67 FLRA No. 154

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF CHIEF COUNSEL
WASHINGTON, D.C.
(Agency)

0-NG-3130
(66 FLRA 809 (2012)
66 FLRA 1030 (2012))

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

September 25, 2014

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

I. Statement of the Case

In *NTEU*,[1] the Authority found that a provision requiring the Agency to counsel an employee before placing that employee on sick-leave restriction (the provision) was not contrary to law because the provision did not "abrogate"[2] management's right to discipline employees under § 7106(a)(2)(A) of the Federal Service Labor-Management Relations Statute (the Statute).[3] The Agency petitioned the U.S. Court of Appeals for the District of Columbia Circuit (the court) for review, and in *U.S. Department of the Treasury, IRS, Office of the Chief Counsel, Washington, D.C. v. FLRA* (*IRS*),[4] the court vacated the Authority's decision and remanded the case to the Authority.

Applying the court's opinion in *IRS* as the law of the case, the question before us on remand is whether, under the "excessive[-]interference test,"[5] the provision is an "appropriate arrangement" within the meaning of § 7106(b)(3) of the Statute.[6] Because the provision preserves the Agency's right to respond to a first instance of suspected leave abuse with *any and every* form of discipline other than placing the employee on sick-leave restriction, we find that the provision does not excessively interfere with management's right to discipline its employees under § 7106(a)(2)(A) of the Statute. Accordingly, we conclude that the provision is an appropriate arrangement under § 7106(b)(3) of the Statute, and we order the Agency to rescind its disapproval of the provision.

II. Background

The background is set forth fully in *NTEU* and is only briefly summarized here. The parties executed an agreement, and the Agency head subsequently disapproved the agreement under § 7114(c) of the Statute.[7] The Union filed a negotiability appeal (the petition); the Agency filed a statement of position (the Agency's statement); the Union filed a response (the Union's response); and the Agency filed a reply (the Agency's reply).

As relevant here, the Authority, in *NTEU*, addressed whether the provision is contrary to § 7106(a)(2)(A) of the Statute.[8] In so doing, the Authority applied its previous holding that, in cases involving agency-head review of agreed-upon provisions, it would find that "a contractual arrangement is an 'appropriate' arrangement within the meaning of § 7106(b)(3) of the Statute – and that an agency head may not disapprove such an arrangement on § 7106 grounds – unless the arrangement abrogates, or waives, a management right."[9] Therefore, the Authority declined to apply the "excessive[-]interference standard"[10] that the Authority applies in negotiability cases involving contract proposals to which the parties have not yet agreed.[11]

Applying the "abrogation standard,"[12] the Authority found that the provision does not abrogate management's right to discipline employees.[13] Therefore, the Authority found that the provision is an appropriate arrangement and – consequently – is not

[1] 66 FLRA 809 (2012) (Member Beck dissenting in part), *recons. denied*, 66 FLRA 1030 (2012).
[2] *Id.* at 813.
[3] 5 U.S.C. § 7106(a)(2)(A).
[4] 739 F.3d 13 (D.C. Cir. 2014).
[5] *Id.* at 21 (internal quotation marks omitted).
[6] 5 U.S.C. § 7106(b)(3).
[7] *Id.* § 7114(c).
[8] 66 FLRA at 813.
[9] *NTEU*, 65 FLRA 509, 515 (2011) (*NTEU I*) (Member Beck dissenting in part) (quoting 5 U.S.C. § 7106(b)(3)).
[10] *NTEU*, 66 FLRA at 812 n.8.
[11] *NTEU I*, 65 FLRA at 512 n.4.
[12] *NTEU*, 66 FLRA at 812 n.8.
[13] *Id.* at 813.

contrary to law.[14] The Authority ordered the Agency to rescind its disapproval of the provision.[15]

The Agency filed a petition for review of the Authority's decision with the court. On review, the court held that the Authority erred by applying two different "appropriate[-]arrangement" standards in different contexts – specifically, the "abrogation" standard in cases involving agreed-upon provisions, and the "excessive[-]interference" standard in cases involving bargaining proposals.[16] However, the court declined the Agency's request to determine whether the provision is an appropriate arrangement under the "excessive[-]interference" test.[17] Instead, the court stated that, "consistent with [its] usual practice," it would permit the Authority to make that determination upon remand.[18] We do so here.

