67 FLRA No. 21

NATIONAL ASSOCIATION
OF INDEPENDENT LABOR
LOCAL 5
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE LOGISTICS AGENCY
DEFENSE DISTRIBUTION
DEPOT RED RIVER
TEXARKANA, TEXAS
(Agency)

0-NG-3149

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

December 20, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). This case concerns the negotiability of four proposals relating to the Agency's decision to offer forty Agency employees opportunities for voluntary-separation-incentive payments (VSIP). The Agency filed a statement of position (SOP), to which the Union filed a response (response). The Agency did not file a reply to the Union's response.

For the reasons that follow, we find that Proposals 1 and 4 are outside the Agency's duty to bargain, and that Proposals 2 and 3 are within the Agency's duty to bargain.

II. Background

In order to meet its staffing reduction goals, the Agency, an activity of the Department of Defense (DOD), made an offer of VSIP[1] in January/February[2] to forty Agency employees prior to implementing a transfer of function in which the Agency transferred forty employees to the United States Army Materiel Command (Army). SOP at 2-3; SOP, Attach. 6, Human Resources Bulletin at 1. The Union filed an unfair labor practice (ULP) charge over the Agency's alleged failure to bargain over the impact and implementation of this offer of VSIP (VSIP ULP). Response at 2. The parties entered into a settlement agreement and agreed to bargain over future VSIP offers and the impact and implementation of the initial VSIP offer. Petition, Attach. 2, Settlement Agreement at 1. After the settlement, the Union filed a second ULP charge (the transfer ULP) over, among other things, the Agency's alleged failure to bargain over the impact and implementation of the transfer of function to the Army.[3] SOP, Attach. 1, Transfer ULP at 1.

III. Preliminary Issue: The Authority will not dismiss, without prejudice, the Union's petition because the petition is not directly related to a pending ULP charge.

At the post-petition conference, the Union informed the Authority about the transfer ULP. Record at 3. The Union stated that there is a pending, "consolidated" ULP charge concerning the Agency's "alleged refusal to bargain over the transfer of functions and personnel to the Army." *Id.* Subsequently, the Authority issued an Order to Show Cause (Order) under § 2424.30(a) of the Authority's Regulations directing the Union to show cause why its petition should not be dismissed without prejudice because it may be directly related to the transfer ULP.[4] Order at 2. The Union filed a response (show-cause response) to the Order, arguing

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[1] The parties alternate between referring to this offer as an offer of VSIP and an offer of VSIP and voluntary early retirement (VERA). *See, e.g.*, SOP at 4-6; Response at 2-4. For purposes of convenience, we will refer to the offer and other similar offers solely as an offer of VSIP.

[2] All dates in this decision refer to 2011.

[3] The Union claims that the Agency initially indicated that, during the transfer of function to the Army, the Agency would transfer only work, not employees. Response at 5; Record at 2. The Agency disputes this claim. *See* SOP at 3. Because the parties' dispute does not affect the resolution of this matter, we do not address the dispute further.

[4] Section 2424.30(a) provides, in pertinent part, that:

> [W]here an exclusive representative files [a ULP] charge . . . and the charge . . . concerns issues directly related to the petition for review . . . , the Authority will dismiss the petition for review. The dismissal will be without prejudice to the right of the exclusive representative to refile the petition for review after the [ULP] charge . . . has been resolved administratively.

5 C.F.R. § 2424.30(a).

that its petition is related solely to the VSIP ULP, rather than the transfer ULP. Show-Cause Response at 1-2; Response at 2. In response to the Union's claim, the Agency argued that the Union's petition is directly related to the transfer ULP because the Union's proposals seek to change the outcome of the transfer of functions. SOP at 3.

After the Order was issued and the parties responded, the Authority's Dallas Regional Office entered into a settlement agreement with the Agency to settle the transfer ULP.[5] The Authority has found that, when a union withdraws, or the Authority resolves a ULP claim related to a petition, the Authority will consider the petition, not dismiss it, because the ULP claim "has been resolved administratively." 5 C.F.R. § 2424.30(a); *see also NTEU*, 62 FLRA 267, 268-69 (2007) (*NTEU I*), *aff'd & rev'd as to other matters sub nom.*, *NTEU v. FLRA*, 550 F.3d 1148 (D.C. Cir. 2008); *NTEU*, 59 FLRA 978, 978 (2004) (*NTEU II*). Similarly, the Dallas Regional Office's settlement of the charge means that the transfer ULP is no longer pending. Thus, even assuming that the transfer ULP was directly related to the Union's negotiability petition, that ULP "has been resolved administratively." 5 C.F.R. § 2424.30(a); *cf. NTEU I*, 62 FLRA at 268-69 (Authority considered negotiability petition, despite the existence of a related grievance that alleged a ULP, because Authority had already resolved exceptions to an arbitration award, which concerned that grievance); *NTEU II*, 59 FLRA at 978 (Authority considered negotiability petition because Union withdrew related grievance that alleged a ULP). Accordingly, we find that the Union's petition is not barred. *See* 5 C.F.R. § 2424.30(a); *NTEU I*, 62 FLRA at 269.

