

Collective Bargaining Agreement Provisions Guide

For National Guard Labor Relations Professionals



People First, Mission Always

Produced by National Guard Bureau Office of Technician Personnel

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January 2005 Edition

Forward...

This is the first edition of the National Guard Bureau Human Resource Labor Branch Collective Bargaining Agreement (CBA) Provisions Guide. This Guide is designed for the new and experienced Labor Relations Specialist and Human Resource Officer. Our goal is to provide you with the latest and most pertinent CBA opinions and Federal Labor Relations Authority (FLRA) case citations. The Guide features “acceptable contract language” and explanations by subject matter as a method to teach and inform.

The intent of this Guide is to provide you examples of acceptable contract language for use in negotiations that is not contrary to law or proper management practice. Improper language samples have also been included with a discussion of why these provisions are unacceptable and, where possible, substitute language or action is suggested. The end result of your use of this guide should result in improved contract language that is acceptable to both NGB and Field Advisory Service (FAS) on review.

As with any human resource discipline, labor relations is undergoing great change in the federal sector. As this Guide is being written, the National Security Personnel System is on the horizon and will make many fundamental changes to the federal sector labor management relations system. In using this Guide, also be aware that case law changes constantly and there is a need to review case law for pertinent updates that may pertain to the topics covered in this Guide.

As always, your comments are deeply appreciated. Please let us know how this Guide can be improved and what other subjects should be included the next edition.



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PART I. Potential Management Proposals

1. Union Sponsored Training

Acceptable Language: "Union sponsored training (exclusive of internal union training / activities) is appropriate and may be supported consistent with workload and mission when it is of benefit for professional development. Such training shall be paid for by labor and requested at least 45 calendar days in advance of the proposed training. Moreover, a memorandum signed by the local labor union President detailing the syllabus, organizational benefits, official leave requirement, as well as time and location of training shall be provided to management designee and accompany the request for training."

Explanation: Official time and related expenses for travel and per diem may be allowed for labor-relations training. DHHS, SSA and AFGE, 27 FLRA 391, 395 (1987).

Explanation: As to training, NTEU and Dept. of Treasury, Fin. Management Serv., 29 FLRA 422, 434 (1987), held negotiable a proposal that required the agency to grant a union representative official time to attend an OPM course about employee assistance programs.

Explanation: Held negotiable in NTEU and Dept. of Treasury, BATF, 45 FLRA 339, 362 (1992), was Provision 7, calling for agreement that "[d]uring each year of this Agreement up to 32 hours of administrative leave will be granted to each of 3 representatives from each of the nine designated chapters for travel and attendance at union sponsored training." The proposal was found negotiable under section 7131(d), and alternatively as an appropriate arrangement, due to the adverse impact upon employees relying upon otherwise untrained union representatives drawn from the ranks of their co-workers.

Explanation: DHHS, SSA and AFGE, 25 FLRA 479 (1987), *aff'd on reconsideration, 27 FLRA 114 (1987)*, determined that approximately 10 months of official time awarded by an arbitrator for an employee to obtain a masters degree in public administration was not an appropriate use of official time under § 7131. The record indicated that the predominant purpose of the

training was personal to the employee. No showing was made of the sort of direct relationship between the course of study and working conditions of employees that brought the use of the official time within the Statute.

2. Official Time

Acceptable Language: “The union representative will submit a “Memorandum Through” management designee to the Human Resources Office . . . requesting official time. The memorandum shall include the following: when, where, how much time, and the purpose for requesting time. On each occasion where official time is requested, a leave slip (SF 71) will be submitted to management designee.”

Acceptable Language: “Advance notice for official time for representational matters shall not be required for such matters in duration of less than two hours of official time. Advance notice of at least two hours is required in order to receive official time for representational activities in duration of two to four hours. Advance notice of at least four hours is required in order to receive official time for representational duties in duration of four or more hours.”

Explanation: Efforts by management to police official time used by union stewards or other officials, at the direction of OPM, are not inherently coercive nor do they constitute interference if unaccompanied by improper acts or speech. Defense Gen. Supply Ctr. and AFGE Local 2047, 15 FLRA 932 (1984) (ALJ Decision). Inquiries concerning use of sick leave by a union official are protected if consistent with the manager’s responsibility of insuring that employees abide by leave regulations. DHHS, SSA, Baltimore and AFGE, 22 FLRA 91 (1986) (ALJ Decision). An agency does not interfere with union business by policing a contract allowing reasonable official time through monitoring of phone calls to a union steward and requests to callers for the nature of their calls. There is no interference when the contract requires a certain procedure for calls on official time to union officials, if the agency insists the procedure be followed rather than allowing a more direct procedure selected by a union official that avoids the contractual procedure. Air Force Logistics Command, Wright-Patterson AFB and AFGE Local 1138, 14 FLRA 311 (1984) (ALJ Decision). An agency commits a ULP by restricting official time for EEO representational activities because the

representative is a union official with other official time commitments. See Dept. of Army, Ft. Riley and AFGE Local 2324, 26 FLRA 222 (1987) (ALJ Decision).

Explanation: The agency may impose reasonable restrictions on use of official time so that it can properly control the workforce. Marine Corps Logistics Base, Barstow and AFGE Local 1482, 23 FLRA 594 (1986) (ALJ Decision). Official time is to be used for labor-management activities, i.e., with respect to representation for investigation and attempted informal resolution of employee grievances, participation in formal grievance resolution procedures, attendance or preparation for meetings of joint labor-management committees, and discussion of problems in contract administration between union and management officials. A supervisor may restrict use of official time by challenging the use of time previously granted and precluding its use if it is reasonably suspected that it is not being used for labor-management activities. If the grievant believes that she was improperly denied official time, her recourse is to obey the order then file a grievance. A contrary arbitration award was set aside. Nat'l Archives and Records Admin. and AFGE Council 236, Local 2928, 24 FLRA 245 (1986).

Explanation: No ULP is committed if management charges a union negotiator with AWOL for lateness at negotiation sessions set for duty hours when the official would otherwise be on official time. DMA, Hydrographic/Topographic Ctr. and AFGE Local 3407, 18 FLRA 532 (1985) (ALJ Decision). If the union arrives with too many negotiators and refuses to designate a proper number, management does not violate the Statute by putting all of them on AWOL until the union designates the individuals who will serve on official time. Dept. of Air Force, Space Div., Los Angeles and AFGE Local 2429, 6 FLRA 439 (1981). An agency did not interfere with an employee's protected rights by carrying him AWOL when he left the base in connection with an FLRA interview. The contract and past practice required him to either remain on base when using official time or provide to management some notice of his activities or whereabouts. Marine Corps Logistics Base, Barstow and AFGE Local 1482, 23 FLRA 594 (1986) (ALJ Decision). In the context of two adverse action cases, arbitrators and a reviewing court found lawful discipline against union officials who refused to obey orders directing them to perform agency work and instead performed union representational duties under the erroneous impression that they

had a contractual right to official time. The employees should have followed and grieved orders instead of disobeying and testing those orders through the adverse action process. Bigelow v. DHHS, 750 F.2d 962 (Fed. Cir. 1984).

Explanation: A union violates §§ 7116(b) (1) and (8) if it knowingly violates the spirit and letter of § 7131(b) by allowing its representative to meet with employees to solicit membership on their duty time, thereby conducting union business that should be conducted on non-duty time. SEIU Local 556 and Paige, 17 FLRA 862 (1985).

3. Impact and Implementation Bargaining

Acceptable Language: "Except for changes otherwise provided for in this Agreement, the Employer agrees to provide an elected Union official with proposed changes which would result in substantive changes in working conditions or personnel policies. The Union agrees to respond to such changes within fourteen calendar days if they desire to bargain on the impact / implementation of such changes. If, after the expiration of fourteen calendar days, the Union has not responded, the Employer may then implement the proposed changes."

Explanation: Reduced to its essentials, a "change in working conditions" may occur if the agency requires its employees to do something not previously required of them. The change is "substantial" if it means more work or less money for the employee. Dept. of Treasury, Customs Serv., Region I and NTEU, 16 FLRA 654, 668 (1984) (ALJ Decision).

Explanation: : Bargaining is not necessary either as impact bargaining or substantive bargaining if the change in working conditions is "de minimis," meaning the change in working conditions is so minor as to be of negligible effect on bargaining unit members. SSA and AFGE Local 1760, 24 FLRA 403, 59 FLRA 118 (2004).

Explanation: Bargaining obligations do not arise if the changes do not change routine practice. No bargainable change in employment conditions occurred when the agency loaned out to the U.S. Attorney's Office several of its own attorneys to prosecute misdemeanors occurring on activity property. The U.S. Attorney had prosecuted the cases in the past and the prosecutorial

procedures remained the same. DLA, Alexandria and AFGE Local 1148, 22 FLRA 327, 327-28 (1986). A directive to concentrate on certain categories of cases, e.g., taxpayer delinquencies, was not a change in working conditions. No new deadlines were set, no penalties imposed, no additional cases were assigned, and no new methods or procedures were instituted for case handling. Dept. of Treasury, IRS and NTEU Chapter 10, 13 FLRA 636, 651-52 (1984) (ALJ Decision).

