

Member Beck, Dissenting:

I cannot agree with Chairman Pope and Member DuBester that the Union's proposal is negotiable. I would instead find that the proposal is not negotiable because it interferes with management's right to determine its internal security practices under § 7106(a)(1) of our Statute.

Internal security practices include "the policies and practices that are necessary to safeguard [an Agency's] operations, personnel, and physical property against internal and external risks." *AFGE, Local 1030*, 57 FLRA 901, 902 (2002), citing *AFGE, Local 1920*, 47 FLRA 340, 348 (1993) (emphasis added). In this case, the Agency determined that it was necessary to arm its security officers after a "number" of "officers and others" were killed or injured in violent incidents at VA medical facilities, including psychiatric wards. Agency Statement of Position at 2-3. The Agency identified at least three specific features* of the weapon at issue – the Beretta 92D – that made it the only acceptable weapon for its unique work environment. The Agency has therefore established a direct "link" between the requirement to use only the Beretta 92D and its concern for the safety of its personnel and the public. *AFGE, Local 1030*, 57 FLRA at 902. Therefore — and despite the Majority's effort to avoid the Agency's internal security concerns by characterizing the proposal as "akin to a negotiable reopener provision" — I cannot conclude that the proposal does not directly affect the Agency's right to determine its internal security practices.

Neither would I find that the Union's proposal could be categorized as either a "procedure" or an "arrangement". A proposal that affects a management right is not a "procedure" under § 7106(b)(2) if it requires an agency to adopt a particular practice for safeguarding its personnel. *NTEU*, 59 FLRA 844, 847 (2004); *IBPO*, 47 FLRA 397, 398 (1993). The Union, in its Petition for Review, acknowledges that its proposal would include either the option to use "alternat[ive] models" or two-handed, as opposed to one-handed, testing. See Petition for Review at 5. Neither am I convinced that the Union's proposal is an "arrangement." Any potential benefit to the employees is outweighed by the Agency's legitimate concerns regarding the unacceptable risks regarding the use of modified or alternative firearms and qualification requirements. See *AFGE, Natl Border Patrol Council*, 40 FLRA 521, 544-

*. Magazine disconnect feature, disabling safety device, and security holster that reduces the ability of pistol being taken by an unauthorized person.

6 (1991); *NAGE, SEIU, Local R7-51*, 30 FLRA 415, 419 (1987).

I am particularly troubled by the Majority's conclusion that the addition of the language "to the extent provided by law" makes the proposal negotiable. The addition of that language is inconsequential. It is axiomatic that all proposals and contract provisions must be consistent with law; the substantive contractual obligation reflected in the proposal is either legally permissible or it is not. If it is legally permissible, then the addition of the phrase "to the extent provided by law" is superfluous and without effect. On the other hand, if the substantive contractual obligation contemplated by the proposal is not legally permissible, then the phrase makes the obligation null and void, and the entire proposal is without effect.

One foreseeable consequence of the Majority's holding is that, henceforth, all collective bargaining proposals will include the boilerplate linguistic appendage "to the extent provided by law," and all such proposals — no matter how frivolous, onerous or ultimately unenforceable — will be deemed negotiable. Negotiability will then, in effect, be determined by arbitrators when parties seek to enforce such provisions through the grievance and arbitration process. Many of the awards in such arbitration cases will then be appealed to the Authority, and the appealing party will argue that the arbitrator erred in determining "the extent provided by law." I do not believe this is the process Congress intended for negotiability determinations when it so clearly committed that responsibility to the Authority (see 5 U.S.C. §§ 7105(a)(2)(E) and 7117(c)), and when it mandated that we apply our Statute in a way that promotes "effective and efficient Government." 5 U.S.C. § 7101(b).

Accordingly, I dissent.