III. Wording

> When the Office has reasonable grounds to question whether an employee is properly using sick leave including annual leave in lieu of sick leave (for example, when sick leave is used frequently or in unusual patterns or circumstances), the Office may inquire further into the matter and ask the employee to explain. Absent a reasonably acceptable explanation, the Office will counsel the employee that continued frequent use of sick leave, or use in unusual patterns or circumstances, may result in a written requirement to furnish administratively acceptable evidence for each subsequent absence due to illness or incapacitation regardless of duration.[19]

IV. Meaning

As discussed in *NTEU*,[20] the provision concerns sick-leave usage and applies when the Agency has reasonable grounds to question whether an employee is properly using sick leave.[21] In these circumstances, the Agency may inquire into the matter and ask the employee to explain.[22] If the Agency decides that the employee has not provided a reasonable explanation, then the Agency will counsel the employee.[23] This counseling would inform the employee that, if the employee continues to abuse sick leave, then the Agency could require the employee to furnish administratively acceptable evidence for each subsequent absence due to illness or incapacitation regardless of duration.[24]

Before the Authority in *NTEU*, the Agency argued that the provision precludes management from disciplining any first instance of sick-leave abuse.[25] But the Union argued that the provision precludes management only from placing an employee on sick-leave restriction without first counseling the employee.[26] In this regard, the Union asserted that, under the provision, the Agency could still respond to a first offense of sick-leave abuse by denying the leave request, declaring the employee absent without leave, or imposing any form of discipline other than sick-leave restriction.[27] Additionally, the Union stated that "nothing in [the provision] would limit [the Agency] from disciplining an employee while contemporaneously providing counseling."[28] The Authority adopted the Union's explanation that the provision permits management to respond to a first offense of sick-leave abuse with any form of discipline other than the issuance of a written restriction of sick leave.[29]

V. Analysis and Conclusions

The court's decision in *IRS* did not disturb the Authority's findings that: (1) the provision permits management to respond to a first offense of sick-leave abuse with any form of discipline other than the issuance of a sick-leave restriction;[30] (2) the provision affects management's right to discipline employees under § 7106(a)(2)(A) of the Statute;[31] and (3) the provision is an arrangement.[32] Accordingly, the sole issue before us is whether the arrangement is "appropriate" within the meaning of § 7106(b)(3) of the Statute.[33]

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[14] *Id.*
[15] *Id.* at 815.
[16] *IRS*, 739 F.3d at 21 (internal quotation marks omitted).
[17] *Id.* (internal quotation marks omitted).
[18] *Id.* (internal quotation marks omitted).
[19] Petition at 3 (emphasis omitted).
[20] 66 FLRA at 810-11.
[21] *Id.* at 810.
[22] *Id.*
[23] *Id.*
[24] *See id.*
[25] *Id.*
[26] *Id.*
[27] *See* Union's Response at 7-9.
[28] *Id.* at 8.
[29] *NTEU*, 66 FLRA at 811 (citing *NTEU I*, 65 FLRA at 515-16).
[30] *Id.*
[31] *Id.* at 812.
[32] *Id.*
[33] 5 U.S.C. § 7106(b)(3).

We adopt the court's opinion in *IRS* as the law of the case.[34] Accordingly, we apply the "excessive[-]interference" test.[35] Under that test, the Authority assesses whether an arrangement is appropriate, or whether it is inappropriate because it excessively interferes with the affected management right.[36]

In order to determine whether an arrangement excessively interferes with the affected management right, the Authority weighs the benefits that the arrangement provides to employees against the burdens that the arrangement imposes on the exercise of management's rights.[37] Here, the provision would benefit employees adversely affected by the exercise of a management right because management would be required to warn an employee suspected of leave abuse that a failure to correct his or her behavior could result in leave restriction before actually placing the employee on sick-leave restriction. Thus, the provision would protect employees suspected of abusing sick leave from being required to support future leave requests with documentation without first receiving counseling and the opportunity to correct problematic leave usage.

Regarding the provision's intrusion on management's right to discipline, the Agency argues that the provision "dictates a course of action, substitutes non-disciplinary action for a disciplinary action[,] and precludes management from taking disciplinary action for the conduct that gave rise to the inquiry in the first place."[38] However, the Agency overstates the provision's burden on the exercise of management rights. In this regard, the provision would entitle an employee to only a single counseling session before the Agency may impose leave restriction. And nothing in the provision prevents the Agency from providing this counseling session while simultaneously pursuing another form of discipline. This is because, as stated previously, under the provision, the Agency could respond to a first offense of leave abuse with any form of discipline other than the issuance of a leave-restriction notice. Thus, the Agency's argument is based on a misinterpretation of the meaning of the provision, and does not provide a basis for finding the provision contrary to law.[39] As noted above, the court in *IRS* did not disturb the Authority's interpretation of the meaning of the provision.