Explanation: Because a change in working conditions, to have a negotiable impact, must affect employees of the unit, a decision (in accordance with FLRA decisions) to discontinue the practice of permitting union officials of one unit to have official time to bargain for the employees of another unit, did not require impact bargaining. Termination of the practice did not impact upon employees of the unit employing the officials. Dept. of Navy, Naval Constr. Battalion Ctr., Ft. Hueneme and NAGE Local R12-29, 14 FLRA 360, 361 (1984).

Explanation: There is a caveat to the general obligation to bargain over impact: if the matter sought to be negotiated is already contained in the parties' agreement, and if there is no assertion that the procedures in the agreement were not followed properly, the agency has no further duty to bargain on the impact and implementation of that matter. Naval Aviation Depot, Norfolk and IAM Lodge 39, 39 FLRA 1597 (1991) (ALJ Decision).

Explanation: However, unilateral relocation of a telephone used by employees to make and take personal calls was a "substantive change" that required bargaining. Dept. of Air Force, AFLC, Robins AFB and AFGE Local 987, 53 FLRA 1664, 1668-69 (1998).

4. Merit Promotion – Crediting Plan

Acceptable Language: "The crediting plan is established in the (State) National Guard Merit Placement Plan and provides a system for rating and ranking applicants. The plan is included in this contract and is identical to the crediting plan in the merit placement plan. It is included to inform the bargaining unit members of the procedure currently used. Determining the qualifications required to carry out the mission of the National Guard is a management right, nothing in this contract shall restrict management from changing the crediting plan in the merit plan or

from using an alternative crediting plan to determine the applicants that best meet the needs of the organization.”

Explanation: An arbitrator may enforce a contractual article that creates an arrangement for employees adversely affected by the exercise of management’s right to make selections for positions. VA Network 13 and AFGE Local 390, 56 FLRA 647 (2000). The Authority’s framework for resolving exceptions alleging that an award violates management’s rights under section 7106(a) of the Statute is set forth in U.S. Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C. and National Treasury Employees Union, Chapter 201, 53 FLRA 146, 151-54 (1997) (BEP). Upon finding that the award affects a management right under 7106(a), the Authority applies a two-prong test to determine if the award is deficient. Under prong I, the Authority examines whether the award provides a remedy for a violation of either an applicable law, within the meaning of 7106(a) (2) of the Statute, or a contract provision that was negotiated pursuant to section 7106(b) of the Statute. Id. at 153. Under prong II, the Authority considers whether the arbitrator’s remedy reflects a reconstruction of what management would have done if management had not violated the law or the contractual provision at issue. Id. at 154.

Explanation: The Authority has held that “an award that orders an agency to promote a grievant retroactively into a specified position affects management’s right to select under section 7106(a) (2) (C) of the Statute.” U.S. Department of the Navy, Naval Undersea Warfare Center Division, Keyport, Washington and Bremerton Metal Trades Council, 55 FLRA 884, 887 (1999). Thus the award affects management’s right to select and must be evaluated under the Bureau of Engraving and Printing (BEP) framework as established in 53 FLRA 146, 151-54 (1997) cited above. This BEP decision is the landmark case that established the two-prong test.

5. Reopener Clause

Acceptable Language: “Either party may open this Agreement at any time after the first anniversary. Such reopener shall be limited to only once by each party during the life of the Agreement, and each party will be limited to no more than three new or amended articles each time it is opened. This may amount to modification of three (3) articles, an addition of three (3) articles

or any combination thereof. The reopener will be initiated in writing to the other party and will include the proposals. Negotiations for the reopener will commence at a mutually agreed time, not to exceed thirty (30) days from the date of the reopener request.”

Explanation: The Authority held in IRS and NTEU, 29 FLRA 162, 164-67 (1987), that midterm bargaining was appropriate unless it was waived either through the existence of a “zipper” clause or through a demonstration that the subject matter of the midterm bargaining was fully explored and discussed during negotiations leading to the parties’ contract. A “zipper” or integration clause is a contractual provision stating that the contract represents the parties’ complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract.

Explanation: In Dept. of Labor and AFGE Nat’l Council of Field Labor Locals, 38 FLRA 1374, 1384 (1991), the FLRA stated:

“[A] union may contractually agree to a waiver of its right to initiate mid-term bargaining, either in general or as a specific subject matter or matters, during the term of an agreement. . . . Such a waiver of bargaining rights may be established by express agreement or bargaining history. Any such waiver must be clear and unmistakable. . . . In determining whether a contract provision constitutes a clear and unmistakable waiver, we examine the wording of the provision as well as other relevant contractual provisions, bargaining history, and past practice.”

6. Specific Duties

Acceptable Language: “Whenever language in this Agreement refers to specific duties or responsibilities of specific employees or management officials, it is intended only to provide a guide as to how a situation may be handled. It is agreed that the Employer retains the sole discretion to assign work and to determine who will perform the function discussed.”

Acceptable Language: An alternative to using the above language would be to change the wording in each such instance to a more generic statement that does not identify specific individuals to perform the particular functions. For instance, the

phrase, "The Employer will . . . "could be used or add "his/her designee".

Explanation: There are a number of instances in which Agreements identify a specific individual to perform a certain function, such as the supervisor, immediate supervisor, first level supervisor, etc. This type of language is nonnegotiable because it conflicts with management's right to assign work under 5 U.S.C. § 7106(a) (2) (B). See National Labor Relations Board Union and National Labor Relations Board, 42 FLRA No. 90, Proposal 1 (1991). See also National Federation of Federal Employees, Local 405 and U.S. Army Aviation Systems Command and U.S. Army Troop Support Command, 33 FLRA No. 77, Provision 3.

Improper Language with Explanation as part of Citation:
As stated in New York State Nurses Ass'n and VA Bronx Med. Ctr., 30 FLRA 706, 707-08 (1987): "Another preliminary matter concerns the technical defects in many of the Union's proposals. We have held that management's right to assign work includes the right to determine the individuals who will perform particular tasks. This right includes assignment to bargaining unit and nonbargaining unit employees. Many of the Union's proposals require the assignment of work to specific employees or portions of the Agency's organization and are nonnegotiable on that basis. For example, although on its face the fifth sentence in Proposal 1 appears very reasonable, **we are required to find it to be nonnegotiable, consistent with a long line of Authority precedent, because it requires unit employees to schedule official time "with their immediate supervisor."** This sentence would be negotiable if the Union substituted "management" or "the Agency" for the reference to the immediate supervisor. . . . In most of the proposals, these defects would not permit management to exercise its congressionally accorded discretion to assign the tasks involved to whomever it elects (emphasis added)."

7. Unfair Labor Practice

Acceptable Language: "Prior to filing an unfair labor practice charge with the Federal Labor Relations Authority, the union will first provide the agency with thirty (30) calendar days notice for an opportunity to resolve the charge."

Explanation: This provision does not conflict with either 5 U.S.C. § 7116(a) (5) or (b) (5) or 5 U.S.C. § 7117. However, despite its encouragement of informal settlement of ULP cases, the Authority found that a union has no duty to bargain as to a procedure for resolution of ULP disputes prior to the filing of a charge. The Statute provides that a party may file a charge as soon as it wants to. Neither the language of the Statute nor their legislative histories suggest that the right should be qualified. The issue of precharge procedures was permissive only. Insistence on the issue to the point of impasse by the agency was itself a ULP. Dept. of Agric., Food Safety and Inspection Serv. and Nat'l Joint Council of Food Inspection Locals, AFGE, 22 FLRA 586 (1986).

Explanation: In 24th CSG, Howard AFB and Unlicensed Div. of District 1, MEBA, 55 FLRA 273 (1999), the Authority rejected, absent persuasive bargaining history, that ULP processes were waived by a clause contained in a contract article on "matters appropriate for consultation and negotiation," stating that "[d]isputes arising from the failure of the parties to comply with the provisions of this article shall be processed utilizing the negotiated Grievance Procedure." Another provision of the contract permitted the parties to challenge matters of policy, regulation, or interpretation through "lawful channels." The ambiguity in the contract was resolved against an implied waiver. Id. at 280.

8. Employee Assistance Program

Acceptable Language: "The parties recognize that the program is designed to be carried out as a non-disciplinary procedure aimed at rehabilitation of persons who suffer from a health or other personal problem(s). If an employee requests assistance under the program, or is referred by the supervisor and participates in the program, the responsible supervisory official shall [prefer "may"] give consideration to this fact in determining any appropriate disciplinary action based upon the employee performance and conduct on the job."

Explanation: Management is no longer required to offer "reasonable accommodations" prior to initiating and carrying out an adverse action. In Johnson v. Dept. of the Interior, MSPB SF-0752-93-0613-I-1 (E.E.O.C. 1996), an employer was permitted to

hold an employee, who was an alcoholic, to the same qualification standards for employment, job performance or behavior as other employees, even if the employee's unsatisfactory performance or behavior was related to the employee's alcoholism. 29 U.S.C. § 12114; see *also*, Kimbel v. Dept. of the Navy, 70 M.S.P.R. 617 (1996).

