

67 FLRA No. 148

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 7
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
SEYMOUR JOHNSON
AIR FORCE BASE, NORTH CAROLINA
(Agency)

0-NG-3180

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

September 18, 2014

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Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members
(Member Pizzella concurring, in part, and dissenting, in part)

I. Statement of the Case

The Union filed a negotiability appeal under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute),¹ concerning two provisions (Provision 1 and Provision 3). There are two substantive questions before us.

The first question is whether the Agency has established that Provision 1 – which pertains to employee requests for sick leave – conflicts with 5 C.F.R. § 630.405(a), or is otherwise contrary to government-wide regulation or law. Because § 630.405(a) affords the Agency discretion to comply with Provision 1, we find that the provision does not conflict with § 630.405(a). And because the Agency has not demonstrated that Provision 1 is otherwise contrary to government-wide regulation or law, we order the Agency to rescind its disapproval of that provision.

The second question is whether the Agency has established that Provision 3 – which entitles an employee who is subject to an adverse action to advance notice and a right to reply – is contrary to 5 C.F.R. § 752.404(d)(2) or 31 U.S.C. § 1341 (the Anti-Deficiency Act).

Section 752.404(d)(2) provides an exception to notice-and-reply requirements in the event of an emergency furlough;² the Anti-Deficiency Act precludes an agency from expending funds: (1) in excess of those appropriated for the fiscal year in which the expenditure is made; and (2) prior to their appropriation.³ We find that, in the event of an emergency furlough, Provision 3 would require the Agency to provide notice-and-reply entitlements that are inconsistent with § 752.404(d)(2), and to keep affected employees in a paid, duty status longer than the Anti-Deficiency Act would permit. Accordingly, we find that Provision 3 is contrary to § 752.404(d)(2) and the Anti-Deficiency Act.

II. Background

The parties executed an agreement, and the Agency head subsequently disapproved the agreement under § 7114(c) of the Statute.⁴ The Union filed a negotiability appeal (the petition); the Authority conducted a post-petition conference (the conference); the Agency filed a statement of position (the Agency's statement); and the Union filed a response (the Union's response).

III. Preliminary Matter

Under § 2424.23 of the Authority's Regulations, the Authority prepared and served a record of the conference (the record) on the parties.⁵ In the Agency's statement, the Agency objects that the record omits a legal argument that the Agency made at the conference concerning Provision 3's alleged inconsistency with § 752.404(d)(2).⁶ However, because an agency is not bound by the legal arguments that it raises at a post-petition conference, the Authority does not include those arguments in its written record of the conference.⁷ Instead, an agency must supply all of its arguments in its statement of position.⁸ Because the Authority does not include legal arguments like the one identified by the Agency in records of post-petition conferences, we reject the Agency's objection to the record.

² 5 C.F.R. § 752.404(d)(2).

³ 31 U.S.C. § 1341(a)(1)(A)-(B).

⁴ 5 U.S.C. § 7114(c).

⁵ 5 C.F.R. § 2424.23.

⁶ Agency's Statement at 8.

⁷ Cf. 5 C.F.R. § 2424.23(c) (record of post-petition conference includes "whether the parties agree on the meaning of the disputed proposal or provision, the resolution of any disputed *factual* issues, and any other appropriate matters." (emphasis added)).

⁸ *Id.* § 2424.24(a).

¹ 5 U.S.C. § 7105(a)(2)(E).

IV. Provision 1

A. Wording

Sick leave of more than three consecutive workdays should be supported by a medical certificate. When for justifiable reasons a medical certificate is unnecessary, the Employer may accept an employee's certificate showing incapacitation waiving medical documentation. The certificate, when required, must cover all absence beyond the third workday and show that the employee was incapacitated for duty for the entire period covered by the certificate. In cases of extended illness, medical certificates may be required periodically if necessary to establish the employee's continued incapacity to return to duty.⁹

B. Meaning

If the parties do not dispute the meaning of a provision, and that meaning is consistent with the provision's wording, then the Authority bases its negotiability determination on the undisputed meaning.¹⁰ In addition, where a proposal or provision is ambiguous or silent as to a particular matter, but the parties agree on that aspect of the proposal or provision's meaning, the Authority will adopt the agreed-upon meaning so long as it is consistent with the proposal or provision's wording.¹¹

Here, the parties disagree – in part – over the meaning of the first two sentences of Provision 1. As the parties do not reference the remaining sentences of the provision, neither do we.

Where parties disagree over the meaning of a proposal or provision, the Authority looks to its plain wording and any union statement of intent.¹² If the union's explanation is consistent with the provision's plain wording, then the Authority adopts that explanation for the purpose of assessing the provision's legality.¹³ For example, where a union explained that a provision stating

that an agency “may” issue a written warning would permit – but not require – the agency to issue a written warning in certain circumstances, the Authority adopted the union's explanation as consistent with the provision's wording.¹⁴ We note that the meaning that the Authority adopts in resolving a negotiability dispute applies in other proceedings – including arbitration – unless modified by the parties through subsequent agreement.¹⁵

The first sentence of Provision 1 states that “[s]ick leave of *more than three* consecutive workdays should be supported by a medical certificate.”¹⁶ The parties disagree over the extent to which the provision's first sentence limits the Agency's ability to require medical certification to support sick-leave requests of three or fewer workdays. Specifically, the Agency claims that this sentence would prohibit the Agency from requiring medical certification to support any request for three or fewer days of sick leave.¹⁷ The Union, on the other hand, asserts that Provision 1 should be read in the context of the sick-leave-abuse provision of the parties' agreement,¹⁸ under which the Agency may place any employee it suspects of sick-leave abuse on sick-leave restriction and require that employee to provide medical certification to support sick-leave requests of any duration.¹⁹ Thus, the Union asserts that, under the first sentence of Provision 1, “an employee on sick leave for three days or less will not be required to provide [medical] documentation, *unless* the employee” is on sick-leave restriction.²⁰

Provision 1 is silent as to sick-leave requests for three or fewer days. As both parties interpret the first sentence of Provision 1 as precluding the Agency from requiring an employee *who is not on sick-leave restriction* to provide medical certification for requests of three or fewer days of sick leave,²¹ we adopt that meaning for determining the negotiability of Provision 1.²² However, to the extent that the Agency argues that Provision 1 would prevent the Agency from requiring an employee *who is on sick-leave restriction* to provide medical certification to support requests for three or fewer days of sick leave,²³ that argument is inconsistent with the Union's explanation of the meaning and operation of the

⁹ Petition at 5.