In addition, the Agency cites *NFFE, Local 858* (*Local 858*)[40] and *AFGE, Local 1156* (*Local 1156*)[41] in support of its argument that the provision is contrary to law.[42] In *Local 1156*, the provision at issue would require the Agency to counsel an employee about suspected sick-leave abuse before placing the employee on sick-leave restriction.[43] In *Local 858*, the provision at issue would require the Agency to first counsel, and then provide written warning, before placing an employee on leave restriction.[44] The Authority held that both provisions excessively interfered with management's right to discipline employees.[45] However, there is a crucial distinction between those provisions and the one now before us. Specifically, the Authority interpreted the provisions in both *Local 858* and *Local 1156* as precluding management from taking *any* disciplinary action in response to a first instance of leave abuse.[46] That is because the unions in *Local 858* and *Local 1156* did not assert that the provisions would preserve management's right to discipline first instances of leave abuse using disciplinary methods other than leave restriction.[47] By contrast, here, as discussed above, the provision would preserve the Agency's right to employ any and every disciplinary measure other than leave restriction in response to an employee's first instance of leave abuse. Thus, *Local 858* and *Local 1156* are distinguishable. In this regard, we note that the Authority bases its negotiability determinations only on the arguments presented by the parties.[48] And we note also that our interpretation of the meaning of this provision

[34] *See, e.g., U.S. DOJ, Fed. BOP, Wash., D.C.*, 67 FLRA 69, 70 (2012) (adopting the court's decision, on remand, as "the law of the case"); *Nat'l Weather Serv. Emps. Org.*, 64 FLRA 569, 571 (2010) (Member Beck dissenting) (same).
[35] *IRS*, 739 F.3d at 21 (internal quotation marks omitted).
[36] *AFGE, Local 1770*, 64 FLRA 953, 959 (2010).
[37] *See NAGE, Local R14-87*, 21 FLRA 24, 31-33 (1986).
[38] Agency's Statement at 5.
[39] *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).
[40] 42 FLRA 1169 (1991).
[41] 42 FLRA 1157 (1991).
[42] Agency's Statement at 4 & n.1.
[43] 42 FLRA at 1160-61.
[44] 42 FLRA at 1172.
[45] *Local 858*, 42 FLRA at 1173; *Local 1156*, 42 FLRA at 1164.
[46] *See Local 858*, 42 FLRA at 1173; *Local 1156*, 42 FLRA at 1161-62 ("for the incidents giving rise to a suspicion of sick[-]leave abuse, the provision prevents the Agency from taking *any action* other than written warnings" (emphasis added))
[47] *See Local 858*, 42 FLRA at 1170-74; *Local 1156*, 42 FLRA at 1161-62.
[48] *See, e.g., AFGE, Local 997*, 66 FLRA 499, 500-01 (2012) (Authority does not consider whether proposal enforces applicable law where union argues only that proposal is consistent with law); *AFGE, Local 2145*, 64 FLRA 231, 234 (2009) (Authority does not consider whether proposal that affects a management right constitutes an exception to management's rights under § 7106(b) if the union does not make that argument); *NAGE, Local R1-109*, 53 FLRA 403, 405 (1997) ("In the absence of any [a]gency argument that these proposals are inconsistent with law, rule, or regulation, there is no issue before us appropriate for resolution in a negotiability appeal.").

would apply in future disputes – including arbitration – unless modified by the parties through subsequent agreement.[49]

Additionally, the Agency cites *NFFE* (*NFFE*)[50] and *NTEU* (*Commerce*)[51] in support of its argument that the provision is contrary to its right to discipline employees.[52] But the Agency fails to explain how either decision supports its position. In this regard, *NFFE* is distinguishable because the union in that case did not assert that the provision at issue was an appropriate arrangement under § 7106(b)(3).[53] And in *Commerce*, the Authority found that the cited proposals *were* appropriate arrangements.[54]

