a).
* Parties normally are required to maintain the status quo until the bargaining process, including impasse procedures, has been completed. *INS, Washington, D.C.*, [99 FLRR 1-1003](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=99+FLRR+1-1003), 55 FLRA 69 (FLRA 1999).
* A proposal involves a condition of employment if it focuses primarily on unit employees or positions and directly affects their work situation or employment relationship. *Antilles Consolidated School System*, [86 FLRR 1-1640](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=86+FLRR+1-1640), 22 FLRA 235 (FLRA 1986).
* As a general rule, proposals that would establish conditions of employment for individuals outside a union's bargaining unit are not within the duty to bargain. *Bureau of Engraving and Printing*, [95 FLRR 1-1073](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=95+FLRR+1-1073), 50 FLRA 677 (FLRA 1995).
* Access to a benefit for a prolonged period of time does not automatically render it a condition of employment. *Department of Labor*, [87 FLRR 1-1257](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=87+FLRR+1-1257), 27 FLRA 375 (FLRA 1987).
* A claim that a condition of employment has been created by past practice requires a showing that 1) the practice actually involves the personnel policies, practices or working conditions of bargaining unit employees; 2) the practice is known to both sides; 3) the practice has been in place for a significant period of time; and 4) it is consistent with applicable law and regulations. *Internal Revenue Service*, [87 FLRR 1-1251](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=87+FLRR+1-1251), 27 FLRA 322 (FLRA 1987).
* A matter that is not otherwise a condition of employment does not become a condition of employment through past practice. When determining whether an agency is required to bargain over a change in practice, the FLRA first examines whether the change concerns a condition of employment*. Internal Revenue Service*, 108 LRP 29053, 62 FLRA 411 (FLRA 2008); *IRS Hartford*, 87 FLRR 1-1251, 27 FLRA 322 (FLRA 1987).
* A notice of a change in conditions of employment must be adequate, i.e. sufficiently specific and definitive to provide the union with a reasonable opportunity to request bargaining. To be adequate, it must advise the union of the planned timing of the change. *National Federation of Federal Employees, FD-1, IAMAW, Local 1442 v. FLRA,* 104 LRP 36739, 369 F.3d 548 (D.C. Cir. 2004).

**Appropriate arrangements**

* Although management rights listed in [5 USC 7106](http://www.cyberfeds.com/CF3/CF3/servlet/GetReg?cite=5+USC+7106)(a) are not open to negotiation as to the decision to exercise them, the procedures and appropriate arrangements involved in such exercise are negotiable. [5 USC 7106](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7106)(b)(2) and (3).
* An appropriate arrangement for employees adversely affected by the exercise of a management right is one that does not excessively interfere with the management right. *Kansas Army National Guard*, [86 FLRR 1-1492](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=86+FLRR+1-1492), 21 FLRA 24 (FLRA 1986).
* Excessive interference is something more than direct interference. *AFGE Local 1923 v. FLRA*, [87 FLRR 1-8019](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=87+FLRR+1-8019), 819 F.2d 306 (D.C. Cir. 1987).
* An assertion that a proposal, intended as an appropriate arrangement, excessively interferes with a management right must be made at the bargaining table. An agency head may no longer reject an agreed-upon provision when reviewing a contract under the terms of 5 USC 7114 (c) on the basis that the provision excessively interferes with a management right. An agency head may reject such a provision only if it abrogates (waives) the management right. *Bureau of the Public Debt,* 111 LRP 11273, 65 FLRA 509 (FLRA 2011).
* In order to qualify as an appropriate arrangement a proposal must: 1) address a reasonably foreseeable adverse effect flowing from a management action; 2) be tailored to benefit or compensate employees suffering such adverse effects. *Minerals Management Service v. FLRA*, [92 FLRR 1-8030](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=92+FLRR+1-8030), 969 F.2d 1158 (D.C. Cir. 1992); *Defense Contract Audit Agency*, [101 FLRR 1-1069](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=101+FLRR+1-1069), 56 FLRA 1049 (FLRA 2001).
* Terms such as "fair and equitable" when used in proposals that govern the exercise of a management right constitute substantive limitations on the exercise of that right, and thus affect the right. *Patent and Trademark Office*, 97 FLRR 1-1123, 53 FLRA 539 (FLRA 1997).
* A proposal that does not require fair and equitable policies but merely fair and equitable application constitutes an appropriate arrangement. *Office of the Comptroller of Currency*, 106 LRP 73094, 61 FLRA 871 (FLRA 2006).
* The FLRA ruled that eight proposals regarding the workload and compensation of housekeepers at an Air Force base were within the duty to bargain as appropriate arrangements. The agency didn't explain how the proposals violated the management right to assign work, so the proposals' benefits outweighed the "unexplained and undemonstrated burdens" on management. *Department of the Air Force, Lackland AFB, Texas*, 110 LRP 34948, 64 FLRA 869 (FLRA 2010).

