**Permissive Topics of Bargaining**

**Overview**

The matters enumerated in 5 USC 7106(b)(1) are generally referred to as the permissive topics for bargaining. These are:

* The numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty; and
* The technology, methods, and means of performing work.

An agency may elect to negotiate over the substance of union proposals addressing these matters or it may lawfully refuse to bargain. There is considerable overlap between the permissive scope of bargaining and the nonnegotiable management rights contained in Section 7106(a). Where a proposal concerns a permissive matter and at the same time affects the exercise of a management right, it is viewed as permissive because Section 7106(b)(1) was intended as an exception to Subsection (a).

Permissive bargaining extends beyond the scope of Section 7106(b). For example, an agency may, but does not have to, negotiate over the manner in which it fills supervisory positions. A union may, but is not required to, negotiate a waiver of a statutory right.

A party has the unilateral right to terminate a permissibly negotiable agreement upon expiration of the agreement.

In December 2009, President Obama issued [Executive Order 13522 -- Creating Labor-Management Forums to Improve Delivery of Government Services](http://www.cyberfeds.com/CF3/index.jsp?contentId=5003&chunkid=310822). The EO calls for some agencies to establish pilot projects designed to negotiate some or all of the matters contained in [5 USC 7106](http://www.cyberfeds.com/CF3/servlet/GetReg?cite=5+USC+7106)(b)(1). The National Council on Federal Labor-Management Relations is charged with reporting the results of the permissive bargaining pilot projects to the president no later than 18 months from the issuance of the EO.