¹⁰ *E.g.*, *NTEU*, 65 FLRA 509, 510 (2011) (*NTEU III*), *pet. for review dismissed sub nom. U.S. Dep't of the Treasury v. FLRA*, 670 F.3d 1315 (D.C. Cir. 2012).

¹¹ *See, e.g.*, *AFGE, Local 221*, 64 FLRA 1153, 1155 (2010) (*Local 221*) (adopting parties' undisputed clarification that proposal stating that testing “will be offered” would impose voluntary – rather than mandatory – testing).

¹² *E.g.*, *NAGE, Local R-109*, 66 FLRA 278, 278 (2011) (*Local R-109*).

¹³ *See, e.g., id.*

¹⁴ *NTEU*, 53 FLRA 539, 587-88 (1997) (*NTEU I*).

¹⁵ *NATCA*, 64 FLRA 161, 161 n.2 (2009); *Ass'n of Civilian Technicians, Volunteer Chapter 103*, 55 FLRA 562, 564 n.9 (1999); *Nat'l Educ. Ass'n, Overseas Educ. Ass'n, Laurel Bay Teachers Ass'n*, 51 FLRA 733, 741 n.8 (1996).

¹⁶ Petition at 5 (emphasis added).

¹⁷ *See* Agency's Statement at 6.

¹⁸ *See* Petition at 5; Union's Response at 3-4.

¹⁹ *See* Petition at 5.

²⁰ Record at 2 (emphasis added).

²¹ *See id.*; Petition at 5; Agency's Statement at 6.

²² *See, e.g., Local 221*, 64 FLRA at 1155.

²³ Agency's Statement at 6, 11.

provision.²⁴ In particular, the Union clarified at the conference that “the Agency may request that any employee suspected of abusing sick leave . . . submit medical certification” to support a sick-leave request of any duration.²⁵ Because the Union’s explanation of the provision’s meaning is consistent with the provision’s plain wording, we adopt that meaning.²⁶ Thus, we interpret Provision 1 as permitting the Agency to require medical certification to support any sick-leave request (of any duration) from an employee on sick-leave restriction. That is, the first sentence would preclude the Agency from requiring medical certification to support requests for three or fewer days of sick leave only from employees who are not on sick-leave restriction.

The parties also dispute the meaning of the second sentence of Provision 1, which pertains to requests for more than three days of sick leave, and which provides that the Agency “*may* accept” an employee’s self-certification in lieu of medical certification “[w]hen[,] for justifiable reasons[,] a medical certificate is unnecessary.”²⁷ Specifically, although the parties agree that this sentence would *permit* the Agency to accept an employee’s self-certification to support a sick-leave request of more than three days,²⁸ the Agency also asserts that this sentence would *require* the Agency to accept a self-certification whenever an employee asserts a “justifiable reason.”²⁹

The Union clarified at the conference that, under the second sentence of Provision 1, the Agency would retain “the discretion to determine whether to accept or reject” an employee’s self-certification for a sick-leave request for more than three days.³⁰ Thus, in the event that the Agency rejected the employee’s self-certification, the Agency would retain the ability to require medical certification to support a sick-leave request for more than three days. As the Union’s explanation is consistent with the plain wording of the provision – specifically, that the Agency “*may* accept” an employee’s self-certification³¹ – we interpret Provision 1 as permitting the Agency to accept or reject an employee’s self-certification to support a sick-leave request for more than three days.³²

In sum, under the first sentence of Provision 1, the Agency would be required to accept an employee’s

self-certification in support of a sick-leave request for three or fewer days unless the employee is on sick-leave restriction. Under the second sentence, the Agency would be permitted, but not required, to accept an employee’s self-certification for a sick-leave request of more than three days. The Agency would be permitted to require medical certification for a sick-leave request of any duration from an employee who is on sick-leave restriction.

C. Analysis and Conclusions

1. The Agency has not established that Provision 1 conflicts with a government-wide regulation.

If parties reach an agreement that is contrary to the Statute or “any other applicable law, rule, or regulation,” then the head of the agency may disapprove it under § 7114(c)(2) of the Statute.³³ Thus, an agency may properly disapprove of a provision that is inconsistent with an applicable “[g]overnment-wide . . . regulation” within the meaning of § 7117(a)(1) of the Statute.³⁴ And regulations issued by the Office of Personnel Management (OPM) that apply generally to civilian employees of the federal government are government-wide regulations within the meaning of § 7117(a)(1).³⁵ Here, the OPM regulation cited by the Agency – 5 C.F.R. § 630.405(a) – provides that an agency may grant a sick-leave request only when supported by “administratively acceptable evidence.”³⁶ The regulation further provides that an agency “*may* . . . require a medical certificate . . . for an absence in excess of [three] workdays, or for a lesser period when the agency determines it is necessary.”³⁷ However, the regulation also states that an agency “*may* consider an employee’s self-certification as to the reason for his or her absence as administratively acceptable evidence, regardless of the duration of the absence.”³⁸

We note that, previously, the wording of § 630.405 was contained in 5 C.F.R. § 630.403.³⁹ However, the renumbering did not change the wording.⁴⁰ Accordingly, Authority precedent interpreting the wording at both locations is relevant.⁴¹

²⁴ Record at 2; *see also* Petition at 5.

²⁵ Record at 2.

²⁶ *E.g.*, *Local R-109*, 66 FLRA at 278-80.

²⁷ Petition at 5 (emphasis added).

²⁸ *See* Record at 2; Union’s Response at 5; Agency’s Statement at 11.

²⁹ Agency’s Statement at 6.

³⁰ Record at 2.

³¹ Petition at 5.

³² *E.g.*, *Local R-109*, 66 FLRA at 278-80; *NTEU I*, 53 FLRA at 587-88.

³³ 5 U.S.C. § 7114(c)(2).

³⁴ *Id.* § 7117(a)(1).