**Individuals outside the bargaining unit**

* ***Broida:*** An agency is not required under the statute to bargain with one exclusive representative about conditions of employment in a unit represented by another union because such a requirement would run afoul of the principle of exclusive recognition. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Matters Affecting Nonunit Employees](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+05:+Subjects+of+Bargaining:+Substantive+Limitations+on+Negotiability+Determinations,+Subchapter+02:+Employment+Conditions,+Section+C:+Matters+Affecting+Nonunit+Employees), *citing Department of Housing and Urban Development*, 98 FLRR 1-1184, 54 FLRA 1267 (FLRA 1998).
* Proposals that directly affect the conditions of employment of certain non-unit employees are negotiable if they "vitally affect" unit employees' conditions of employment. *Internal Revenue Service*, 110 LRP 25755, 64 FLRA 723 (FLRA 2010); *Health Care Financing Administration*, 92 FLRR 1-1172, 44 FLRA 1405 (FLRA 1992).
* Proposals that would directly affect employees who are located in other bargaining units or who are supervisors or managers, however, are not negotiable. *Office of Personnel Management*, [95 FLRR 1-1118](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=95+FLRR+1-1118), 51 FLRA 491(FLRA 1995).
* ***Broida:*** A proposal that required the agency to provide visitors a view of an agency workstation during a facility tour was not negotiable. Proposals that are directed at the interests of the public, even where a union is, or unit employees are, indirectly involved, do not pertain to conditions of employment. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Matters Affecting Agency Clients](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+05:+Subjects+of+Bargaining:+Substantive+Limitations+on+Negotiability+Determinations,+Subchapter+02:+Employment+Conditions,+Section+B:+Employment+Conditions+Defined,+Subsection+02:+Matters+Affecting+Agency+Clients), *citing Broadcasting Board of Governors*, 103 LRP 53112, 59 FLRA 447 (FLRA 2003) (Proposal 1).

**Matters covered by law**

* If the subject matter of a proposal is specifically provided for by federal statute, it is not negotiable. 5 USC 7103 (a)(14(C).
* Mere reference in a statute to a particular matter does not necessarily bar the matter from negotiations unless the statute leaves no discretion to the agency. *Immigration and Naturalization Service*, 99 FLRR 1-1135, 55 FLRA 892 (FLRA 1999).
* ***Broida:*** If the proposal seeks to require the agency to follow the law or if the proposal does no more than call on the agency to incorporate into the contract statutory provisions that undeniably cover unit employees, the proposals are negotiable. The dividing line between negotiable and nonnegotiable proposals is whether they require negotiations over the substantive content of matters that are specifically provided for by statute, i.e., whether the proposal modifies the substantive statutory provisions. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Matters Covered By Law](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+05:+Subjects+of+Bargaining:+Substantive+Limitations+on+Negotiability+Determinations,+Subchapter+02:+Employment+Conditions,+Section+A:+Matters+Covered+By+Law), *citing Department of Energy*, 88 FLRR 1-1251, 32 FLRA 578 (FLRA 1988).
* ***Broida:*** It is well-established that if a law indicates that an agency's discretion is intended to be exercised only by the agency -- referred to by the FLRA as "sole and exclusive" discretion -- then the agency is not obligated under the statute to exercise that discretion through collective bargaining. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Matters Within Exclusive Authority of Agency](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+05:+Subjects+of+Bargaining:+Substantive+Limitations+on+Negotiability+Determinations,+Subchapter+02:+Employment+Conditions,+Section+A:+Matters+Covered+By+Law,+Subsection+02:+Matters+Within+Exclusive), *citing* *DVA, Ralph H. Johnson Medical Center, Charleston, S.C.,*100 FLRR 1-1091, 56 FLRA 346 (FLRA 2000).