Explanation: In essence, the doctrine of firm choice has historically required Federal employers to excuse the violation of otherwise-uniformly-applied job performance or conduct standards by giving the employee with the alcoholism the firm choice of entering into and completing treatment, or receiving discipline, up to and including removal. **Under section 501, as amended by the Rehabilitation Act Amendments of 1992, incorporating ADA employment standards, an agency is no longer required to provide a firm choice for treatment and removal** (emphasis added).

Explanation: Therefore, the agency was not required to provide petitioner a firm choice between treatment and removal, and properly removed him for being AWOL and giving false information to a management official. Accordingly, the MSPB concluded that the petitioner was not discriminated against when he was removed.

9. Training and Safety

Acceptable Language: "The agency agrees to make a reasonable effort to provide all personnel with the training required by the directives and standards detailing the hazards associated with chemicals used in their respective shops. Employees who handle, use, or are potentially exposed to hazardous materials in the course of official duties will receive training on the specific hazards in their work areas. The agency agrees to make a reasonable effort to conduct training upon initial work area assignment and whenever a new hazard is identified or introduced into a work area."

Explanation: Proposals requiring specific safety training programs interfered with the right of the agency to determine unilaterally the methods of performing work and, to the extent proposals established specific responsibilities of agency personnel for safety reasons, the proposals interfered with the right of the agency to assign work. NFFE Local 1442 and Dept. of Army,

Letterkenny Army Depot, 30 FLRA 373 (1987) (proposal for mandatory training by agency on motorcycle safety rejected as nonnegotiable).

Explanation: Provision 8 in SEIU Local 150 and VAMC, Milwaukee, 35 FLRA 521 (1990), calling on the employer to agree that only those employees either qualified or in training could operate machinery or perform work that could harm others, was nonnegotiable because it conflicted with management's right to assign work. See also NFFE Local 1655 and Dept. of Defense, Nat'l Guard Bureau, Alexandria, 49 FLRA 874 (1994) (same result as to Provision 7). Proposals requiring the employer to inform new employees of requirements concerning use of respirators and precluding supervisors from harassing employees in connection with the use of respirators were negotiable. Dept. of Air Force, Hq., Air Force Logistics Command, Wright-Patterson AFB and AFGE Council 214, 22 FLRA 502 (1986).

Explanation: The citation that follows is extracted from 48 FLRA 168, 185 (1993.) The Authority allows bargaining over safety training for some employees, e.g., union representatives, if their safety responsibilities are collateral to their principal work assignments. The distinction in treatment of proposals seeking safety training for employees was carefully explained in AFGE Local 1345 and Dept. of Army, Ft. Carson, 48 FLRA 168, 185 (1993), as to Proposal 10, that:

Part 1 - "The [A]gency shall provide appropriate safety and health training for employees, including specialized job safety and health training, appropriate to the work performed by the employee. Such training also shall inform employees of the Agency Occupational [S]afety and Health Program, with emphasis on their rights and responsibilities. (The Agency further agrees to provide designated members of safety committees with training in accordance with 1960.58 in order for them to carry out their assigned committee responsibilities.) Management will also provide training for union representatives in accordance with 1960.59(b) [sic] that will enhance the effectiveness of the safety program."

In AFGE Local 1345, the Authority held a portion of the proposal negotiable, 48 FLRA at 185-88: "An agency's right to assign work includes the right to assign employees to attend job-related

training during duty hours and the right to determine the type of training that is appropriate. . . . Consequently, proposals requiring agencies to [provide] employees with training concerning the duties and responsibilities of their positions directly interfere with management's right to assign work. . . .

On the other hand, proposals that obligate an agency only to provide information to employees are negotiable, if the information is otherwise disclosable and concerns conditions of employment. In this connection, we have found negotiable a proposal requiring an agency to provide classes that: (1) constituted only the vehicle by which information would be conveyed to employees; (2) did not encompass instruction on employees' duties and responsibilities; and (3) were not intended to increase the knowledge, proficiency, ability, skill, and qualifications of unit employees in the performance of their official duties within the meaning of the definition of training under 5 U.S.C. 4101(4). See Health Care Financing Administration, 44 FLRA at 1431.

Part 2 - Proposal 10 requires the Agency to conduct training on safety and health for unit employees, designated safety committee members, and Union representatives. As applicable to unit employees, the proposal's first two sentences require, among other things, that the training include "specialized job safety and health training, appropriate to the work performed by the employee." Based on the wording of the first two sentences, we find that the training required is directly related to the work unit employees perform. As the proposal's first two sentences require the Agency to provide training related to the duties of unit employees, we conclude that, to the extent that such training is mandated, these sentences directly interfere with management's right to assign work under section 7106(a)(2)(B). See Engineer District, Kansas City, 45 FLRA at 611.

Part 3 - It is unclear from the record whether the "designated members of safety committees" covered by the parenthetical sentence in Proposal 10 are designated by management to serve on those committees as collateral assignments. However, the sentence requires that the training accord with 29 CFR 1960.58 "in order for them to carry out their assigned committee responsibilities." 29 CFR 1960.58 governs training for "collateral duty safety and health

personnel and all members of certified occupational safety and health committees[.]” Therefore, we find that the personnel covered by the parenthetical sentence are unit employees whose service on safety committees is collateral to their principal duties and responsibilities and that the training is directed at enhancing their performance in that collateral assignment. Assigning employees to perform collateral duties constitutes an assignment of work under section 7106(a)(2)(B). See Health Care Financing Administration, 44 FLRA at 1432. Therefore, as the parenthetical sentence prescribes training concerning employees’ collateral work assignment, it also directly interferes with the right to assign work. See Id. at 1433.

Part 4 - In concluding that the first three sentences of Proposal 10 directly interfere with the right to assign work, we reject the Union’s argument that a contrary finding is required because the training is like that prescribed by the applicable regulations. Even assuming that the Union’s characterization is correct, these three sentences require the Agency to provide the specified training for the life of the parties’ negotiated agreement, notwithstanding any revision to the applicable regulations. As such, these sentences establish a substantive limitation on the Agency’s exercise of its right to assign work. As the Union does not assert that the three sentences constitute an appropriate arrangement under section 7106(b)(3) for employees adversely affected by the exercise of a management right, they are nonnegotiable.

Part 5 - There is no indication in the record that the training for union representatives, required by the last sentence of Proposal 10, includes anything other than providing the representatives with the information necessary for the conduct of their representational responsibilities regarding health and safety. We note, in this connection, that the sentence requires the Agency to train Union representatives “in accordance with” 29 CFR 1960.59(b). [7] More particularly, there is no indication that the Union representatives are to be trained in facets of the duties and responsibilities contained in their position descriptions. Moreover, the health and safety information conveyed by the training clearly concerns conditions of employment, and there is no evidence on which to conclude that the information is not disclosable. Accordingly, the last sentence of Proposal 10 which requires training for Union representatives in health and safety does not directly interfere with

the right to assign work under section 7106(a)(2)(B) and is negotiable. See Health Care Financing Administration, 44 FLRA at 1432.

Part 6: At footnote [7] for AFGE Local 1345 and Dept. of Army, Ft. Carson, 48 FLRA 168, 185 (1993), 29 CFR 1960.59(b) provides, as pertinent, that:

(b) Occupational safety and health training for employees of the agency who are representatives of employee groups, such as labor organizations which are recognized by the agency, shall include both introductory and specialized courses and materials that will enable such groups to function appropriately in ensuring safe and healthful working conditions and practices in the workplace and enable them to effectively assist in conducting workplace safety and health inspections.”

PART II. Potential Union Proposals

1. Breaks/Lunch

a. Make-up time for Interrupted Breaks

Improper Language: “If employees are not allowed a one-half (1/2) hour uninterrupted break, they will be released one-half (1/2) hour prior to the end of the scheduled shift.”

Explanation: Provisions, which limit management’s right to assign work, are nonnegotiable. The right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions will be assigned is left to management’s discretion according to 7106(a)(2)(B). Fort Bragg Association of Teachers and U.S. Department of the Army, Fort Bragg Schools, Fort Bragg, North Carolina, 44 FLRA No. 70 (1992).

b. Duty-Free Lunch

Improper Language: “. . . a scheduled, uninterrupted thirty (30) minute lunch will commence . . . only in emergency situations will the lunch period be interrupted.”

Improper Language: “The lunch period, during which the employee is entirely free of duty, is not considered duty time.”

Improper Language: “Each technician is authorized one-half (1/2) hour of uninterrupted, duty-free time for a lunch break each day . . . lunch periods, during which the technician is entirely free of duty in connection with his job.”

Explanation: If the parties intended for these provisions to ensure that employees receive a duty free lunch period, then it is nonnegotiable because it would preclude management from assigning work during the lunch period. Thus, it is inconsistent with management’s rights under 7106(a)(2)(B) of the Statute. Fort Bragg Association of Educators, NEA and Department of the Army, Fort Bragg Schools, 30 FLRA No. 69 (1987).