The dissent relies on several of the decisions (addressed above) that the Agency cites.[55] And the dissent's reliance is misplaced for the same reasons as the Agency's. In addition, the dissent cites two dissenting opinions.[56] But, *by definition*, dissenting opinions are not Authority precedent.[57] Additionally, the dissent cites *NAGE Local R5-82* (*NAGE*),[58] where the union "[did] not argue that [the provision at issue was] intended to be an appropriate arrangement," and the Authority found the "record . . . insufficient" to – and thus did not – "make a determination on that matter."[59] So *NAGE* has no relevance whatsoever to the issue now before us: whether the provision in this case is an appropriate arrangement. And, finally, the dissent cites *AFGE, AFL-CIO, Local 2052* (*Local 2052*),[60] which addressed a proposal that would "totally prevent[] the [a]gency from requiring employees to account for their sick[-]leave usage, thereby immunizing them from discipline for failure to account for absence."[61] The differences between the proposal in *Local 2052* and the provision now before us are stark. Specifically, the provision in this case has no effect on management's right to require employees to account for their sick-leave usage, and it neither "totally prevents" the Agency from doing anything, nor "immunize[s]" employees from discipline.[62] Rather, as discussed above, it prohibits the Agency from taking one specific type of disciplinary measure – imposing a sick-leave restriction – in one and only one circumstance: in response to a *first* instance of suspected sick-leave abuse. With that one exception, the Agency's complete arsenal of disciplinary (and, for that matter, investigatory) weapons remains intact. For example, management could issue a written reprimand to an employee for a first instance of suspected sick-leave abuse, while counseling the employee that the next instance will result in a sick-leave restriction (alone or in combination with any other form of discipline). Thus, *Local 2052* is inapposite.

Balancing the respective interests, we find that the benefits the provision would afford employees outweigh the burden that the provision would impose on management's right to discipline employees. Accordingly, we find that the provision does not excessively interfere with management's right to discipline employees under § 7106(a)(2)(A), and we conclude that the provision is an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute.

VI. Order

We order the Agency to rescind its disapproval of the provision.

[49] *Ass'n of Civilian Technicians, Evergreen & Rainier Chapters*, 57 FLRA 475, 477 n.11 (2001).
[50] 29 FLRA 1491 (1987).
[51] 53 FLRA 539 (1997).
[52] Agency's Statement at 5 n.3; Agency's Reply at 4.
[53] 29 FLRA at 1510-11.
[54] 53 FLRA at 557-59.
[55] Dissent at 8 n.5 (citing *Local 858*, 42 FLRA at 1173; *Local 1156*, 42 FLRA at 1161; *NFFE*, 29 FLRA at 1505).
[56] *Id.* (citing *NAIL, Local 7*, 67 FLRA 654, 663 (2014) (*NAIL*) (Dissenting Opinion of Member Pizzella); *NTEU*, 66 FLRA at 815 (Dissenting Opinion of Member Beck)).
[57] *NAIL*, 67 FLRA at 659; *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).
[58] 43 FLRA 25 (1991).
[59] *Id.* at 29.
[60] 30 FLRA 837 (1987).
[61] *Id.* at 842.
[62] *Id.*

Member Pizzella, dissenting:

When this case first came before the Authority, I was not a Member. However, my colleagues were cautioned, in Member Beck's premonitory dissent, that they were wrong on two accounts – that it was "legally improper to apply an abrogation standard to those situations where an agency head rejects a provision that was provisionally accepted at the bargaining table"[1] and that the "sick leave provision [at issue] excessively interferes with management's right to discipline."[2]

The U.S. Court of Appeals for the District of Columbia Circuit (the court) agreed with that dissent and determined that the majority was wrong when it applied "two inconsistent interpretations of the very same statutory term"[3] and remanded the case back to the Authority to give us one more chance to fashion a standard that is coherent.[4] In other words, the court found that the Authority may not apply the excessive-interference in some situations and the abrogation standard in others.

The same provision that was rejected by the Agency head is, therefore, before us once again. But my colleagues do not seem to have learned from the court's admonition. Therefore, I dissent.

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*."[5] Despite the majority's attempt to draw distinctions (that have no consequence) between the proposal in this case and the cases cited above, the Authority's precedent has clearly held that unions may not place preconditions on an agency's prerogatives to control sick leave abuse. The proposal at issue in this case does just that – it *requires* the Agency to counsel an employee *before* it may take any other steps to restrict the use of sick leave even when the Agency has "reasonable grounds" to question whether an employee is properly using sick leave.[6] The fact of the matter is that the proposal restricts the Agency's ability to take an action that would typically be a first step in addressing sick leave abuse. That is clearly a "precondition" on the Agency's prerogative and its right to determine how, when, and in what form to discipline an employee.