³⁵ *See NAGE, SEIU, AFL-CIO*, 32 FLRA 206, 208 (1988) (*NAGE*).

³⁶ 5 C.F.R. § 630.405(a).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See* 75 Fed. Reg. 75,363, 75,373 (2010).

⁴⁰ *See id.*

⁴¹ *Cf. U.S. Dep’t of the Navy, Trident Refit Facility, Kings Bay, Ga.*, 65 FLRA 672, 674 n.3 (2011) (relying on Authority precedent interpreting relocated regulatory wording that had not changed).

The Agency argues that it has a right to require medical certification for absences of three or fewer days under § 630.405(a).⁴² Consistent with the meaning we adopt above, the first sentence of Provision 1 prohibits the Agency from exercising this alleged right unless the Agency has placed the employee on sick-leave restriction.

As noted and relevant here, under § 630.405(a), an agency “may” require medical certification for a sick-leave request for three or fewer days.⁴³ The question here is whether an agency has the authority to contractually agree to accept something other than medical certification without running afoul of the regulation. In this regard, the U.S. Supreme Court has held that lawmakers’ use of “the word ‘may’ . . . usually implies some degree of discretion.”⁴⁴

Consistent with OPM’s use of the word “may” in § 630.405(a),⁴⁵ the Authority has interpreted the regulation as permissive and discretionary. In *AFGE, AFL-CIO, Local 2052 (Local 2052)*,⁴⁶ the Authority held that a proposal that prohibited an agency from requiring anything other than self-certification to support an employee’s sick-leave request did not conflict with the regulation.⁴⁷ Specifically, the Authority emphasized that the regulation permits an agency to accept self-certification as “administratively acceptable evidence” for any absence regardless of duration, and permits – but does not require – the agency to request additional evidence.⁴⁸ Thus, the Authority reasoned that a proposal requiring an agency to exercise its discretion *not* to require anything more than self-certification to support a sick-leave request was consistent with the regulation.⁴⁹

Subsequently, in *U.S. Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia (Navy)*,⁵⁰ an arbitrator enforced a contract provision that required an agency to accept self-certification in certain circumstances, such as where an employee had a recurring illness.⁵¹ Denying an agency-filed exception to the award, the Authority found that the arbitrator’s enforcement of

that provision did not conflict with the regulation.⁵² Thus, the Authority’s decisions in *Local 2052* and *Navy* support a conclusion that the Agency’s discretion to require a medical certificate may be the subject of collective bargaining.⁵³

The Agency cites the Authority’s statement in *NFFE, Local 1380 (Local 1380)*,⁵⁴ that “nothing in OPM regulations limits an agency’s right to require evidence in support of a request for sick leave” beyond self-certification.⁵⁵ However, the Authority made that statement in response to a union argument that management’s right to hold employees accountable for their sick-leave use under § 7106 of the Statute did not extend beyond self-certification.⁵⁶ And the issue of whether the provision conflicted with § 630.405(a) was not before the Authority in that case. Thus, *Local 1380* is inapposite.

Consistent with the foregoing, § 630.405(a) authorizes the Agency to accept self-certification to support sick leave of any duration,⁵⁷ and does not compel the Agency to require medical certification in any circumstance. Accordingly, we find that the first sentence of Provision 1 is consistent with the discretion conferred on the Agency by § 630.405(a).⁵⁸

The Agency also argues that the second sentence of Provision 1, which concerns sick-leave requests of more than three days, conflicts with § 630.405(a) because the sentence would *require* the Agency to “waive its right to request medical certification in the face of a ‘justifiable reason’ from an employee.”⁵⁹ However, consistent with the meaning we adopt above, the second sentence would permit – *but not require* – the Agency to accept self-certification to support requests for more than three days of sick leave. Thus, the Agency’s argument provides no basis for finding that the second sentence of Provision 1 conflicts with § 630.405(a).⁶⁰

As part of its argument that Provision 1 is inconsistent with § 630.405(a), the Agency also asserts that “[s]ick[-]leave restriction is considered a prelude to formal discipline and is not within the scope of

⁴² See Agency’s Statement at 10, 12.

⁴³ 5 C.F.R. § 630.405(a).

⁴⁴ *United States v. Rodgers*, 461 U.S. 677, 706 (1983); see also *Haig v. Agee*, 453 U.S. 280, 294 n.26 (1981) (“‘may’ expressly recognizes substantial discretion”); *Contreras v. United States*, 64 Fed. Cl. 583, 593 (Fed. Cl. 2005) (“strong presumption that ‘may’ is permissive and discretionary, and not mandatory”).

⁴⁵ 5 C.F.R. § 630.405(a).

⁴⁶ 30 FLRA 837 (1987).

⁴⁷ *Id.* at 840-41 (proposal stating that “[w]hen an employee calls in on sick leave, the supervisor shall not ask or order an employee to make a medical diagnosis of his/her condition” was consistent with 5 C.F.R. § 630.403).

⁴⁸ *Id.*

⁴⁹ See *id.*

⁵⁰ 55 FLRA 1103 (1999).

⁵¹ *Id.* at 1103-04.

⁵² *Id.* at 1105.

⁵³ See *Navy*, 55 FLRA at 1105; *Local 2052*, 30 FLRA at 841.

⁵⁴ 36 FLRA 725 (1990).

⁵⁵ *Id.* at 740.

⁵⁶ *Id.* at 740-41.

⁵⁷ 5 C.F.R. § 630.405(a)

⁵⁸ See *id.*; *Navy*, 55 FLRA at 1105; *Local 2052*, 30 FLRA at 840-41.

⁵⁹ Agency’s Statement at 12 (quoting Provision 1).

⁶⁰ See, e.g., *NTEU*, 52 FLRA 1265, 1277-78 (1997) (rejecting agency’s negotiability arguments that were based on misinterpretation of meaning and operation of provision).

. . . § 630.405(a).⁶¹ But the Agency does not explain – and we do not understand – how a claim that sick-leave restriction is not a part of § 630.405(a) supports an argument that the Provision 1 is inconsistent with the same section. And although the Agency states that “[d]isciplinary and adverse actions are covered in 5 C.F.R. [p]art 752,”⁶² the Agency does not claim that Provision 1 conflicts with those regulations. Accordingly, we reject these arguments.