2. Committees Established By Management

Improper Language: “If a committee directly affecting the working conditions of Air Civilian Technicians is established, [the Union] will be consulted and shall have membership thereon, except unless expressly prohibited by rules and regulation.”

Explanation: This provision is nonnegotiable because it would directly interfere with the rights reserved to management by section 7106 of the Statute. See National Union of Hospital and Health Care Employees, AFL-CIO, District 1199 and Veterans Administration Medical Center, Dayton, Ohio, 28 FLRA No. 65 (1987).

3. Department of Defense Approval of Collective Bargaining Agreements

Improper Language: “The effective date of this Agreement shall be after execution by the parties and approval by the Agency (NGB).”

Explanation: Since the Department of Defense, Field Advisory Service currently has the responsibility of agency review, this language is contrary to 5 U.S.C. § 7114(c). The parties can resolve this by substituting Department of Defense for “Agency (NGB).”

4. Discipline

a. Time Limits for Initiating Action

1. *Improper Language:* “. . . therefore it must be initiated within ten workdays after the situation becomes known to the immediate supervisor, unless an extension is requested.”

Explanation: This provision is nonnegotiable because it directly interferes with management's right under 7106(a)(2)(A) of the Statute to discipline employees. Proposals which establish time limits on management's ability to initiate disciplinary or adverse actions against employees have been held to directly interfere with management's rights under section 7106(a)(2)(A) to discipline employees because such proposals establish a

contractual “statute of limitations” which prevents management from disciplining employees after the time limits expire. American Federation of Government Employees, AFL-CIO, Local 3732 and U.S. Department of Transportation, United States Merchant Marine Academy, Kings Point, New York, 39 FLRA No. 13 (1991).

2. *Improper Language:* “If the penalty is not affected within the specified period, management must treat it as if it never happened.”

Explanation: This provision restricts the evidence the agency may consider to support disciplinary action. Therefore, it interferes with management’s right to discipline under 7106(a)(2)(A). See American Federation of Government Employees, Council 214 and U.S. Department of the Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, 38 FLRA No. 34 (1990).

b. Procedures for Supervisors

Improper Language: “Before disciplining an employee, the supervisor will gather all available facts and discuss them with the employee, informing the employee of the reason for the investigation.”

Explanation: The Authority has consistently held that management’s right to discipline under section 7106(a)(2)(B) encompasses the right to assign specific duties to particular individuals, including management officials, that provisions which interfere with this right are nonnegotiable. American Federation of Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, The U.S. Army Test, Measurement, and Diagnostic Equipment Support Group, the U.S. Army Information Systems Command – Redstone Arsenal Commissary, 27 FLRA No. 14, Provision 6 (1987).

Remedy: The parties can remedy this problem by replacing the word “supervisor” with the word “Employer,” or include the statement “or his/her designee” in their agreement.

c. Suspected Leave Abuse

1. *Improper Language:* “Employees suspected of abusing leave privileges may be required to submit a medical

certificate in substantiation of each absence due to claimed illness, regardless of duration. This requirement will not be involved without first advising the employee of his/her questionable sick leave record and giving him/her an opportunity to improve.”

Explanation: This provision is nonnegotiable because it prevents management from placing an employee on leave restriction prior to counseling; therefore, it interferes with management’s right to take disciplinary action under 7106(a)(2)(A) of the Statute. See Service and Hospital Employees International Union, Local 150 and Veterans Administration Medical Center, Milwaukee, Wisconsin, 35 FLRA No. 61, Provision 2 (1990).

Remedy: The parties may remedy the problem by omitting the second sentence.

2. *Improper Language:* “A technician suspected of abuse of sick leave privileges, despite an oral warning, will be required to submit a physician’s certificate in substantiation of each absence due to claimed illness, regardless of duration, provided that he/she is again cautioned in writing concerning such abuse . . . When a six month period shall have elapsed following such purported absence without further incident, the requirement for a physician’s certificate shall be eliminated and the written notice to remain as a matter of record for not less than nine (9) months or more than twelve (12) months after which the matter shall be considered closed and shall not be referred to again.”

Improper Language: “The employee will be placed on a six month observation period to monitor sick leave abuse. If during the observation period the supervisor feels that the suspected abuse has not been corrected, the supervisor will notify the employee that any subsequent absences, regardless of duration, must be substantiated by a medical certificate and that restrictions may be imposed for the duration of the observation period. The supervisor will notify the employee at the end of the six (6) month observation period as to whether the suspected abuse has been corrected.”

Improper Language: “Employees must be advised of their suspected abuse of sick leave and may be given an opportunity to correct the abuse.”

Explanation: The provisions above interfere with management's right to take disciplinary action under 7106(a)(2)(A) of the Statute. See National Association of Government Employees, Local R5-82 and U.S. Department of the Navy, 43 FLRA 25, Provision 1 (1991); Service Employees International Union, Local 150 and Veterans Administration Medical Center, Milwaukee, Wisconsin, 35 FLRA No. 61, Provision 2 (1990). By requiring management to first counsel the employee and then wait to see whether the employee's sick leave record improves before imposing a sick leave restriction, this provision would preclude management from taking action to impose a sick leave restriction when it deems appropriate, if counseling had not previously occurred. The parties could remedy this problem by dropping the requirement for management to wait and see whether improvement occurs before imposing the sick leave restriction.

d. Determining the Appropriate Penalty

Improper Language: "This restrictive provision will be removed after a six (6) month period without further evidence of sick leave abuse."

Improper Language: "Any record of discipline in the employee's record will be removed at the end of six (6) months provided there is no reason, such as continuing problems, to warrant retention."

Explanation: All of the provisions above limit the Agency's discretion to determine an appropriate penalty. These provisions are outside the duty to bargain because they interfere with management's right to discipline under 7106(a)(2)(A) of the Statute. American Federation of Government Employees, Local 1770 and U.S. Department of the Army Headquarters, XVII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 34 FLRA No. 151 (1990). See also American Federation of Government Employees, Local 900 and U.S. Department of the Army, U.S. Army Reserve Personnel Center, St. Louis, Missouri, 46 FLRA No. 143 (1993).

e. "Progressive Discipline" Requirements

1. *Improper Language:* "Where corrective action can be accomplished through closer supervision, training, or oral admonitions or warnings, formal disciplinary actions should not be

taken . . . normally the concept of progressive discipline will be followed.”

Improper Language: “Where corrective action can be accomplished through closer supervision, training, or oral admonitions or warnings, formal disciplinary actions should not be taken. Normally, the concept of progressive discipline will be followed. A logical disciplinary sequence would include: warning; oral admonishment; letter of reprimand; suspension; etc.”

Explanation: These provisions are nonnegotiable. Provisions which restrict an Agency’s ability to choose the specific penalty to impose in disciplinary actions or which limit the circumstances when management can take disciplinary action directly interfere with management’s right to discipline employees under section 7106(a)(2)(A) of the Statute. See American Federation of Government Employees, Local 1426 and U.S. Department of the Army, Fort Sheridan, Illinois, 45 FLRA No. 79 (1992). See also West Point Elementary School Teachers Association, NEA and the United States Military Academy Elementary School, 29 FLRA No. 123 (1987).

2. *Improper Language:* “The parties agree that normally the use of disciplinary and adverse actions is intended to be corrective, constructive and progressive in nature, to rehabilitate the Employee and to promote the efficiency of the service.”

Explanation: This provision requires the agency to follow progressive discipline. It directly interferes with management’s right to discipline under 5 U.S.C. 7106(a)(2)(A). See National Treasury Employees Union and U.S. Department of the Treasury, U.S. Customs Service, Washington, D.C., 46 FLRA No. 67, Provisions 35 & 38.

f. Evidence Used to Support Management Actions

Improper Language: “Items of a disciplinary nature will not be used as part of that measurement.”

Explanation: Management’s right to discipline employees encompass the right to obtain and use evidence to support actions. Provisions that restrict an Agency’s use of various materials and documentation as evidence directly interfere with management’s rights to discipline employees under section

7106(a)(2)(A) of the Statute. See National Association of Government Employees and U.S. Department of Veterans Affairs, Medical Center, Brockton and West Roxbury, Massachusetts, 41 FLRA No. 52 (1991).

5. Drugs and/or Alcohol

Improper Language: “Technicians having a drug abuse problem will be dealt with by use of non-disciplinary procedures.”

Explanation: This provision is nonnegotiable because it conflicts with Executive Order 12564 and therefore is outside the duty to bargain. See National Federation of Federal Employees, Local 15 and Department of the Army, U.S. Army Armament, Munitions and Chemical Command, Rock Island, Illinois, 30 FLRA No. 115 (1988), *slip op.* at 25 (U.S. Army Armament, Munitions and Chemical Command). Also see National Federation of Federal Employees, Local 1655 and U.S. Department of Defense, National Guard Bureau, Alexandria, Virginia, 49 FLRA No. 84, Provisions 9 and 11 (1994).

6. Dues Withholding – Cancellation of Dues

Improper Language: “Allotments will be automatically terminated on the effective date when . . . Technicians leave because of transfer or other personnel action (except temporary promotion or detail, or upon separation from the unit.)”