Not to be outdone by our well-established precedent, however, the majority today interjects an entirely new factor into the Authority's excessive interference analysis – that is, how many "circumstance[s]" of interference does it take before a provision "excessively interfere[s]" with management's right to discipline?[7] My colleagues concede that this provision "*prohibit[s]* the Agency from imposing sick-leave restriction[s]" in "one circumstance" but then conclude that the provision does not "*excessively* interfere" with management's prerogatives because it interferes in "only one circumstance."[8] From my perspective, that makes about as much sense as telling the victim, with the broken nose, that he can't file assault-and-battery charges because the bully only punched him in the face once. Either a provision "excessively interferes" with a management right or it does not.

In this case, the provision excessively interferes with management's right to discipline because it *requires* the Agency to counsel an employee *before* it may take any other steps to restrict the use of sick leave.

I also disagree with the majority because they ignore the court's implicit, if not plain, rejection of the abrogation standard and reject the court's invitation to adopt the excessive-interference standard in all cases.

While my colleagues acknowledge that the court found that the Authority erred when it previously "appli[ed] two different 'appropriate[-]arrangement' standards in different contexts"[9] (i.e., at the bargaining table and upon agency-head review), they nonetheless

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[1] *NTEU*, 66 FLRA 809, 815 (2012) (Dissenting Opinion of Member Beck).
[2] *Id.* at 816.
[3] *U.S. Dep't of the Treasury, IRS, Office of the Chief Counsel, Wash., D.C. v. FLRA*, 739 F.3d 13, 21 (D.C. Cir. 2014) (*IRS*).
[4] *Id.* at 21.
[5] *NAIL, Local 7* 67 FLRA 654, 663 (2014) (Dissenting Opinion of Member Pizzella) (*NAIL*); *NTEU*, 66 FLRA 809, 815 (2012) (Dissenting Opinion of Member Beck) (internal citations omitted); *NAGE, Local R5-82*, 43 FLRA 25, 27-28 (1991) (provision requiring agency to first orally warn employee before placing employee on sick leave restriction directly interferes with management's right to discipline employees); *AFGE, Local 1156*, 42 FLRA 1157, 1161 (1991) (requirement that the Agency issue written notice prior to placing employees on sick leave restriction directly interferes with management's right to discipline); *NFFE Local 858*, 42 FLRA 1169, 1173 (1991) (precluding disciplinary action for initial incidents of suspected sick leave abuse excessively interferes with management's right to discipline employees); *AFGE, AFL-CIO, Local 2052*, 30 FLRA 837, 841-42 (1987) (proposal that precludes supervisor from asking for reasons for requested sick leave interferes with management's right to discipline); *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).
[6] Record of Post-Petition Conference at 2.
[7] Majority at 7.
[8] *Id.*
[9] *Id.* at 3.

avoid entirely the court's not-so-subtle hint that it did not entertain the Agency's "contention that the abrogation standard represents an impermissible construction of *[5 U.S.C. §] 7106(b)(3)'s* 'appropriate arrangements' language"[10] only "*because the Authority has given no indication that it plans to abandon its 'excessive interference' test*."[11]

The Authority must decide which standard it will apply.

As I noted in my dissent in *American Federation of Government Employees, Local 1164*, the excessive interference standard has "served the Authority well for [over] thirty years,"[12] has been upheld consistently by seven different federal circuits (including the D.C. Circuit),[13] and "ha[s] been endorsed by numerous state courts to define the extent to which various collective bargaining arrangements may impinge on public employer-management rights."[14]

Against this backdrop, it is simply fanciful for the majority to believe that this, or any other, federal court would be convinced that abrogation is the "permissible" standard.[15] But my colleagues have passed on three opportunities to settle this matter since the court issued its *IRS* decision in January 2014,[16] and they do so again today.

In my opinion, however, now is the time for the Authority to put this matter to repose for the labor-management relations community. In this case, at the behest of the court, we have an excellent opportunity to clarify that we will apply one, and only one, standard – excessive interference – in all contexts to determine whether a provision or proposal, whether at the bargaining table or as applied by an arbitrator, interferes with a management right under 5 U.S.C. § 7106(a).