IV. Proposal 1

A. Wording

> VSIP will be offered again to all NAIL bargaining[-]unit employees who were employed by DDRT[6] in January 2011 who were previously offered a VSIP and who are currently employed by DDRT.

Record at 2.

B. Meaning

The Union asserts that the proposal compels the Agency to reoffer VSIP to every current bargaining-unit employee who was employed by the Agency in January. *Id.* The Union claims that the proposal also is intended to diminish the effect "of the Agency's decision to transfer certain functions and employees to the Army." *Id.* The Agency agrees with the Union's explanation of the proposal's intended meaning, operation, and impact. *Id.*

C. Positions of the Parties

1. Agency

The Agency argues that the proposal affects its right to retain employees under § 7106(a)(2)(A) of the Statute. *See* SOP at 5-6. The Agency claims that, in January, it determined that only forty positions with a certain title, series, and grade within certain divisions of the Agency were excess and that it approved VSIP only for employees working in those positions. *Id.* Additionally, the Agency maintains that, if it is required to reoffer VSIP to employees who were offered, but not approved for, VSIP in January, then it would be unable to retain the number of employees in particular titles, series, and grades that are necessary to accomplish its mission. *Id.* at 6.

The Agency also contends that the proposal is not an appropriate arrangement under § 7106(b)(3) of the Statute. *Id.* at 9. Specifically, the Agency asserts that, even if the proposal is an arrangement, the proposal excessively interferes with the Agency's right to retain employees. *See id.* at 8-9. The Agency notes that, although it offered VSIP to more than forty employees, it approved VSIP in January for only forty employees whose positions it determined to be excess. *See id.* at 7-8. The Agency claims that, as a result of its decision to approve VSIP for only forty employees in January, it retained employees who "were offered . . . VSIP and elected to remain" employed or "were offered . . . VSIP, but did not have the seniority necessary" to qualify for VSIP. *Id.* at 8. According to the Agency, the employees whom it retained are not excess because they perform necessary functions. *Id.* at 7-8. The Agency maintains that requiring it to offer such employees an incentive to terminate their employment would undermine its ability to retain those employees "necessary to accomplish" its mission. *Id.* at 8. Further, the Agency argues that this proposal is distinguishable from a proposal concerning VSIP in *AFGE, Local 1827*, 58 FLRA 344, 344 (2003) (*Local 1827*) (Chairman Cabaniss concurring in part and Member Armendariz dissenting in part). SOP at 6-7. The Agency contends that, while the proposal in *Local 1827* required the agency to offer VSIP to employees whose positions were contracted out, the

[5] For purposes of this decision, we note that, although the Union appealed to the Office of the General Counsel the Dallas Regional Office's decision to settle the transfer ULP, the General Counsel has denied the Union's appeal.

[6] The Union notes that the term "DDRT" refers to the Distribution Depot in Red River, Texas. Record at 2. It is synonymous with "the Agency."

proposal here requires the Agency to offer VSIP to employees who are still employed and who are necessary to accomplish the Agency's mission. *Id.* (citing *Local 1827*, 58 FLRA at 346-47).

2. Union

The Union asserts that Proposal 1 is negotiable. Response at 5. In this regard, the Union argues that the proposal is "tailored specifically" to current Agency employees to whom the Agency previously offered VSIP. *Id.* The Union also claims that the proposal does not "unduly interfere" with management's rights. *Id.* According to the Union, if employees accept a VSIP offer as a result of the proposal, then the Agency could hire additional employees if necessary. *Id.* The Union notes that, in *Local 1827*, the Authority found a provision, which required the agency to "provide VERA authority with VSIP for positions targeted for outsourcing," to be an appropriate arrangement. *Id.* at 4 (quoting *Local 1827*, 58 FLRA at 344) (internal quotation marks omitted). Further, the Union questions how the Agency can declare this proposal nonnegotiable when it agreed, in a settlement agreement, "to negotiate procedures and appropriate arrangements" for the January and February VSIP. *Id.*