**Governmentwide rules**

* Governmentwide rules or regulations are those regulations and other official declarations of policy that are binding on agencies and the officials to which they apply. *IRS, New Orleans*, [80 FLRR 1-1366](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=80+FLRR+1-1366), 3 FLRA 748 (FLRA 1980).
* Proposals that conflict with governmentwide rules and regulations are generally not within the duty to bargain. *Veterans Administration, Newington*, *Conn.*, [88 FLRR 1-1201](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=88+FLRR+1-1201), 32 FLRA 206 (FLRA 1988).
* Governmentwide issuances that merely state advice or guidance do not bar negotiation of a proposal. *Customs Service*, [86 FLRR 1-1490](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=86+FLRR+1-1490), 21 FLRA 6 (FLRA 1986).
* ***Broida:*** The FLRA normally defers to guidance from OPM on statutory matters that OPM is entrusted to interpret if that guidance constitutes a reasonable interpretation of the statutory language. *See* *Department of the Interior,* 101 FLRR 1-1032, 56 FLRA 894 (FLRA 2000). However, interpretations that lack the force of law, such as opinion letters, manuals, and the like, do not warrant such deference. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* OPM Regulations, FPM](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Subchapter+04:+Government-Wide+Regulations,+Section+B:+Specific+Rules+and+Regulations,+Subsection+01:+OPM+Regulations,+FPM), *citing**Department of the Air Force, 436th Airlift Wing, Dover AFB, Dover, Del*., 101 FLRR 1-1149, 57 FLRA 304 (FLRA 2001) (other citations omitted).

**Negotiability -- in general**

* Agencies may bargain, at their election, on the numbers, types, and grades of employees assigned to various organizational components, and on the technology, methods, and means used to accomplish the agency's work. 5 USC 7106(b)(1).
* A proposal that involves both [5 USC 7106](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7106)(a) and [5 USC 7106](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7106)(b) [e.g., a proposal affecting the number of employees assigned to a particular shift], is permissibly negotiable because [5 USC 7106](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7106)(b) exists as an exception to [5 USC 7106](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7106)(a). In other words, the mere fact that a [5 USC 7106](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7106)(a) management right is involved does not necessarily render a proposal non-negotiable. *Veterans Administration, Newington*, *Conn.,* [98 FLRR 1-1130](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=98+FLRR+1-1130), 54 FLRA 521 (FLRA 1998).
* Agencies may also elect to bargain on other matters that do not involve the conditions of employment of bargaining unit employees (e.g., promotion procedures for first-level supervisory positions) to the extent such proposals are consistent with applicable federal statutes and regulations. *VA Medical Center, New York*, [86 FLRR 1-1698](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=86+FLRR+1-1698), 22 FLRA 710 (FLRA 1986).
* An agency's prior bargaining over a matter without contending the proposal interfered with management rights does not preclude the agency from raising that contention in future bargaining. *Eielson AFB*, 108 LRP 19512, 62 FLRA 369 (FLRA 2008).
* The Federal Service Impasses Panel is not authorized to render negotiability decisions independently, but may apply existing FLRA and court precedent to determine whether it holds jurisdiction over a particular proposal. *Veterans Administration*, [87 FLRR 1-1129](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=87+FLRR+1-1129), 26 FLRA 264 (FLRA 1987).
* Similarly, an interest arbitrator appointed to resolve bargaining disputes between the parties may also apply existing precedent to determine the negotiability of a disputed issue, but may not independently determine whether a matter is within the obligation to bargain. *Carswell AFB*, [88 FLRR 1-1081](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=88+FLRR+1-1081), 31 FLRA 620 (FLRA 1988).