Improper Language: “The parties agree that an allotment will be terminated . . . when the employee leaves the unit as a result of any type of separation, transfer, or other personnel action (except temporary promotion or detail).”

Explanation: These provisions are nonnegotiable because section 7115(b)(1) of the Statute requires the termination of a dues deduction authorization when the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee. The Authority has previously held that the agreement between the parties ceases to be applicable to an employee when he/she is promoted, even temporarily. Also, if the employee is transferred to a position outside the bargaining unit, to include details, the agreement would no longer be applicable to the employee. See International Association Machinist and

Aerospace Workers, Lodge 2424 and Department of the Army, Aberdeen Proving Ground, Maryland, 25 FLRA No. 14 (1987).

Remedy: These proposals could be acceptable if the exceptions noted were deleted.

7. Emergencies

Improper Language: “An emergency situation is one which poses sudden, immediate, and unforeseen work requirements for the Employer as a result of a natural phenomena or other circumstances beyond the Employer’s reasonable control or ability to anticipate.”

Improper Language: “Emergency/emergencies – Section 2.4(c), this agreement, a declared Federal or State emergency where instances of injury to life or property damage are probable.”

Explanation: These provisions are nonnegotiable because they would limit the exercise of management’s section 7106(a)(2)(D) right to determine those situations falling within the definition of emergency. They also preclude the Agency from independently assessing whether an emergency exists. See National Federation of Federal Employees, Local 2059 and U.S. Department of Justice, U.S. Attorney’s Office, Southern District of New York, New York, New York, 22 FLRA No. 13 (1986).

8. Hours of Work

a. Callbacks

Improper Language: “. . . and be promptly excused upon completion of the job for which he/she is called in.”

Explanation: This provision is nonnegotiable because it directly interferes with management’s right to assign work under section 7106(a)(2)(B) of the Statute. The provision requires that an employee be excused after completing the job that he/she was called in to perform. The wording of the provision indicates that after employees finish the tasks they were called back to perform, they would be allowed to leave and management would be precluded from assigning them any work other than the tasks they were called in to perform. American Federation of Government Employees, Local 53 and U.S. Department of the Navy, Navy

Material Transportation Office, Norfolk, Virginia, 42 FLRA No. 68, Provision 2 (1991).

b. Change in Tour of Duty

Improper Language: “Employees will be notified no less than two (2) weeks in advance of a shift change.”

Improper Language: “A situation which imposes immediate and unforeseen work requirements as a result of natural phenomena or mission related circumstances beyond the employer’s reasonable control or ability to anticipate, are excluded from the one (1) week notice requirement.”

Improper Language: “A situation which imposes immediate and unforeseen work requirements as a result of natural phenomena or mission related circumstances beyond the employer’s reasonable control or ability to anticipate, are excluded from the seven (7) day notice requirement.”

Improper Language: “A situation which imposes immediate and unforeseen work requirements as a result of natural phenomena or mission related circumstances beyond the employer’s reasonable control or ability to anticipate, are excluded from the fourteen (14) day notice requirement.”

Improper Language: “Changes to the posted schedules will only be made in case of emergency and/or essential operational requirements.”

Improper Language: “Shift differential, if authorized for the original shift will be paid if seven (7) days notice is not provided. A situation which imposes immediate and unforeseen work requirements as a result of natural phenomena or mission related circumstances beyond the employers’ reasonable control or ability to anticipate, are excluded from the seven (7) day notice requirement.”

Explanation: These provisions above are nonnegotiable because they are inconsistent with law and regulation. See 5 C.F.R. 610.121(a)(1) and (b)(2). An agency may make changes in work schedules within the required seven (7) day notice period where the agency would otherwise be handicapped in carrying out its mission or where costs would be substantially increased.

Fraternal Order of Police, Lodge 1F (R.I.) Federal and Veterans Administration, Veterans Administration Medical Center, Providence, Rhode Island, 32 FLRA No. 135 (1988). See also National Association of Government Employees, Local R1-100H and Department of the Navy, Navy Hospital, Groton, Connecticut, 20 FLRA No. 17 (1985).

c. Regularly Scheduled Workweek

Improper Language: “A provision of the contract specifies the regularly scheduled workweek for technicians, including the days per week, hours per day, and hours per week during which technicians may work.”

Explanation: Such language is nonnegotiable pursuant to the National Guard Technicians Act, 32 U.S.C. 709(h). In sum, this citation provides that the Secretary of the Army or the Secretary of the Air Force, as the case may be, will prescribe the hours of duties as well as rates of basic and additional compensation.

9. Job Duties

1. *Improper Language:* “Assignments should be reasonably related to the technician’s position and qualification.”

Explanation: This provision is nonnegotiable because it restricts the Agency’s ability to assign particular duties to employees. National Federation of Federal Employees, Local 1214 and U.S. Department of the Army, Headquarters, U.S. Army Training Center and Fort Jackson, Fort Jackson, South Carolina, 45 FLRA No. 111, Proposal 2 (1992).

2. *Improper Language:* “No employee other than qualified maintenance personnel, shall be required to perform repair work on or about moving or operating machines when in motion or operation.”

Explanation: This provision is nonnegotiable because it conflicts with management’s right to assign work under section 7106(a)(2)(B) of the Statute. The Authority has held that provisions which require management to restrict work assignments to “qualified” personnel or which condition management’s ability to assign work conflict with this right. American Federation of

Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, The U.S. Army Test, Measurement, and Diagnostic Equipment Support Group, The U.S. Army Information Systems Command – Redstone Arsenal Commissary, 27 FLRA No. 14 (1987).

3. *Improper Language:* “Other duties as assigned will not exceed fifteen (15%) per annum of the employee’s work time.”

Explanation: This provision is nonnegotiable because it violates management’s right to assign work under section 7106(a)(2)(B) of the Statute. Management’s right to assign work includes the right to assign general continuing duties, make specific work assignments, and determine when the work will occur. National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA No. 119 (1980).

4. *Improper Language:* “An expected completion date will be understood.”

Explanation: This provision is nonnegotiable because it establishes limitations on the length of temporary assignments which violates the agency’s right to assign work pursuant to section 7106(a)(2)(B) of the Statute. See American Federation of Government Employees, AFL-CIO, National Border Patrol Council and Department of Justice, Immigration and Naturalization Service, 16 FLRA No. 35 (1984).

5. *Improper Language:* “In the interest of saving life or limb and preventing equipment damage, technicians will not be assigned other skill duties which they are not qualified to perform except in circumstances of assisting a qualified technician.”

Improper Language: “Technicians, normally, will not be assigned other skill duties which they are not qualified to perform except in circumstances of assisting a qualified technician.”

Explanation: Provisions that restrict the agency’s ability to assign work to employees who do not possess the necessary skills directly interferes with management’s right to assign work under section 7106(a)(2)(B) of the Statute and are outside the duty to bargain. National Federation of Federal Employees, Local 1655 and Department of Military Affairs, Illinois Air National Guard, 35 FLRA No. 86 (1990). *See also* American Federation of

Government Employees, Local 32, AFL-CIO and Office of Personnel Management, 17 FLRA No. 99 (1985).

6. *Improper Language:* “Janitorial services, such as washing, buffing, dusting, and sweeping of offices and latrines will not be accomplished by technicians, except in unusual cases when required by the Employer. In these instances the local . . . (union) official will be notified.”

Explanation: Provisions that restrict the Agency's ability to assign work in specified circumstances directly interfere with management's right to assign work under section 7106(a)(2)(B) of the Statute and are outside the duty to bargain. Requiring management to avoid assigning janitorial or other custodial duties to employees in nonnegotiable. National Federation of Federal Employees, Local 1655 and Department of Military Affairs, Illinois Air National Guard, 35 FLRA No. 86 (1990).

7. *Improper Language:* “When a major change (a change in any critical element) to the job standard occurs within one hundred twenty (120) days before the anniversary date, the technician appraisal will be based on the old standard.”

Explanation: This provision requires the technician to be rated under an old standard, and is nonnegotiable. National Federation of Federal Employees, Local 1974 and U.S. Department of Veterans Affairs, 46 FLRA 1170, Provision 7 (1993).

10. Leave

a. Cancellation of Leave

1. *Improper Language:* “If the leave approving official deems it necessary to cancel previously approved leave, the technician will be informed of the reason for such action at least two weeks in advance.”

Explanation: Provisions that preclude the Agency from rescinding leave approval violate the Agency's right to assign work and is therefore outside the duty to bargain. The right to assign work under section 7106(a)(2)(B) of the Statute includes the right to determine whether the work that has been assigned will be

performed. See Service and Hospital Employees International Union, Local 150 and Veterans Administration Medical Center, Milwaukee, Wisconsin, 35 FLRA No. 61 (1990).

2. *Improper Language*: “The Employer may cancel approved leave only in situations where failure to do so would severely impair mission accomplishment.”