D. Analysis and Conclusions

1. Proposal 1 affects the Agency's right to retain employees under § 7106(a)(2)(A) of the Statute.

The Agency argues that Proposal 1 affects its right to retain employees under § 7106(a)(2)(A) of the Statute. SOP at 5-6. According to the Agency, it already has granted VSIP to a certain number of excess employees, and it needs all of its remaining employees in order to accomplish its mission. *Id.*

The right to retain employees under § 7106(a)(2)(A) is "the right to establish policies or practices that encourage or discourage employees from remaining employed by an agency." *U.S. Dep't of Commerce, Patent & Trademark Office*, 60 FLRA 839, 841 (2005) (quoting *Local 1827*, 58 FLRA at 346) (internal quotation marks omitted). Proposal 1 requires the Agency to reoffer VSIP to all current bargaining-unit employees whom the Agency employed in January and to whom the Agency previously offered, but did not grant, VSIP. *See* Record at 2. The offer of VSIP, a lump-sum payment to leave the Agency, discourages at least some employees from remaining employed by the Agency. *See Local 1827*, 58 FLRA at 346. Accordingly, we find that Proposal 1 affects management's right to retain employees. *See id.* at 345-46 (finding that a proposal, which required the agency to "provide VERA authority with VSIP for positions targeted for outsourcing," affected management's right to retain employees).

2. Proposal 1 is not an appropriate arrangement.

The Union asserts that Proposal 1 is an appropriate arrangement. Response at 4-5. The test for determining whether a proposal is within the duty to bargain under § 7106(b)(3) is set out in *NAGE, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). Under that test, the Authority initially determines whether a proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right. *Id.* at 31. An arrangement must seek to mitigate adverse effects "flowing from the exercise of a protected management right." *U.S. Dep't of the Treasury, Office of the Chief Counsel, IRS v. FLRA*, 960 F.2d 1068, 1073 (D.C. Cir. 1992). To establish that a proposal is an arrangement, a union must identify the effects or reasonably foreseeable effects on employees that flow from the exercise of management's rights and how those effects are adverse. *KANG*, 21 FLRA at 31. Proposals that address speculative or hypothetical concerns do not constitute arrangements. *E.g.*, *NFFE, Local 2015*, 53 FLRA 967, 973 (1997). The alleged arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights. *E.g.*, *AFGE, Local 1687*, 52 FLRA 521, 523 (1996).

If a proposal is an arrangement, then the Authority determines whether it is appropriate or whether it is inappropriate because it excessively interferes with the relevant management rights. *KANG*, 21 FLRA at 31-33. The Authority makes this determination by weighing "the competing practical needs of employees and managers" to ascertain whether the benefit to employees flowing from the proposal outweighs the proposal's burden on the exercise of the management right or rights involved. *Id.* at 31-32.

The Union contends that Proposal 1 is negotiable as an appropriate arrangement. Response at 4-5. Because the Agency does not contest the Union's contention that Proposal 1 constitutes an arrangement, we find that the proposal is an arrangement. *See* SOP at 8 (arguing merely that, even if the proposal constituted an arrangement, the proposal excessively interfered with management's right to retain employees by requiring it to rerun VSIP); *NATCA, Local ZHU*, 65 FLRA 738, 740, 742 (2011) (*Local ZHU*) (finding that, because the agency did not dispute that two proposals were arrangements, the proposals constituted arrangements).

With respect to whether the arrangement is appropriate, the Agency argues that the proposal burdens

its right to retain employees. In this regard, the Agency indicates that, while it initially offered VSIP to more than forty employees, it approved VSIP in January for only forty employees whose positions it determined to be excess. *See* SOP at 7-8; *see also* Response at 5 (claiming that, when the Agency initially offered VSIP in January/February, Agency representatives told the Union that 130 employees were excess). The Agency maintains that, as a result of its decision to approve VSIP for only forty employees, it retained those employees who "were offered . . . VSIP and elected to remain" employed or "were offered . . . VSIP, but did not have the seniority necessary" to qualify for VSIP. SOP at 8. According to the Agency, the retained employees perform necessary functions. *Id.* at 7-8. Moreover, the Agency contends that requiring it to offer such employees an incentive to terminate their employment would hamper its ability to retain those employees necessary to perform its core functions. *Id.* at 8.