**Agency regulations**

* Once a collective bargaining agreement becomes effective, subsequently issued rules or regulations, with the exception of governmentwide rules or regulations issued under 5 USC 2302, cannot nullify the terms of the collective bargaining agreement. *Internal Revenue Service,* 83 FLRR 1-1350, 13 FLRA 554 (FLRA 1983).
* Agencies must bargain in good faith over union proposals on matters governed by agency regulations that are not inconsistent with law or governmentwide regulation, unless the agency can establish a compelling need for the regulation. 5 USC 7117(a).
* With respect to agency regulations issued before the effective date of a collective bargaining agreement, agencies have the burden of coming forward with support for its position that its regulations bar negotiation of conflicting proposals because there is a "compelling need" for its regulations. *Internal Revenue Service*, 83 FLRR 1-1350, 13 FLRA 554 (FLRA 1983).
* The FLRA defines a compelling need regulation as one that is: 1) essential, rather than merely helpful or desirable to the accomplishment of the agency's mission; 2) necessary to ensure maintenance of basic merit principles; or 3) implements a mandate or order. [5 CFR 2424.11](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+CFR+2424.11).
* ***Broida:*** The general rule, as restated in *Department of the Air Force, Seymour Johnson AFB*, 99 FLRR 1-1011, 55 FLRA 163 (FLRA 1999), is that "collective bargaining agreements, rather than agencywide regulations, govern the disposition of matters to which they both apply." The compelling need exemption goes to the negotiability of a proposal before it is accepted into an agreement. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Compelling Need Determinations; Procedure](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+05:+Subjects+of+Bargaining:+Substantive+Limitations+on+Negotiability+Determinations,+Subchapter+03:+Compelling+Need+Determinations,+Section+A:+Procedure).

**Permissive topics**

* An agency may elect to cease bargaining on a permissive topic at any time prior to reaching agreement without committing an unfair labor practice. *Mine Safety and Health Administration*, [86 FLRR 1-1610](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=86+FLRR+1-1610), 21 FLRA 1046 (FLRA 1986).
* Insisting that a previously agreed-upon permissive topic of bargaining be retained in a subsequent labor agreement to the point of creating an impasse constitutes bad faith bargaining. *Customs Service, Region IX*, 85 FLRR 1-1033, 17 FLRA 221 (FLRA 1985).

**Severance**

* In its petition for review of an agency allegation of non-negotiability or later in its response to the agency's statement of position, a union may request the FLRA to sever portions of a proposal or provision and to rule separately on their negotiability. In doing so, the union must explain how each severed portion stands alone and how it will operate. [5 CFR 2424.22](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+CFR+2424.22)(c); *Bureau of Indian Affairs,* 109 LRP 48728, 63 FLRA 585 (FLRA 2009).
* Severance is defined as the division of a proposal or provision into separate parts having independent meaning for the purpose of determining whether any of the parts is within the duty to bargain. In effect, severance results in the creation of separate proposals or provisions. [5 CFR 2424.2](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+CFR+2424.2)(h).
* The FLRA will not sever a proposal or provision absent a request from the union. *Defense Contract Audit Agency*, 104 LRP 4364, 59 FLRA 619 (FLRA 2004).
* ***Broida:*** Severance was denied in *Kansas National Guard*, 102 LRP 21261, 58 FLRA 28 (FLRA 2002) (the FLRA concluded that the union made "no attempt to explain how the severed portions would stand alone or otherwise operate" when the union stated only that various parts of the proposal were severable); *reconsideration denied*, 103 LRP 17195, 58 FLRA 483 (FLRA 2003). [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Severable Proposals](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+04:+Subjects+of+Bargaining:+Procedures+For+Negotiability+Determinations,+Subchapter+04:+Framework+For+Negotiability+Appeals,+Section+I:+Effect+of+FLRA+Ruling,+Subsection+03:+Severable+Proposals).
* Severance is used only when a legal issue applies differently to any portion of a proposal or provision. *National Weather Service*, 105 LRP 45617, 61 FLRA 241 (FLRA 2005).
* Severance is not required when a union bargaining package contains proposals or provisions that have independent meanings. *Professional Airways Systems Specialists*, 105 LRP 5059, 60 FLRA 609 (FLRA 2005).
* Simply using the term "proposal" does not, for severance purposes, necessarily qualify it as such. A union's failure to explain how each severed proposal could stand alone and how it would operate caused the FLRA to view the proposal as an integrated whole. *Professional Airways Systems Specialists*, 103 LRP 37584, 59 FLRA 25 (FLRA 2003).
* Where severance is requested, it can occur on a section by section basis. *Federal Aviation Administration*, 106 LRP 614, 61 FLRA 341 (FLRA 2005).
* A union may seek severance of sentences or even parts of sentences. *National Guard Bureau*, [100 FLRR 1-1124](http://www.cyberfeds.com/CF3/servlet/GetCase?cite=100+FLRR+1-1124), 56 FLRA 526 (FLRA 2000).
* Severance is not necessary when the agency does not object to the negotiability of the portion of the proposal or provision the union seeks to sever. *Department of Labor*, 105 LRP 627, 60 FLRA 533 (FLRA 2004).