**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**

* Because Section 7106(b)(1) is an exception to Section 7106(a), an arbitrator's award enforcing an agreement made under Subsection (b)(1) will not be disturbed even though it affects a management right contained in Subsection (a). *Federal Aviation Administration, Alaskan Region*, 107 LRP 38321, 62 FLRA 90 (FLRA 2007).
* A contrary to law exception will not be applied to an arbitrator's award enforcing a provision concerning a permissively negotiated matter. Instead, the question is one of contract interpretation subject only to an essence of agreement analysis. *Internal Revenue Service*, 105 LRP 55140, 61 FLRA 377 (FLRA 2005).
* When the parties have reached agreement on a matter within the permissive scope of bargaining, it cannot be rejected as being contrary to law upon agency head review. *Air Route Traffic Control Center*, 105 LRP 48959, 61 FLRA 336 (FLRA 2005); *ACT Montana Air Chapter v. FLRA*, 94 FLRR 1-8003, 22 F.3d 1150 (D.C. Cir. 1994).
* An arbitrator's interpretation of a partnership agreement finding that it constitutes an election to bargain over Subsection (b)(1) matters will not be reversed by the Federal Labor Relations Authority if the interpretation is plausible. *Social Security Administration*, 100 FLRR 1-1004, 55 FLRA 1063 (FLRA 1999).
* Generally, a proposal that concerns a Section 7106(b)(1) matter is negotiable only at the election of the agency. However, if it constitutes an appropriate arrangement under Section 7016(b)(3), the agency is obligated to bargain. *National Weather Service, Alaska Region*, 105 LRP 45617, 61 FLRA 241 (FLRA 2005).
* ***Broida:*** Where an agency claims that a proposal affects a management right under Section 7106(a), and a union disagrees or claims that the proposal is within the duty to bargain under Section 7106(b)(2) and/or (3), as well as being electively negotiable under Section 7106(b)(1), the FLRA will first resolve those claims that would determine if a proposal is within the duty to bargain, and then, if necessary, address those claims that would determine if a proposal is electively negotiable. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Permissive Subjects of Bargaining; Executive Orders 12871, 13522](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+05:+Subjects+of+Bargaining:+Substantive+Limitations+on+Negotiability+Determinations,+Subchapter+05:+Permissive+Subjects+of+Bargaining;+Executive+Orders+12871,+13522), *citing VA Medical Center*, *Newington, Conn.,* 98 FLRR 1-1130, 54 FLRA 521 (FLRA 1998).
* An agreement to bargain Section (b)(1) matters can be interpreted to contain an implied agreement to submit impasses to the normal impasse resolution procedures. *Internal Revenue Service*, 100 FLRR 1-1096, 56 FLRA 393 (FLRA 2000); *reconsideration denied*, 101 FLRR 1-1038, 56 FLRA 935 (FLRA 2000).
* Although a change may involve the permissive scope of bargaining, negotiation over impact and implementation is mandatory. *SSA, Office of Disability Adjudication and Review*, 110 LRP 8825, 64 FLRA 469 (FLRA 2010).
* Although an agency cannot be compelled to bargain over the substance of Section 7106(b)(1) matters, it is obligated to bargain over impact and implementation when a more than de minimis change occurs. *Federal Correctional Institution, Bastrop, Texas*, 99 FLRR 1-1131, 55 FLRA 848 (FLRA 1999).
* Insisting upon bargaining a non-mandatory subject to the point of impasse is an unfair labor practice. *Food and Drug Administration*, 98 FLRR 1-1023, 53 FLRA 1269 (FLRA 1998); *reconsideration denied*, 98 FLRR 1-1143, 54 FLRA 630 (FLRA 1998).
* A party may withdraw from the negotiation of a permissive matter at any point prior to agreement. *Social Security Administration*, 96 FLRR 1-1154, 52 FLRA 677 (FLRA 1996); *National Park Service*, 86 FLRR 1-1839, 24 FLRA 56 (FLRA 1986).
* ***Broida:*** An interest arbitrator selected by the parties with the approval of FSIP may resolve a dispute by imposing contractual conditions that amount to permissive subjects of bargaining, as occurred and as was approved in *Pension Benefit Guarantee Corp.*, 104 LRP 23354, 59 FLRA 937 (FLRA 2004), *reconsideration denied*, 104 LRP 43462, 60 FLRA 258 (FLRA 2004). [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Permissive Subjects of Bargaining](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Subsection+02:+Authority+of+FSIP,+Interest+Arbitrators+to+Resolve+Duty+to+Bargain+or+Negotiability+Disputes,+Part+A:+Permissive+Subjects+of+Bargaining).
* If the parties agree to extend all terms of an agreement pending its renegotiation, provisions involving permissive topics remain in effect unless properly withdrawn by a party. *Fort Sam Houston*, 84 FLRR 1-1663, 15 FLRA 974 (FLRA 1984); *Ohio National Guard*, 85 FLRR 1-1127, 17 FLRA 957 (FLRA 1985).

**Numbers, types and grades**

* "Numbers, types and grades of employees" applies to the establishment of agency staffing patterns, or the allocation of staff for the purpose of an agency's organization and the accomplishment of its work. *Defense Distribution Depot*, 103 LRP 8747, 58 FLRA 368 (FLRA 2003); *DVA Medical Center, Providence*, *R.I.,* 101 FLRR 1-1154, 57 FLRA 373 (FLRA 2001).
* "Types" refers to distinguishable classes, groups or categories of employees or positions that are relevant to the establishment of staffing patterns. *DVA Medical Center, Lexington, Ky.*, 97 FLRR 1-1025, 52 FLRA 1024 (FLRA 1997).
* Staffing levels are permissive subjects of bargaining, and agreements on such matters are enforceable in arbitration. *Federal Aviation Administration*, 106 LRP 65070, 61 FLRA 854 (FLRA 2006).
* A proposal concerns the numbers of employees assigned to an organizational subdivision regardless of whether it would increase, decrease or maintain the number of employees the agency chooses to assign. *Federal Aviation Administration*, 104 LRP 42100, 60 FLRA 159 (FLRA 2004).
* The determination of whether and which positions assigned to an organizational subdivision will be filled concerns the allocation of staff and is within the permissive scope of bargaining. *DVA Medical Center, Lexington, Ky.*, 99 FLRR 1-1080, 55 FLRA 549 (FLRA 1999).
* A proposal dictating the number of employees the agency will employ affects management's Section 7106(a) right to determine number of employees. A proposal addressing the number of employees assigned to various components of the agency is permissibly negotiable under Subsection (b)(1). *Office of Surface Mining*, 97 FLRR 1-1113, 53 FLRA 427 (FLRA 1997).
* A proposal requiring the establishment of subdivisions did not fall within the permissive area of bargaining because it did not establish the numbers, types or grades assigned to a subdivision. *Army Corps of Engineers*, 96 FLRR 1-1168, 52 FLRA 813 (FLRA 1996).
* Proposals establishing tours of duty determine the number of employees assigned to a tour of duty and are negotiable at the agency's election. *USDA, Animal Plant Health Inspection Services*, 101 FLRR 1-1160, 57 FLRA 424 (FLRA 2001).
* A proposal determinative of the grade level of employees assigned to an organization is negotiable at the agency's election where it does not require the agency to classify or reclassify existing positions. *Defense Automated Printing Service*, 99 FLRR 1-1072, 55 FLRA 509 (FLRA 1999).