For the foregoing reasons, we find that the Agency has not established that Provision 1 conflicts with a government-wide regulation.

2. The Agency has not established that Provision 1 is otherwise contrary to law.

The Agency also argues that Provision 1 is “[n]ot [a]n [a]ppropriate [a]rrangement”⁶³ because, to the extent that Provision 1 conflicts with § 630.405(a), it is “outside the duty to bargain under §[7106(b)(3) of the Statute.”⁶⁴ As a general matter, agencies have certain management rights under § 7106(a) of the Statute, but § 7106(b) operates as an exception to those rights.⁶⁵ And in order for an agency to demonstrate that a proposal or provision is contrary to § 7106, the agency must allege and demonstrate that the proposal or provision affects a management right; if it does not do that, then it is unnecessary to resolve any claims regarding whether the proposal or provision falls within an exception set forth in § 7106(b).⁶⁶

Here, the Agency does not assert that Provision 1 affects the exercise of any management rights under § 7106(a), cite any rights under § 7106(a), or explain why the provision is otherwise contrary to law under § 7106. And we have found that Provision 1 does not conflict with

⁶¹ Agency’s Statement at 11 (citing *NFFE, Local 858*, 42 FLRA 1169 (1991)).

⁶² *Id.* at 11 n.3.

⁶³ *Id.* at 12.

⁶⁴ *Id.* at 13.

⁶⁵ 5 U.S.C. § 7106(a)-(b).

⁶⁶ *E.g.*, *AFGE, Local 3928*, 66 FLRA 175, 179 n.5 (2011) (Member Beck dissenting in part) (*Local 3928*) (as agency failed to demonstrate that proposal concerned the specified management rights, Authority found it unnecessary to address agency arguments that the proposal was not a procedure or an appropriate arrangement); *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 128 n.7 (2011) (Member Beck dissenting in part) (*Local 1998*) (as an agency argument did “not cite a management right under § 7106 that the proposal would affect[,] . . . that argument provide[d] no basis for finding [a proposal] outside the duty to bargain,” and as the agency did not demonstrate that the proposal affected a cited management right, it was unnecessary to address the union’s claim that the proposal was a procedure and an appropriate arrangement).

§ 630.405(a). Accordingly, we conclude that the Agency has not met its regulatory burden to demonstrate that Provision 1 is contrary to law. In this regard, we find that, as discussed further below, despite being on notice that it must “supply all arguments and authorities in support of its position” in its statement of position,⁶⁷ the Agency has not met its burden of proving that the provision is contrary to § 7106. In order to explain this finding, and in response to the dissent, we discuss the relevant provisions of the Authority’s Regulations.

In 1999, the Authority revised its negotiability regulations. In so doing, the Authority noted that its existing negotiability regulations “d[id] not directly address filing requirements, burdens, waivers, and concessions.”⁶⁸ The revisions changed that situation. Specifically, as relevant here, the revised regulations expressly set forth the parties’ burdens and laid out the consequences for failing to satisfy those burdens.

After the exclusive representative files its petition for review, the agency must file its statement of position, in which it must, “among other things, set forth its understanding of the . . . provision, state any disagreement with the facts, arguments, or meaning of the . . . provision set forth in the . . . petition . . . , and supply all arguments and authorities in support of its position.”⁶⁹ In this regard, the agency’s statement of position must

[s]et forth in full [the agency’s] position on any matters relevant to the petition that [it] want[s] the Authority to consider in reaching its decision, including: A statement of the arguments and authorities supporting any bargaining obligation or negotiability claims; any disagreement with claims that the exclusive representative made in the petition for review; specific citation to any law, rule, regulation, section of a collective[-]bargaining agreement, or other authority that [the agency] rel[ies] on; and a copy of any such material that the Authority may not easily access⁷⁰

In addition, the negotiability regulations clarify that an agency “has the burden of raising and supporting arguments that the . . . provision is . . . contrary to law.”⁷¹ And, consistent with these regulations, in its statement of position, “an agency has the burden of providing a record

⁶⁷ 5 C.F.R. § 2424.24(a).

⁶⁸ Negotiability Proceedings, 63 Fed. Reg. 66405-01, 66412 (Dec. 2, 1998) (Fed. Reg.).

⁶⁹ 5 C.F.R. § 2424.24(a).

⁷⁰ *Id.* § 2424.24(c)(2).

⁷¹ *Id.* § 2424.32(b).

to support its assertion” that a provision is contrary to law.⁷² The Authority has found that agencies fail to meet their regulatory burden when they merely cite a law or regulation without explaining how a particular proposal or provision conflicts with that law or regulation.⁷³ Additionally, an agency’s “[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument.”⁷⁴

Because the Agency fails to assert that Provision 1 affects the exercise of any management rights under § 7106(a) of the Statute, cite any right under § 7106(a), or explain why the provision is otherwise contrary to law under § 7106, the Agency’s argument does not meet its burden of establishing that Provision 1 is contrary to law.

In taking the opposing position, the dissent cites a decision that pre-dates the above-mentioned revisions to the Authority’s regulations,⁷⁵ as well as two dissenting opinions.⁷⁶ By definition, dissenting opinions are not Authority precedent.⁷⁷ Further, in all three of the decisions referred to by the dissent, the agency identified the management rights with which the disputed proposals or provisions allegedly conflicted.⁷⁸ Here, by contrast, the Agency does not identify *any* right under § 7106(a). And it is (both legally and logically) the Agency’s burden to cite a “law” in support of an argument that a provision is “contrary to law.”⁷⁹ It appears that the dissent would permit an agency to argue only that a provision is “outside the duty to bargain under § [7106(b)(3)]”⁸⁰ and then rely on the Authority to discern (guess?) which of the nineteen management rights in § 7106(a) the Agency may have intended to raise. And even if we could accurately decipher which management right an agency *could have (or even should have) raised*, doing so effectively makes the neutral adjudicator an agency advocate. This turns on

its head any notion of fair and orderly decision making. And it is not supported by the U.S. Court of Appeals for the District of Columbia Circuit’s decision in *NTEU v. FLRA*⁸¹ (also cited by the dissent), which did not involve § 7106, and which held only that a party’s broad argument before the Authority preserved that party’s ability to raise a narrower argument in its appeal of the Authority’s decision.⁸²

In addition, the dissent would relieve the Agency of its obligation to properly raise and support its arguments because of the allegedly “unsteady, contextual framework”⁸³ used to resolve claims regarding § 7106(b)(3).⁸⁴ But that is illogical. There can be no (principled) application of § 7106(b)(3) *at all* in the absence of a claim under § 7106(a). And here there is no such claim.