The failure to do so here will result in further confusion, and thus more litigation, for agencies and unions alike.[17] Therefore, I am willing to accept that challenge and invite my colleagues to do the same.

Thank you.

[10] *IRS*, 739 F.3d at 21 (emphasis in original).
[11] *Id*. (emphasis added).
[12] 67 FLRA 316, 320 (2014) (Dissenting Opinion of Member Pizzella).
[13] *Id*. (citing *U.S. INS, U.S. Border Patrol v. FLRA*, 12 F.3d 882, 884 (9th Cir. 1993) ("The Second, Fourth[,] and D.C. Circuits have adopted the [excessive interference] analysis[,] and we feel constrained to join them."); *U.S. INS v. FLRA*, 4 F.3d 268, 272 n.7 (4th Cir. 1993) ("The competing practical needs of employees and managers are weighed in the light of various factors, so as to determine whether, on balance, the impact of the proposal on management's rights is *excessive* when compared to the benefits afforded employees.") (quoting *Nuclear Regulatory Comm'n. v. FLRA*, 895 F.2d 152, 155 (4th Cir. 1990) (internal quotation marks omitted)); *U.S. DOJ, INS v. FLRA*, 975 F.2d 218, 225 (5th Cir. 1992) ("[W]e find the FLRA's interpretation of § 7106(b)(3) to be reasonable and thus we adopt the 'excessive interference' test."); *Overseas Educ. Ass'n v. FLRA*, 961 F.2d 36, 40 (2d Cir. 1992) ("[The] excessive interference standard properly adds flesh to the term 'appropriate' by employing a test that balances the competing needs of employees and managers."); *Horner v. Bell*, 825 F.2d 382, 389 (Fed. Cir. 1987) ("[T]he critical inquiry is whether the provision interferes with management prerogatives to 'an excessive degree.'") (quoting *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983)); *AFGE, Local 3748 v. FLRA*, 797 F.2d 612, 619 n.38 (8th Cir. 1986) (citing "excessive[e] interfere[nce]" as accepted test for negotiability cases) (quoting *NAGE, Local R14-87*, 21 FLRA 24, 30 (1986) (*KANG*))).
[14] *Id*. (citing *Baltimore v. Balt. Ass'n Fire Fighters, Local 734, I.A.F.F.*, 93 Md. App. 604, 618 (Md. Ct. Spec. App. 1992); *Int'l Assn' of Fighters, Local No. 672 v. City of Boise City*, 136 Idaho 162, 171 (Idaho 2001); *United Pub. Workers, Local 646 v. City & County of Honolulu*, No. 26347 2007 Haw. App. LEXIS 277 (Haw. Ct. App. April 17, 2007); *Springfield Police Ass'n v. City of Springfield*, 134 Ore. App. 26, 29 (Or. Ct. App. 1995); *City of Scranton v. Fire Fighters Local Union No. 60*, 20 A. 3d 525, 531 (Pa. Commw. Ct. 2011)).

[15] *IRS*, 739 F.3d at 21.
[16] *NAIL*, 67 FLRA at 664 (Dissenting Opinion of Member Pizzella) ("I would take this opportunity to acknowledge the decision of [the court in *IRS*] and . . . embrace the excessive interference standard."); *SSA Office of Disability Adjudication & Review, Region VI, New Orleans, La.*, 67 FLRA 597, 608 (2014) (Dissenting Opinion of Member Pizzella) ("After the recent decision of [the court in *IRS*], it is imperative that the Authority 'bring this matter to repose for the labor-management relations community.'") (internal citations omitted); *AFGE, Local 1164*, 67 FLRA 316, 321 (2014) (Concurring Opinion of Member Pizzella) ("I would use this case to embrace a single standard – excessive interference – . . . it is time for the Authority to bring this matter to repose for the labor-management relations community and to endorse the only standard that is fundamentally fair and that has been affirmatively embraced by the federal courts.").
[17] *See NAIL*, 67 FLRA at 663-64 (Dissenting Opinion of Member Pizzella) ("When the Agency head rejected the wording of [the provision], the [a]gency was forced to frame its arguments within the confines of a 'one-sided' and 'meaningless' standard that the Authority had never, and still has never, 'found' to have 'happen[ed].' But by the time the [a]gency filed its statement of position with us in June 2013, the IRS had appealed the Authority's application of the abrogation standard to [the court], and in January 2014, the court rejected the Authority's application of that standard.") (internal citations omitted).