**Technology, methods and means**

* The legislative history of the statute indicates that the term "method" was intended to mean "how" work is performed, while the terms "means" was intended to mean "with what." *National Guard Bureau*, 99 FLRR 1-1085, 55 FLRA 591 (FLRA 1999).
* A "method" refers to the way an agency performs its work; a "means" refers to any instrumentality including an agent, tool, device, measure, plan or policy used by an agency for the accomplishment or furtherance of the performance of its work. *DVA Medical Center, Dublin, Ga.*, 100 FLRR 1-1015, 55 FLRA 1145 (FLRA 1999).
* In order for a proposal to affect the methods and means of accomplishing work, there must be a direct and integral relationship between the method or means the agency has chosen, and the accomplishment of the agency's mission. Also, the proposal must directly interfere with the mission-related purpose for which the method or means was adopted. *Defense Contract Audit Agency*, 99 FLRR 1-1127, 55 FLRA 830 (FLRA 1999).
* Proposals requiring work to be performed in one location rather than another do not impact the methods and means of performing work. *Federal Aviation Administration*, 101 FLRR 1-1017, 56 FLRA 798 (FLRA 2000).
* An agency's determination that employees must wear a uniform while performing work constitutes a decision as to the methods and means of performing work. *Bureau of Customs and Border Protection*, 105 LRP 27628, 61 FLRA 48 (FLRA 2005).
* A proposal prescribing the use of firearms concerns the means of performing work. The fact that the proposal also may be related to an agency's internal security policies does not make it any less a Section 7106(b)(1) matter. *Immigration and Naturalization Service*, 99 FLRR 1-1024, 55 FLRA 228 (FLRA 1999).
* A proposal to maintain two pieces of equipment to perform work involved the methods and means of performing work because the agency intended that the work be performed by one piece of equipment. *Western Area Power Administration*, 98 FLRR 1-1144, 54 FLRA 642 (FLRA 1998).
* A provision allowing the union to discontinue using certain equipment was enforceable in arbitration. That the award may have excessively interfered with management rights was deemed irrelevant. *Federal Aviation Administration*, 107 LRP 38321, 62 FLRA 90 (FLRA 2007).
* ***Broida:*** *General Services Administration*, 98 FLRR 1-1211, 54 FLRA 1582 (FLRA 1998), presented the issue, in the context of review of an arbitrator's award, whether matters pertaining to contracting out may be considered permissive subjects of bargaining under 5 USC 7106 (b)(1) as methods and means of performing work. The FLRA decided against negotiability on that theory. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Permissive Negotiation](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+06:+Subjects+of+Bargaining:+Specific+Applications+of+Negotiability+Determinations,+Subchapter+05:+Contracting+Out,+Section+C:+Permissive+Negotiation).
* Work space is generally a substantively negotiable matter. To be negotiable only at the election of the agency as a methods or means, it must be shown not only that a proposal concerns the use of office space for work, but also that the proposed use has some connection to or is determinative of how the agency will perform its work. *Social Security Administration*, 90 FLRR 1-1461, 37 FLRA 350 (FLRA 1990).
* An agency wasn't required to negotiate a union proposal concerning the height of partitions between employee work spaces. The proposal impacted the means of performing work because supervisors had to locate employees quickly, and higher partitions would directly interfere with the mission-related purposes of lower partitions. *Broadcasting Board of Governors*, 103 LRP 53112, 59 FLRA 447 (FLRA 2003).