For the foregoing reasons, we find that the Agency has not shown that Provision 1 is contrary to law, and we direct the Agency to rescind its disapproval of Provision 1.

V. Provision 3

A. Wording

An employee against whom an adverse action is proposed is entitled to:

A. At least thirty (30) days advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

B. Not less than seven (7) work days to answer orally and/or in writing and to furnish affidavits and other documentary evidence in support of the answer[.]⁸⁵

B. Meaning

As discussed above, if the parties do not dispute the meaning of a provision, and that meaning is consistent with the provision’s wording, then the Authority bases its

⁷² *Local 3928*, 66 FLRA at 178 (discussing proposals); *Local 1998*, 66 FLRA at 125 (same).

⁷³ See *Local 1998*, 66 FLRA at 128 & n.7; *AFGE, Local 1547*, 65 FLRA 911, 913 (2011), *pet. for review denied sub nom. U.S. Dep’t of the Air Force, Luke Air Force Base v. FLRA*, 680 F.3d 826 (D.C. Cir. 2012); *AFGE, Local 1367*, 64 FLRA 869, 875 (2010).

⁷⁴ 5 C.F.R. § 2424.32(c)(1).

⁷⁵ Dissent at 17 (citing *AFGE, Local 1156*, 42 FLRA 1157, 1159 (1991) (*Local 1156*)).

⁷⁶ *Id.* (citing *AFGE, Local 3928*, 66 FLRA 175, 180 (2011) (*Local 3928*) (Dissenting Opinion of Member Beck); *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 136 (2011) (*NFFE*) (Dissenting Opinion of Member Beck)).

⁷⁷ *Cf. United States v. Goodrich*, 871 F.2d 1011, 1013 (11th Cir. 1989) (dissent is not binding precedent); *United States v. Young*, 541 F. Supp. 2d 1226, 1231 (D.N.M. 2008) (same).

⁷⁸ *Local 3928*, 66 FLRA at 177; *NFFE*, 66 FLRA at 124, 127, 129, 131, 132, 133, 134; *Local 1156*, 42 FLRA at 1158.

⁷⁹ 5 C.F.R. § 2424.32(b).

⁸⁰ Agency’s Statement at 13.

⁸¹ 754 F.3d 1031 (D.C. Cir. 2014).

⁸² *Id.* at 1040.

⁸³ Dissent at 17.

⁸⁴ *Id.* at 17-18.

⁸⁵ Petition at 7.

negotiability determination on the undisputed meaning.⁸⁶ In particular, where a union does not dispute an agency's interpretation of a proposal or provision, and that interpretation comports with the proposal or provision's plain wording, the Authority will adopt the agency's interpretation for the purpose of determining negotiability.⁸⁷

Under Provision 3, the Agency asserts – and the Union does not dispute – that “adverse action” has the same meaning as under 5 U.S.C. § 7512.⁸⁸ Thus, an “adverse action” is a removal, suspension for more than fourteen days, reduction in grade, reduction in pay, or a furlough of thirty days or less.⁸⁹ The parties agree that Provision 3 would require the Agency to provide an employee facing an adverse action with at least thirty days' advance written notice, unless there is reasonable cause to believe that the employee has committed a crime for which a sentence of imprisonment may be imposed.⁹⁰ And the Agency asserts – and the Union does not dispute – that employees are ordinarily in a paid, duty status during the notice period preceding an adverse action.⁹¹ In addition, the parties agree that Provision 3 would require the Agency to provide an employee with at least seven work days to respond to a proposed adverse action.⁹² As these undisputed explanations of the meaning and operation of the provision are consistent with its plain wording, we adopt them for the purpose of determining negotiability.⁹³

C. Analysis and Conclusions

The Agency argues that Provision 3 conflicts with § 752.404(d)(2),⁹⁴ and that complying with Provision 3 in the event of an emergency furlough would cause the Agency to violate the Anti-Deficiency Act.⁹⁵

As discussed above, under § 7114(c)(2), an agency may properly disapprove of a provision that is inconsistent with an applicable “[g]overnment-wide . . . regulation” within the meaning of § 7117(a)(1) of the Statute.⁹⁶ And, as discussed above, OPM regulations that agencies must apply generally to civilian employees of the

federal government are government-wide regulations within the meaning of § 7117(a)(1).⁹⁷

Under authority conferred by 5 U.S.C. § 7513, OPM promulgated regulations providing protections for an employee against whom an adverse action is proposed.⁹⁸ Like Provision 3, OPM regulations provide that such an employee is ordinarily entitled to thirty days' advance notice and a response period of no less than seven days.⁹⁹ However, unlike Provision 3, § 752.404(d)(2) states that “[t]he advance written notice and opportunity to answer are *not* required for furlough without pay due to unforeseeable circumstances, such as sudden breakdowns in equipment, acts of God, or sudden emergencies requiring immediate curtailment of activities.”¹⁰⁰ In addition, as discussed above, the Anti-Deficiency Act precludes an agency from expending funds: (1) in excess of those appropriated for the fiscal year in which the expenditure is made; and (2) prior to their appropriation.¹⁰¹ The Agency asserts – and the Union does not dispute – that a furlough resulting from the loss of appropriations is an “unforeseeable,” or “emergenc[y]” furlough for purposes of § 752.404(d)(2).¹⁰²

The Agency argues that because Provision 3 does not provide an exception to its notice-and-reply requirements in the event of an emergency furlough, the provision conflicts with § 752.404(d)(2).¹⁰³ Relatedly, the Agency argues that if it followed Provision 3 in the event of an emergency furlough due to a lapse in appropriations, then the Agency would be violating the Anti-Deficiency Act.¹⁰⁴

In response, the Union makes three arguments. First, the Union cites *Local 1380*, in which the Authority found negotiable a provision with a similar reply period.¹⁰⁵ In that decision, however, the agency did not argue that the provision at issue conflicted with § 752.404(d)(2) or the Anti-Deficiency Act. Thus, *Local 1380* is inapposite here.