Explanation: Provisions which require an agency to grant an employee’s request for leave without regard for the agency’s need for the employee’s services during the period covered by the request interfere with the right to assign work. American Federation of Government Employees, Local 2761 and Department of the Army, Army Publications Distribution Center, St. Louis, Missouri, 32 FLRA No. 144, Provision 3 (1988). See also American Federation of Government Employees, Local 1900 and Department of the Army, Headquarters, Forces Command, Fort McPherson, Georgia, 51 FLRA No. 14, Provision 1 (1995).

b. Employees as Emergency Services Volunteers

1. *Improper Language*: “When an employee who is an emergency service personnel volunteer is asked by a responsible emergency services official to be released for an emergency, the employee leave status will be annual leave, LWOP, or compensatory time at the employee’s option.”

Explanation: The provision is nonnegotiable because it restrict the Agency’s right to disapprove leave requests which conflict with its work requirements. Therefore, it is contrary to the Agency’s right to assign work under section 7106(a)(2)(B). National Treasury Employees Union, Chapter 22 and Department of the Treasury, Internal Revenue Service, 29 FLRA No. 38, Provision 10 (1987).

Remedy: This proposal can be made negotiable by changing the language to leave management the discretion of approving/disapproving the leave, such as changing the word “will” to “may.”

2. *Improper Language*: “A technician who is a member of a community volunteer emergency service participating in emergency rescue work at the beginning of a duty tour shall be administratively excused for an absence from such duty upon

presentation of a certificate of the head of such emergency service for such absence.”

Improper Language: “An employee who is a member of a community volunteer emergency service engaged in performing emergency service at the beginning of a duty tour will be administratively excused for an absence from duty upon presentation of a certificate from the head of such emergency service for such absence.”

Explanation: The provisions are nonnegotiable because they preclude the Agency from denying administrative leave and therefore directly interferes with management’s right to assign work under section 7106(a)(2)(B).

c. Inclement Weather and Emergency Condition Leave

Improper Language: “A liberal leave policy will apply during weather or emergency conditions which preclude significant numbers of employees from reporting to work.”

Explanation: The provisions are nonnegotiable because they restrict the Agency’s right to disapprove leave requests, which conflict with its work requirements. Therefore, they are contrary to the Agency’s right to assign work under section 7106(a)(2)(B). National Treasury Employees Union, Chapter 22 and Department of the Treasury, Internal Revenue Service, 29 FLRA No. 38, Provision 10 (1987).

Remedy: This proposal can be made negotiable by changing the language to leave management the discretion of approving/disapproving the leave, such as changing the word “will” to “may.”

11. Blood Donation

Improper Language: “A technician who makes a blood donation (without monetary compensation) will be excused for a reasonable time for recuperation (normally not to exceed four (4) hours).”

Improper Language: “Four hours of administrative leave will be provided for the purpose of Phereis and blood donation for

a cumulative total of up to twenty-four (24) hours per year. The four (4) hour period will include the giving process.”

Improper Language: “A reasonable amount of administrative leave will be granted for blood donation.”

Explanation: These provisions are nonnegotiable because they conflict with management’s right to assign work under 5 U.S.C. 7106(a)(2)(B). American Federation of Government Employees, Local 1345 and U.S. Department of the Army, HQ Fort Carson and HQ 4th Infantry Division, Fort Carson, Colorado, 48 FLRA No. 15 (1993). See also National Federation of Federal Employees, Local 1655 and Department of Defense, National Guard Bureau, 49 FLRA No. 84 (1994).

Remedy: The parties could alleviate this problem by stating the Employer “may” grant employees up to four hours of excused leave after they donate blood.

12. Miscellaneous Leave Issues

1. *Improper Language:* “Supervisors will grant compensatory time off which will be lost if not used.”

Explanation: This provision is nonnegotiable because it leaves management with no discretion to deny leave requests; therefore, it would nullify the agency’s ability to determine when assigned work will be performed and thus violates section 7106(a)(2)(B) of the Statute. See National Treasury Employees Union and Department of the Treasury, Bureau of the Public Debt, 3 FLRA No. 119 (1980). See also American Federation of Government Employees, Local 1513 and U.S. Department of Navy, Naval Air Station, Whidbey Island, Oak Harbor, Washington, 41 FLRA No. 57, Provision 2 (1991).

2. *Improper Language:* “Requests for leave without pay (LWOP) over 30 calendar days must be approved by the Support Personnel Management Officer.”

Explanation: This type of language is nonnegotiable because it conflicts with management’s right to assign work under 5 U.S.C. 7106(a)(2)(B) of the Statute. See National Federation of Federal Employees, Local 405 and U.S. Army Aviation Systems

Command and U.S. Army Troop Support Command, 33 FLRA No. 77, Provision 3 (1988).

Remedy: This could be remedied by stating the approval must come from the Support Personnel Management Office or “. . . the Support Personnel Management Officer, or his/her designee,” or use the language “the Employer”.

3. *Improper Language:* “The Employer agrees to follow a liberal annual leave policy for all employees in the unit with regard to holidays not designated as Federal holidays.”

Explanation: This provision is nonnegotiable because it restricts the Agency’s rights to disapprove leave requests, which conflict with its work requirements. Therefore, it is contrary to the Agency’s right to assign work. National Treasury Employees Union, Chapter 22 and Department of the Treasury, Internal Revenue Service, 29 FLRA No. 38, Provision 10 (1987). The parties could remedy the problem by making it “subject to workload requirements.”

4. *Improper Language:* “Funeral Leave. Administrative leave is granted to federal employees not in excess of four (4) hours to attend the funeral of deceased current or former members of the . . . National Guard, current or former employees . . . and civil leaders from local communities.”

Explanation: Provisions that provide for administrative leave for personal emergency or illness are inconsistent with government wide regulation. Annual and sick leave were designed to cover the circumstances raised in the proposal. See American Federation of Government Employees, AFL-CIO, National Council of SSA Field Operations Locals and Social Security Administration, 25 FLRA No. 50 (1987). See also 5 C.F.R. 630.804 for Funeral Leave.

13. National Security

Improper Language: “An Association official has the right to be present at deployment briefing.”

Explanation: If the parties intend for Association officials to be present at classified briefing, then the provision is nonnegotiable.

Remedy: The parties can resolve the problem by stating that the Association official will be required to have all appropriate clearances in order to attend classified briefings. See National Security Act.

14. Overtime

1. *Improper Language:* "Irregular or occasional overtime work performed by an employee, when work was not scheduled for the employee, for which the employee is required to return to his place of employment, (call-back, call-in), employees will be paid or compensated a minimum of four (4) hours overtime in duration whether work is performed or not."

Explanation: This provision is nonnegotiable because it conflicts with Title 32, section 709(g)(2), which prohibits National Guard Technicians from receiving compensation for overtime. It is also inconsistent with 5 C.F.R. 550.112(h) which states that two hours is the maximum amount of time an employee may be credited with in the absence of performance of work.

2. *Improper Language:* "An employee called in to work outside their basic workweek and/or tour of duty will be promptly excused when the work is completed."

Explanation: This is nonnegotiable because it limits the agency's right to assign work to duties related to call back; therefore, it is inconsistent with 7106(a)(2)(B) of the Statute. See American Federation of Government Employees, AFL-CIO, Local 2317 and U.S. Marine Corps, Marine Corps Logistics Base, Nonappropriated Fund, Instrumentality, Albany, Georgia, 29 FLRA No. 126 (1987). See also American Federation of Government Employees, Local 85 and Veteran's Administration, Medical Center, Leavenworth, Kansas, 30 FLRA No. 52, Proposal 6 (1987).

15. Physical Fitness

Improper Language: "Technicians are authorized three (3) hours per week of duty time to participate in the physical fitness program in accordance with the established policy of the employer."

Explanation: This provision is nonnegotiable because it is inconsistent with the agency's right to assign work under 7106(a)(2)(B) under the Statute. See American Federation of Government Employees, Local 2077 and U.S. Department of Defense, Michigan Air National Guard, 127th Tactical Fighter Wing, 43 FLRA No. 35 (1991). National Association of Government Employees, Local R12-105 and the U.S. Department of Defense, National Guard Bureau, The Adjutant General, California National Guard, 37 FLRA No. 31 (1990). See also National Association of Government Employees, Local R12-222 and U.S. Department of Defense, Washington National Guard, Tacoma, Washington, 38 FLRA No. 33, Proposal 2 (1990).

16. Privacy Act

Improper Language: "The Employer will furnish the Labor Organization with a list of names, home addresses . . ."

Explanation: The provision is nonnegotiable because disclosure of a bargaining unit member's home address would constitute a "clearly unwarranted invasion of personal privacy . . ." See United States Department of Defense, et al. v. Federal Labor Relations Authority et al., 114 S. Ct. 1006 (1994).

17. Probationary Employees

Improper Language: "When a probationary employee is to be terminated, the Employer will give the employee thirty days notice of termination or such notice as the remaining of the probationary period permits . . . the Employer agrees to meet with a probationary employee upon request and/or accept a written statement relating to their termination. If the employee elects both, the written statement must be delivered to the employer on or before the date of the meeting. If the employee requests a meeting to submit a written statement, the request for a meeting or receipt of written statement must be within fifteen days of notice of termination . . . the employee will be advised by the Employer within seven workdays if the decision to terminate is sustained or rescinded after considering the employee's written or oral statements. Additionally, the Employer will furnish the Association with a copy of their decision."