**Permissive bargaining beyond Subsection (b)(1)**

* A mandatory bargaining obligation exists only at the level of recognition. Bargaining below the level of recognition is permissive. *Federal Aviation Administration*, 107 LRP 59207, 62 FLRA 174 (FLRA 2007).
* Proposals addressing procedures for filling supervisory positions do not affect the working conditions of bargaining unit employees. However, they may be negotiated at the election of the agency. *VA Connecticut Health Care System*, 106 LRP 29368, 61 FLRA 588 (FLRA 2006).
* ***Broida:*** Once included as part of the agreement, promotion procedures for supervisory positions may be enforced through arbitration. [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Scope of Permissive Bargaining](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+06:+Subjects+of+Bargaining:+Specific+Applications+of+Negotiability+Determinations,+Subchapter+11:+Promotions,+Vacancies,+and+Appointments,+Section+E:+Jobs+Outside+the+Unit,+Subsection+02:+Scope+of+Permissive), *citing* *Equal Employment Opportunity Commission*, 84 FLRR 1-1545, 15 FLRA 283 (FLRA 1984).
* A proposal directly affecting the working conditions of managers and supervisors may be negotiated at the election of the agency. *Internal Revenue Service*, 103 LRP 37592, 59 FLRA 34 (FLRA 2003).

**Termination of permissive agreements**

* When an agreement expires, either party is free to terminate permissibly negotiated provisions. *Customs and Border Protection*, 104 LRP 60627, 60 FLRA 483 (FLRA 2004).
* ***Broida:*** If the agency has bargained over a permissive subject, it is not required to bargain over extensions of the agreement reached on that subject, as the FLRA explained relative to a proposal to extend a memorandum of understanding involving arrangements for leave for supervisors and unit personnel in *Federal Aviation Administration*, 100 FLRR 1-1082, 56 FLRA 288 (FLRA 2000). [*Broida Guide to Federal Labor Relations Authority Law and Practice:* Extension of Existing Agreements](http://www.cyberfeds.com/CF3/servlet/GetDocByTitle?doctitle=Chapter+05:+Subjects+of+Bargaining:+Substantive+Limitations+on+Negotiability+Determinations,+Subchapter+05:+Permissive+Subjects+of+Bargaining;+Executive+Orders+12871,+13522,+Section+A:+Extension+of+Existing+Agreements).
* A party's right to terminate permissive provisions upon expiration of an agreement is not contingent upon first satisfying a bargaining obligation over substance, impact or implementation. *FCI Danbury*, *Conn.,* 99 FLRR 1-1021, 55 FLRA 201 (FLRA 1999).
* Notice of intent to terminate a permissibly negotiated agreement must be expressly stated, not implied. *FCI Danbury*, *Conn.,* 99 FLRR 1-1021, 55 FLRA 201 (FLRA 1999).
* To be effective, a party must give notice that explicitly contains a statement of intent to terminate provisions dealing with permissive subjects. However, there is no requirement that the party state the specific provision revoked. *NTEU v. FLRA*, 106 LRP 38229, 452 F.3d 506 (D.C. Cir. 2006).
* Because a waiver of statutory rights is a non-mandatory subject of bargaining, a union may unilaterally terminate the waiver upon expiration of an agreement. *Social Security Administration*, 91 FLRR 1-1537, 43 FLRA 549 (FLRA 1991).