Second, the Union argues that § 752.404(d)(2) “directly conflicts with the statutory entitlements set forth in 5 U.S.C. § 7513,” and that, because a “regulation cannot trump a [s]tatute,” the regulation is invalid.¹⁰⁶ The U.S. Court of Appeals for the Federal Circuit, which addressed the “tension” between the employee rights

⁸⁶ E.g., *NTEU III*, 65 FLRA at 510.

⁸⁷ E.g., *AFGE, Local 4052*, 65 FLRA 720, 721 (2011) (*Local 4052*).

⁸⁸ See Agency's Statement at 14 (quoting 5 U.S.C. § 7512(5)) (internal quotation marks omitted).

⁸⁹ 5 U.S.C. § 7512.

⁹⁰ Record at 3.

⁹¹ *Id.*; see also 5 C.F.R. § 752.404(b)(3).

⁹² Record at 3.

⁹³ See *NTEU III*, 65 FLRA at 510; *Local 4052*, 65 FLRA at 721.

⁹⁴ Agency's Statement at 14-15.

⁹⁵ *Id.* (citing 31 U.S.C. § 1341).

⁹⁶ 5 U.S.C. § 7117(a)(1).

⁹⁷ See *NAGE*, 32 FLRA at 208.

⁹⁸ 5 U.S.C. § 7513; 5 C.F.R. § 752.404(a).

⁹⁹ 5 C.F.R. § 752.404(b)-(c).

¹⁰⁰ *Id.* § 752.404(d)(2) (emphasis added).

¹⁰¹ 31 U.S.C. § 1341(a)(1)(A)-(B).

¹⁰² *Id.*; see Agency's Statement at 7-8, 14-15.

¹⁰³ Agency's Statement at 14-15.

¹⁰⁴ *Id.* (citing 31 U.S.C. § 1341).

¹⁰⁵ Union's Response at 6 (citing *Local 1380*, 36 FLRA at 732-737).

¹⁰⁶ *Id.* at 7.

conferred by § 7513 and the limitations on agencies imposed by the Anti-Deficiency Act,¹⁰⁷ upheld the validity of the emergency-furlough exception in § 752.404(d)(2).¹⁰⁸ Further, it is well established that the Authority does not have the power to assess whether an OPM regulation is invalid.¹⁰⁹

Third, the Union argues that Provision 3 is rendered negotiable by Article 2, Section 1 of the parties' agreement, which states, in pertinent part, that "[i]n the administration of all matters covered by this agreement, officials and employees are governed by existing and future laws . . . [and] regulations."¹¹⁰ According to the Union, "Article 2, Section 1 . . . provides [an] exception to [Provision 3] if overridden by law or appropriate authority."¹¹¹

This argument implies that the legality of a provision can be established by a separate collective-bargaining-agreement provision that states that the agreement must be administered lawfully (lawful-administration provision). But the Authority has held that, standing alone, a lawful-administration provision cannot make lawful an otherwise unlawful provision.¹¹² Rather, the Authority must assess whether the disputed provision's wording, or the union's explanation of the disputed provision's meaning and operation, provide a basis for finding the provision consistent with the law or regulation at issue.¹¹³

As noted, the Agency argues that Provision 3 conflicts with § 752.404(d)(2). In this regard, although § 7513 provides an employee facing a proposed adverse action with the right to advance notice and an opportunity to reply, § 752.404(d)(2) provides an exception to that requirement in the event of an emergency furlough. The plain wording of Provision 3 does not recognize this exception. Additionally, the Agency argues that Provision 3 conflicts with the Anti-Deficiency Act, which, as discussed above, makes it illegal for an agency to spend funds in the absence of an appropriation from Congress.¹¹⁴ The Union does not explain how Provision 3 would operate in a manner that is consistent with § 752.404(d)(2) and the Anti-Deficiency Act. In this regard, nowhere in its

filings does the Union clearly explain how Provision 3 would permit the Agency to forego the provision's advance notice and reply requirements in the event of an emergency furlough. Instead, the Union repeatedly argues that Provision 3 is consistent with employees' statutory entitlements under § 7513.¹¹⁵

In summary, neither Provision 3's plain wording nor the Union's explanation of the meaning and operation of Provision 3, shows that Provision 3 is consistent with § 752.404(d)(2) and the Anti-Deficiency Act. Consequently, the Union's reliance on a lawful-administration provision – Article 2, Section 1 – does not provide a basis for finding that Provision 3 is consistent with law and regulation.¹¹⁶ Therefore, we find that, in the event of an emergency furlough, Provision 3 would require the Agency to provide advance notice and a reply period in a manner inconsistent with § 752.404(d)(2). In addition, we find that, in the event of an emergency furlough, Provision 3 would require the Agency to keep affected employees in a paid, duty status for the thirty-day advance-notice period in a manner inconsistent with the Anti-Deficiency Act. Accordingly, Provision 3 is contrary to law.

The Union also argues that Provision 3 is a "procedure" and an "appropriate arrangement."¹¹⁷ Because we find that Provision 3 conflicts with § 752.404(d)(2) and the Anti-Deficiency Act, it is unnecessary to consider these arguments.¹¹⁸

VI. Order

We order the Agency to rescind its disapproval of Provision 1, and we find that Provision 3 is contrary to law.

¹⁰⁷ *Horner v. Andrzejewski*, 811 F.2d 571, 574 (Fed. Cir. 1987).

¹⁰⁸ *Id.* at 576.

¹⁰⁹ *AFGE, AFL-CIO, Nat'l Council of Grain Inspection Locals v. FLRA*, 794 F.2d 1013, 1015 (5th Cir. 1986); *NTEU*, 60 FLRA 782, 783 (2005); *U.S. Dep't of the Army, Corpus Christi Army Depot, Corpus Christi, Tex.*, 56 FLRA 1057, 1065 (2001); *AFGE, Local 4052, Council of Prison Locals*, 56 FLRA 414, 416 (2000).