Explanation: The Authority has consistently held that provisions that establish procedural protections for probationary

employees beyond those provided by law and regulation are nonnegotiable. National Treasury Employees Union and U.S. Department of the Treasury, Financial Management Service, 45 FLRA No. 62, Provision 4 (1992). This provision violates management's right to hire under section 7106(a)(2)(A). See American Federation of Government Employees, AFL-CIO, Local 1625 and Nonappropriated Fund Instrumentality Naval Air Station, Oceana, Virginia, 31 FLRA No. 117, Proposal 2 (1988).

18. Recruitment and Selection

a. Job Analysis

Improper Language: "Sections of several contracts contain provisions which specify the weights associated with knowledge, skills, abilities, and various other factors used to evaluate candidates for positions although the provisions do not define the knowledge, skills, abilities and other factors (KSAOs) which are applicable to a specific position. In summary, the provisions specify that certain weights will be applied across the board to candidates evaluated for positions in the bargaining unit."

Explanation: Such provisions are nonnegotiable because they are not based on job analysis that shows a connection between the required weight and the specific positions for which the candidates are applying. The determination of the personnel requirements of a position encompasses management's right to select under section 7106(a)(2)(C) and is therefore nonnegotiable. See National Federation of Federal Employees, Local 1482 and U.S. Department of Defense, Defense Mapping Agency, Hydrographic/Topographic Center, Louisville Office, Louisville, Kentucky, 45 FLRA No. 7, Proposal 5 (1992). See also U.S. Customs, Region II v. FLRA, 739 F.2d 829 and 23 FLRA No. 79, but see 56 FLRA No. 180 (2000).

b. Filling of Positions

Improper Language: "To the extent possible, the employer agrees to fill all technician position vacancies that may impact on bargaining unit members rather than use details."

Explanation: Provisions that limit management's ability to use details to assign employees to positions directly interfere with management's right to assign employees under section

7106(a)(2)(A) of the Statute. See Federal Employees Metal Trades Council and U.S. Department of the Navy, Mare Island Naval Shipyard, Vallejo, California, 38 FLRA No. 110, Provision 2 (1991).

Improper Language: “. . . all vacated positions will be filled as soon as possible.”

Explanation: Provisions that require management to hire employees violates management’s rights under section 7106(a)(2)(A) of the Statute. See International Plate Printers, Die Stampers and Engravers Union of North America, AFL-CIO, Local 2 and Department of the Treasury, Bureau of Engraving and Printing, Washington, D.C., 25 FLRA No. 9 (1987).

c. Selection Panels

1. *Improper Language:* “When filling a bargaining unit position, all three members of the review panel will be technicians, except if the immediate supervisor is an AGR. Only persons from the area may be used as a non-voting technical advisor. With concurrence of the labor organization, outside non-voting technical advisors may be used.”

Explanation: This provision is nonnegotiable because it prohibits the agency from selecting specified employees or types of employees to serve on rating and ranking panels and therefore directly interferes with management’s right to assign work. Patent Office Professional Association and U.S. Department of Commerce Patent and Trademark Office, 41 FLRA No. 72 (1991).

2. *Improper Language:* “The Human Resource Office will appoint a panel of three members to evaluate candidates. One member will be a HRO staff representative and the other two members must have technical expertise in the career field in which the vacancy exists . . . a selecting official should not serve as a member of the panel convened for the purpose of rating or ranking candidates for vacancies within his area.”

Explanation: This provision is nonnegotiable because it prevents the Agency from designating particular management officials who would represent the Agency on rating and ranking panels; therefore, it is inconsistent with management’s right under section 7106(a)(2)(B) of the Statute to determine the personnel by

which agency operations shall be conducted. National Federation of Federal Employees, Locals 1707, 1737, and 1708 and Headquarters, Louisiana Air and Army National Guard, New Orleans, Louisiana, 9 FLRA No. 19 (1982). See also American Federation of Government Employees, Local 2298 and U.S. Department of the Navy, Navy Resale Activity/Navy Exchange, Naval Weapons Station, Charleston, South Carolina, 35 FLRA No. 124 (1990).

3. *Improper Language:* "The Association will be granted representation on any of the following . . . recruiting."

Explanation: If the parties intended to negotiate over management's right to select from among properly ranked and certified candidates for promotion or from any other appropriate source, then this provision is nonnegotiable. The Union cannot require that management allow their participation on recruitment committees. National Federation of Federal Employees, Local 1482 and U.S. Department of Defense, Defense Mapping Agency, Hydrographic/Topographic Center, Louisville Office, Louisville, Kentucky, 45 FLRA No. 7 (1992).

4. *Improper Language:* "Panel Composition: A panel will consist of three (3) supervisory and/or management officials . . . the third member of a panel to fill a vacancy at the . . . must be from a facility/organization outside the aviation career field."

Improper Language: "One member will be a supervisor from outside the affected major section . . . all members will be of a grade equal to or higher than the position bid . . . representatives from HRO and LO will serve as non-rating advisors to the panel . . . the SO and candidates for the promotion vacancy cannot serve on the rating panel."

Improper Language: "One member of the panel will be an HRO staffing representative."

Explanation: These provisions are nonnegotiable because they interfere with management's right under 7106(a)(2)(B) of the Statute to "determine the personnel by which Agency operations will be conducted." National Federation of Federal Employees, Locals 1707, 1737, and 1708 and Headquarters, Louisiana Air and Army National Guard, New Orleans, Louisiana, 9 FLRA No. 19 (1982). See also National

Federation of Federal Employees, Local 78 and Veterans Administration Regional Office, Indianapolis, Indiana, 9 FLRA No. 105 (1982); National Treasury Employees Union and Department of the Treasury, 21 FLRA No. 123 (1986).

5. *Improper Language:* “He/She must have technical expertise in the career field in which the vacancy exists.”

Explanation: By requiring certain employees be appointed to rating and ranking panels, this provision interferes with management’s right to assign work under section 7106(a)(2)(B) of the Statute.

d. Selecting Candidates

Improper Language: “The Employer, upon written request, will submit to the LO the promotional materiel utilized in assessing qualifications of eligible candidates.”

Explanation: This provision is nonnegotiable because it violates the Privacy Act.

Remedy: The parties can remedy the problem by stating that documents provided to the Union will be done so in accordance with the Privacy Act.

19. Reduction in Force, Title 32 Dual Status

Improper Language: “Prior to furloughing permanent employees at a base, all temporary employees at that base will be released.”

Explanation: Provisions which require management to take certain specified personnel actions prior to conducting a RIF placed a condition on management’s right to layoff employees in violation of 7106(a)(2)(A) of the Statute. Congressional Research Employees Association and Library of Congress, Congressional Research Service, 25 FLRA No. 21, Provision 2 (1987).

20. Reduction in Force, Title 5 BOS and Title 32 Non-dual Status

Improper Language: “A reemployment priority list must be maintained for tenure group 1 and 2 technicians separated by reduction in force. Technicians on the list are given consideration

for vacant positions for which they are qualified. Qualified individuals must be offered the position. If they accept, they are placed in the position. If there is more than one eligible technician, the selecting official will be given a list from which to make a selection. These provisions shall apply two (2) years from the notification of the RIF action.”

Explanation: These provisions are nonnegotiable because they conflict with the Department of Defense (DoD) Priority Placement Program. See DoDM 1400.20-1-M.

Remedy: The parties can remedy the problem by stating that “nothing in the article will supercede the DoD Priority Placement Program.”

21. Safety

a. Working with Moving or Operating Equipment

1. *Improper Language:* “No employee shall be required to perform any work on a machine or in an area where conditions exist that are unsafe or detrimental to health.”

Explanation: This provision is intended to immunize employees from discipline due to their failure to work in unsafe conditions. This excessively interferes with management’s right to discipline under 5 U.S.C. 7106(a)(2)(A). See American Federation of Government Employees, Local 1345 and U.S. Department of the Army, Headquarters, Fort Carson and Headquarters, 4th Infantry Division, Fort Carson, Colorado, 48 FLRA No. 15, Provision 15.

2. *Improper Language:* “The Employer will ensure that employees have been properly oriented on the use of new equipment or machinery and will ensure that this equipment or machinery has been properly inspected for safety before initial use. No employee other than qualified maintenance personnel, shall be required to perform repair work on or about moving or operating machines while in motion or operation.”

Explanation: This provision is nonnegotiable because it conflicts with management’s right to assign work under section 7106(a)(2)(B) of the Statute. American Federation of Government Employees, Local 1345 and U.S. Department of the Army, HQ

Fort Carson and HQ, 4th Infantry Division, Fort Carson, Colorado, 48 FLRA No. 15 (1993).