¹¹⁰ Union's Response at 8 (quoting collective-bargaining agreement) (internal quotation marks omitted).

¹¹¹ *Id.*

¹¹² *See, e.g., NTEU*, 61 FLRA 554, 557 (2006) (*NTEU II*).

¹¹³ *See id.*

¹¹⁴ *See* 31 U.S.C. § 1341(a)(1)(A)-(B).

¹¹⁵ *See* Union's Response at 6-8.

¹¹⁶ *See NTEU II*, 61 FLRA at 556-57.

¹¹⁷ Petition at 7.

¹¹⁸ *See, e.g., AFSCME, Local 3097*, 42 FLRA 412, 517 (1991) ("Section 7106(b)(3) is inapplicable when it is determined that a proposal is inconsistent with law.").

Member Pizzella, concurring, in part, and dissenting, in part:

I agree with my colleagues that Provision 3 – that would “require [Seymour Johnson Air Force Base (the Agency)] to keep affected employees in a paid, duty status” for thirty days in the event of an emergency furlough – is contrary to law.¹

Unlike my colleagues, however, I would also conclude that Provision 1 – insofar as it limits when and under what circumstances the Agency may require medical certification from an employee – is contrary to a government-wide regulation.

Peter Drucker once said that “[t]he most important thing in communication is hearing *what isn’t said*.”² And what is not said in Provision 1 is precisely what makes it contrary to government-wide regulation and excessively interfere with management’s right to discipline.

Provision 1 provides that:

Sick leave of *more than three consecutive workdays* should be supported by a medical certificate. When *for justifiable reasons* a medical certificate is *unnecessary*, the Employer may accept an employee’s certificate showing incapacitation waiving medical documentation.³

However, 5 C.F.R. § 630.405(a) permits an agency to require medical documentation for any absence “in excess of [three] workdays, *or for a lesser period* when the agency determines it is necessary.”⁴

But Provision 1 is totally silent with respect to the Agency’s right to require medical certification for sick leave requests for *less than three consecutive workdays*. Despite assurances from the National Association of Independent Labor, Local 7 (the Union) that the provision would not preclude the Agency from requiring medical certification for any length of absence from an employee who is on sick leave restriction, the Union and the majority both agree that the provision would prevent the Agency, in any and all circumstances, from requiring medical certification to support a sick leave request for three or fewer days unless the employee is already on a sick leave restriction. But, as noted above, § 630.405(a) explicitly permits the Agency to require medical

documentation whenever “the [a]gency determines it is necessary” and not just when an employee is already on sick leave restriction. For that reason alone, Provision 1 is contrary to § 630.405(a).

For similar reasons, I also would conclude that the second sentence of Provision 1 is contrary to § 630.405(a) because it imposes an entirely subjective condition precedent – “justifiable reasons”⁵ on the Agency’s prerogative to “consider [or not consider] an employee’s self-certification.”⁶

The Agency head had valid reasons to be concerned with this provision and to reject it pursuant to 5 U.S.C. § 7117(a)(1). Just three years ago, the Agency had to go to the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) to prove that the Authority was wrong when it required the Agency “to bargain over a proposal that would have provided an allowance for the cleaning of [Union bargaining-unit employee] uniforms simply because the proposal ‘did not require’ an expenditure in ‘excess of the minimum.’”⁷ And, time and again, the Authority has held agencies to the strictest interpretation (made by random arbitrators) of any provision that could have included, but did not include, language that could clarify a vague provision.⁸ In other words, Authority precedent has put agencies on notice that they will be held to the language to which they

⁵ Petition at 5.

⁶ 5 C.F.R. § 630.405(a).

⁷ *U.S. DHS, U.S. CBP*, 66 FLRA 206 (2010) (Dissenting Opinion of Member Beck) (quoting *U.S. Dep’t of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base v. FLRA*, 648 F.3d 841, 848 (D.C. Cir. 2011)).

⁸ See *U.S. DOD, Def. Contract Mgmt. Agency*, 66 FLRA 53, 57 (2011) (arbitrator’s award that precludes agency from soliciting volunteers from specific locations does not fail to draw its essence from the agreement where the agreement does not limit the solicitation pool and awarding relief to unspecified individuals also does not fail to draw its essence from the agreement where the agreement does not include a provision that precludes the arbitrator from awarding relief to unspecified when the grievance was filed on their behalf by the union); *U.S. Dep’t of the Treasury, IRS*, 63 FLRA 616, 618 (2009) (agency’s discretion to impose a commuting area limitation on flexiplace sites is not “unfettered” when the flexiplace provision of the parties’ agreement does not specifically impose a commuting area limitation, despite regulations that establish a normal commuting area); *U.S. Info. Agency, Voice of Am.*, 55 FLRA 197, 199 (1999) (work jurisdiction clause of parties’ agreement could not be construed as limited to named studios where provision did not specifically exclude other studios); *U.S. DOD, Army & Air Force Exch. Serv.*, 51 FLRA 1371, 1376 (1996) (provision that limits official time for union representatives who physically leave their work area does not limit official time used by union representatives when they use telephones for representational purposes where provision relating to telephone use does not specifically extend time limits to that use).

¹ Majority at 14.

² <http://www.brainyquote.com/quotes/quotes/p/peterdruck142500.html> (last visited July 29, 2014).

³ Petition at 5. (emphases added).

⁴ 5 C.F.R. § 630.405(a), (emphases added).

agree at the bargaining table. Here, the Agency took the appropriate course and noted its concern about the missing language and even offered alternative language that incorporated the prerogatives contained in § 630.405(a).⁹

Therefore, unlike my colleagues in the majority, I would not summarily dismiss the Agency's argument that Provision 1 is not an appropriate arrangement that falls outside of the duty to bargain under § 7106(b)(3) simply because the Agency did not "assert" a specific management right in the manner they would have preferred.

I disagree with my colleagues on this point for two reasons. First, in its statement of position, the Agency specifically argues that a proposal "is [n]ot [a]n [a]ppropriate [a]rrangement" if it "excessively interferes with the *management right in question*"¹⁰ and later that "the agency head may disapprove the agreement only if it 'abrogates' the *management right in question*."¹¹ For well over twenty-seven years the Authority has consistently recognized "that *any provision* that imposes a '*precondition*' on the [a]gency's prerogative . . . to place restrictions on how sick leave is requested by employees for suspected sick leave abuse excessively interferes with *management's right to discipline*."¹²

Under these circumstances, there is only one management right that *could be* in question – management's right to discipline. Therefore, I am perplexed why my colleagues believe that they are left to "guess"¹³ which management right is in question. It is no more difficult to "discern"¹⁴ which management right the Agency "intended to raise"¹⁵ here than it was in *AFGE, Local 3928*,¹⁶ *NFFE, Federal District 1, Local 1998, IMAW*,¹⁷ or in *AFGE, Local 1156*.¹⁸

⁹ Statement of Position (SOP), Attach. 1 at 2-3.

¹⁰ *Id.* at 12 (emphasis added).

¹¹ *Id.* at 13 (emphasis added).

¹² *NTEU*, 66 FLRA 809, 816 (2012) (Dissenting Opinion of Member Beck) (citations omitted) (emphases added); *NFFE*, 29 FLRA 1491, 1505 (1987) (restrictions on when employee will request sick leave, when sick leave must be requested in advance, and when documentation will be required to support sick leave affects management's right to discipline).

¹³ Majority at 10.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 66 FLRA 175, 180 (2011) (Member Beck concurring) (agency sufficiently supports argument that to allow employees to select seating randomly anywhere within a division would directly interfere with the method by which it has chosen to accomplish its mission).

¹⁷ 66 FLRA 124, 136 (2011) (Member Beck concurring) (discussing the "nature of the employees' duties" and how those duties are "integrally related to accomplishment of the [a]gency's

Second, as I noted in *SSA, Office of Disability Adjudication & Review, Region VI, New Orleans, Louisiana*,¹⁹ I do not believe that the Authority should go out of its way to summarily dismiss otherwise meritorious arguments.²⁰ The D.C. Circuit recently criticized the Authority for holding that a party had "waived" an argument simply because it failed to use the right combination of words in exceptions it had filed with the Authority.²¹ The court noted that "a party is not required to invoke 'magic words' in order to adequately raise an argument before the Authority. Instead, an argument is preserved if the party has '*fairly brought*' the argument 'to the Authority's attention.'"²² It is obvious to me, therefore, because the Authority has consistently found that provisions, such as Provision 1 – that affect when and under what circumstances an agency may require medical documentation to support a sick leave request – affect management's right to discipline, the Agency's assertion that the provision interferes with "the management right in question" sufficiently raises an argument that should be addressed on its merits.²³

It would also be short-sighted for us to consider the parties' arguments in this case without considering the unsteady, contextual framework out of which this negotiability appeal arose. In February 2011, the Authority abruptly changed – from excessive interference to abrogation – the standard by which the Authority determines whether an agency head may reject a provision as contrary to law under § 7114(c) and § 7117(a)(1). The Authority reaffirmed the abrogation standard in July 2012²⁴ (about the same time the parties were negotiating over the substance of Provision 1). Against that backdrop, the parties sent the language of Provision 1 to the Agency head for review, in December 2012.²⁵ Thus, when the Agency head rejected the wording of Provision 1, the Agency was forced to frame its arguments within the confines of a "one-sided" and "meaningless" standard²⁶ that the Authority had never, and still has never,

mission" is sufficient to meet the methods and means test) (citing *NTEU, Chapter 83*, 64 FLRA 723, 725 (2010)).

¹⁸ 42 FLRA 1157, 1159 - 62 (1991) (provision found to directly interfere with management's right to discipline where agency argued that "the provision is not an appropriate arrangement for employees adversely affected by the exercise of a management right" (emphasis added)).

¹⁹ 67 FLRA 597, 605 (2014) (Dissenting Opinion of Member Pizzella).

²⁰ *Id.* at 607.

²¹ *NTEU v. FLRA*, 754 F.3d 1031, 1040 (D.C. Cir., 2014).

²² *Id.* (emphasis added) (quoting *U.S. Dep't of Commerce v. FLRA*, 7 F.3d 243, 245 (D.C. Cir. 1993)).

²³ SOP at 13.

²⁴ *NTEU*, 66 FLRA at 809.

²⁵ SOP, Attach. 1 at 1.

²⁶ *AFGE, Local 1164*, 67 FLRA 316, 321 (2014) (Concurring Opinion of Member Pizzella) (*Local 1164*) (citing *U.S. DOJ*,

“found” to have “happen[ed].”²⁷ But by the time the Agency filed its statement of position with us in June 2013, the IRS had appealed the Authority’s application of the abrogation standard to the D.C. Circuit, and in January 2014, the court rejected the Authority’s application of that standard.²⁸

Once again, I would take this opportunity to acknowledge the decision of the D.C. Circuit in *U.S. Department of the Treasury, IRS, Office of the Chief Counsel, Washington, D.C. v FLRA*²⁹ and, for the reasons that I explained in *AFGE, Local 1164*, would embrace the excessive interference standard to determine whether a proposal or provision impermissibly interferes with any § 7106(a) management right regardless of whether the matter is raised as an exception to an arbitrator’s award, as a negotiability dispute involving proposals, or as the result of a negotiability appeal involving agency-head disapproval of contract provisions under § 7114(c)(2).³⁰

This case demonstrates the need for the Authority to bring this matter to repose for the labor-management-relations community, once and for all, and to endorse the only standard that is fundamentally fair and that has been affirmatively embraced by the federal courts.³¹

Thank you.

Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla., 58 FLRA 109, 115 (2002) (Concurring Opinion of Member Armendariz).

²⁷ *Id.* (citing *NTEU I*, 65 FLRA at 520).

²⁸ *U.S. Dep’t of the Treasury, IRS, Office of the Chief Council, Wash., D.C. v. FLRA*, 739 F.3d 13 (D.C. Cir. 2014) (*IRS*).

²⁹ *Id.*

³⁰ *Local 1164*, 67 FLRA at 321 (Concurring Opinion of Member Pizzella).

³¹ *Id.* at 320 n.18.