3. *Improper Language:* “To ensure the safety of all personnel, management should not require, other than qualified personnel to perform repair work on or about moving or operating machines while in motion or in operation . . . No employee will be required to work in areas where unsafe conditions have been identified to Management and necessary corrective action has not been taken.”

Explanation: This provision is nonnegotiable because it conflicts with management’s right to assign work under section 7106(a)(2)(B) of the Statute. The Authority has held that provisions which require management to restrict work assignments to “qualified” personnel or which condition management’s ability to assign work conflict with this right. American Federation of Government Employees, AFL-CIO,

Local 1858 and U.S. Army Missile Command, The U.S. Army Test, Measurement, and Diagnostic Equipment Support Group, The U.S. Army Information Systems Command – Redstone Arsenal Commissary, 27 FLRA No. 14 (1987).

b. Unsafe Conditions

1. *Improper Language:* “. . . the employer agrees that employees will not be required to perform duties of a hazardous nature.”

Explanation: This provision interferes with management’s right to assign work under 5 U.S.C. 7106(a)(2)(B), by precluding management from assigning duties to employees under certain circumstances. The parties may remedy this problem by deleting the provision or they could state, “The Employer will endeavor to reduce or eliminate unsafe working conditions, and will consider any Union suggestions to that effect.” National Federation of Federal Employees, Local 2052 and Department of the Interior, Bureau of Land Management, Boise District Office, 30 FLRA No. 93 (1987).

2. *Improper Language:* “However, no employee is required to work in unsafe or hazardous conditions.”

Explanation: This provision is nonnegotiable because it conflicts with 29 C.F.R. 1960.46(a) and management's right to assign work under 5 U.S.C. 7106(a)(2)(B). American Federation of Government Employees, Local 1458 and Department of Justice, 29 FLRA No. 1 (1987).

c. Imminent Danger

Improper Language: "An employee who believes that an assigned task poses an imminent danger of death or serious physical harm may refuse to work if there is no reasonable alternative. A refusal to follow an order under these conditions will not, except in emergency situations, subject the employee to punitive action unless the refusal can be proven to be unjustified."

Improper Language: "When it is determined that an imminent danger exists, technicians will not be required to subject themselves to danger. The technicians may refuse to work if an imminent danger exists and this refusal will not subject the technician to punitive or disciplinary action, unless the refusal can be conclusively proven to have been made under false pretenses. . . . A technician may refuse to perform a task when both of the following criteria are met: (1) there is a reasonable belief that there exists an imminent risk of life or serious bodily harm; and (2) there is insufficient time for the individual to have the situation resolved by any method other than refusing to perform the task."

Explanation: These provisions are nonnegotiable because they violate management's right to discipline under 5 U.S.C. 7106(a)(2)(A). See American Federation of Government Employees and Army and Air Force Exchange Service, 30 FLRA No. 102, Provision 1 (1988).

d. Safety Training and Precautions

Improper Language: "Employees will normally not be required to perform such duties until they have received an appropriate briefing, instructions, training, or schooling pertinent to the hazardous task to be performed and all immediately available safety precautions and devices have been incorporated."

Improper Language: "Employees who use, handle, or are potentially exposed to hazardous materials in the course of official duties, will receive training on the specific hazards in their work

area. This training will be conducted upon initial work area assignment and whenever a new hazard is identified or introduced into the work area. This initial training will occur before employees are exposed to hazardous materials.”

Improper Language: “Management agrees that employees will not be required to perform duties that directly threaten the health, safety, and/or welfare of the technician until necessary briefings, instructions, training, or schooling have been completed and all available safety precautions and devices have been incorporated.”

Improper Language: “Certain tasks necessarily performed involve a degree of hazard, and management agrees that employees will not be required to perform duties of a hazardous nature until after the necessary briefings, instructions, training or schooling have been completed and all available safety precautions and devices have been incorporated. This training will be conducted upon initial work area assignment and whenever a new hazard is identified or introduced into a work area . . . this initial training will occur before employees are exposed to hazardous materials.”

Explanation: Although these provisions deal with legitimate health and safety concerns, they are nonnegotiable because they directly interfere with management’s right to assign work under 5 U.S.C. 7106(a)(2)(B) of the Statute. See National Federation of Federal Employees, Local 1655 and U.S. Department of Defense, National Guard Bureau, Alexandria, Virginia, 49 FLRA 874, Provision 7 (1994); National Federation of Federal Employees, Local 422 and Department of the Interior, Bureau of Indian Affairs, Colorado River Agency, Parker, Arizona, 14 FLRA No. 8 (1984). See also American Federation of Government Employees, Local 1345 and U.S. Department of the Army, HQ Fort Carson and HQ, 4th Infantry Division, Fort Carson, Colorado, 48 FLRA No. 15 (1993).

e. Extreme Temperatures

Improper Language: “Employees will not be required to work in extreme temperature situations for extended periods of time without reasonable relief away from the extreme temperature situation. The employee will communicate concerns to the supervisor in order for the supervisor to determine what these

periods will be. In the event of a disagreement, the steward and the supervisor will resolve the disagreement through Impact and Implementation bargaining".

Explanation: The underlined portion of this provision is nonnegotiable because it interferes with management's right to assign work under section 7106(a)(2)(B) of the Statute. See American Federation of Government Employees, AFL-CIO, Local 1770 and Department of the Army, Fort Bragg Dependent Schools, Fort Bragg, North Carolina, 28 FLRA No. 66 (1987).

22. Training

1. *Improper Language:* "Employees will be assisted in improving areas of unacceptable performance by . . . or additional training."

Explanation: Provisions that require the agency to provide job-related training during duty hours are outside the duty to bargain because that type of training constitutes an assignment of work. See National Association of Government Employees, Local R1-144, Federal Union of Scientists and Engineers and U.S. Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 38 FLRA No. 46 (1990).

2. *Improper Language:* "Management will utilize, to the fullest extent practicable, the present skills of technicians to enhance their knowledge through on-the-job training and other training measures, so that they may perform at their highest potential and advance in accordance with their abilities."

Explanation: This provision is nonnegotiable because it directly interferes with management's right to assign work. See American Federation of Government Employees, AFL-CIO, Local 1931 and Department of the Navy, Naval Wagons Station, Concord, California, 32 FLRA No. 146, Provision 24 (1988).

23. Travel

Improper Language: "Employees will not be required to travel for more than a ten hour period in one day, including a lunch stop and rest breaks."

Explanation: If this provision intended to limit when management can require employees to travel, then the provision is nonnegotiable because it interferes with management's right to assign work. See American Federation of Government Employees, Local 53 and U.S. Department of Navy, Navy Material Transportation Office, Norfolk, Virginia, 42 FLRA No. 68, Provision 2 (1991).

Remedy: This provision can be made negotiable by deleting "including a lunch stop and rest breaks," and replacing it with, "without relief." See National Association of Government Employees, Locals R14-68 and R14-73 and the U.S. Department of Defense, Missouri National Guard, 42 FLRA No. 40, Provision 3 (1991).

24. Uniforms

a. Wear

Explanation: Any contract provision that conflicts with 32 U.S.C. 709(b)(4), which requires that technicians wear the uniform appropriate for the member's grade and component of the armed forces while performing duties as a technician is nonnegotiable.

b. Issuance

Improper Language: "The Employer will provide at no cost to the Employee, a total of two (2) additional (BDU) uniforms above the basic allowance in any combination in accordance with current supply regulations to a maximum of six (6) . . ."

Explanation: This provision violates the Anti-deficiency Act, 31 U.S.C. 1341. It may also violate 5 U.S.C. 7122(a) which recognizes the validity of Agency-wide Regulations; the Bona Fide Need Rule, 31 U.S.C. 1502; and the Purpose Act, 31 U.S.C. 1301(a).

Note: A plethora of FSIP and FLRA Regional hearings are occurring as this Guide is published. The "improper language" opinion is based on NGB-TNL opinion. NGB-JA has requested an opinion from DoD. The NGB-ARL Directorate has requested an opinion from DA logistics. DA has failed to respond to this request, despite follow-up action by NGB-ARL.

Advisory opinion: Management should abide by existing contract provisions regarding uniforms until superseded. Negotiating new contract provisions regarding uniforms should be avoided. Existing case law has not yet recognized the authority of the Bona Fide Need Rule or the Purpose Act in superseding contract provisions regarding extra uniforms.

25. Lobbying on Official Time

Improper Language: “Official time provisions include . . . Union activities in association with providing official representation . . . by contacting (visiting, phoning, writing) elected officials in support or opposition to pending or desired legislation which would impact the working conditions of employees represented by the Union.”

Explanation: This provision conflicts with the Authority’s holding that a proposal that provided for official time to lobby Congress concerning pending legislation was contrary to the Department of Defense Appropriations Act. Office of the Adjutant General, New Hampshire National Guard, Concord, New Hampshire, 54 FLRA 301 (1998), *aff’d sub nom.*, Granite State Chapter, ACT v. FLRA, 173 F.3d 25 (1st Cir. 1999).

Note, however, that the Authority allowed as negotiable, language where the union activities provided for official time to lobby Congress by the same methods above for desired legislation (56 FLRA 427-2000).