The Union does not identify any benefits in response to the above arguments. Rather, the Union merely asserts that the proposal does not "unduly interfere" with management's rights. Response at 5. Furthermore, while the Union claims that the Agency could hire additional employees if current employees accept a VSIP offer, *see id.*, the proposal would deprive the Agency of the services of employees who perform specialized work necessary to accomplish the Agency's mission until it could hire new employees, *see* SOP at 8 (arguing that the Agency's remaining employees perform functions necessary to accomplish its mission). The Union also cites *Local 1827*, in which the Authority held that a proposal requiring the agency to offer VSIP to certain employees constituted an appropriate arrangement. Response at 4-5 (citing *Local 1827*, 58 FLRA at 344). But, unlike the union in that case, the Union here has not demonstrated how the burden on the Agency is outweighed by any benefits to employees.

Weighing the burdens placed on the Agency against the absence of demonstrated benefits to employees, we find that Proposal 1 excessively interferes with the Agency's right to retain employees. Accordingly, we conclude that Proposal 1 is not an appropriate arrangement and, therefore, is not within the duty to bargain. *See Fed. Union of Scientists & Eng'rs*, 22 FLRA 731, 734 (1986) (finding that, because a proposal excessively interfered with management's right to retain employees, it was not an appropriate arrangement and, thus, was outside the duty to bargain).

V. Proposal 2

A. Wording

> VSIP allocations will be granted within each title, series, and grade to the applicant with the highest retention score[7] as set forth in 5 CFR 351.

Record at 2.

B. Meaning

The Union maintains that the proposal requires the Agency to utilize reduction in force (RIF) "regulations and RIF retention scores to determine which employees should receive VSIP during the . . . [reoffer] of . . . VSIP [required by] Proposal 1, as well as future VSIP offers." *Id.* According to the Union, the proposal ensures that employees who have the highest retention scores, rather than employees who have the most seniority, receive VSIP. *Id.* The Agency agrees with the Union's explanation of the proposal's intended meaning, operation, and impact. *Id.*

C. Positions of the Parties

1. Agency

The Agency contends that Proposal 2 violates the Agency's right to retain employees under § 7106(a)(2)(A) of the Statute by requiring the Agency to reoffer VSIP to employees who previously were offered, but not approved for, VSIP. SOP at 9. In support of this claim, the Agency relies on the same arguments that it raises to support its claim that Proposal 1 interferes with management's right to retain employees. *Id.*

In addition, the Agency maintains that Proposal 2 is contrary to a DOD regulation for which there is a compelling need. *Id.* at 9-10. In this regard, the Agency argues that the proposal conflicts with DOD Instruction 1400.25 (Instruction), which requires the Agency to process VSIP applications in order of seniority "[w]hen the number of employees applying for VSIP exceeds the offers available." *Id.* at 9 (internal citations and quotation marks omitted); *see also id.* at 10. The Agency also asserts that, because performance is a factor in determining an employee's retention score, the Agency would lose its highest-performing employees as a result of the proposal. *Id.* at 10. According to

[7] A retention score is based on an employee's "tenure of employment, veteran preference, length of service, and performance." 5 C.F.R. § 351.501.

the Agency, it needs to retain its highest-performing employees and to encourage its lowest-performing employees to leave the Agency. *Id.*

2. Union

The Union maintains that Proposal 2 is negotiable. Response at 6. Specifically, the Union contends that the proposal does not violate the Agency's right to retain employees under § 7106(a)(2)(A) of the Statute. *Id.* at 5. The Union claims that the proposal is a procedure intended "to determine which employee(s) will be granted VSIP/VERA if more employees apply for VSIP/VERA within a [t]itle, [s]eries, and [g]rade than approval can be granted." Petition at 4. Also, the Union argues that the proposal constitutes an appropriate arrangement. *See* Response at 5. According to the Union, the proposal does not require the Agency to offer employees VSIP, but, rather, only provides a means to establish which employees should receive VSIP if the number of applications exceeds the number of slots authorized. *Id.* Moreover, the Union claims that the proposal constitutes an appropriate arrangement because it is nearly identical to a proposal in *Local 1827*, except that Proposal 2 identifies highest retention score rather than seniority as the factor to decide which employees should receive VSIP. *Id.* (citing *Local 1827*, 58 FLRA at 344, 347).

In addition, the Union claims that the Agency has failed to establish a compelling need for the Instruction. *Id.* at 5-6. According to the Union, the Agency incorrectly asserts that the proposal would encourage its highest-performing employees to separate and would result in the retention of employees with lower performance ratings. *Id.* at 6. Moreover, the Union maintains that, by using seniority as the factor to rank VSIP applicants, the Agency is likely to grant VSIP to employees with the most experience and highest-performance ratings over employees with less experience and lower ratings. *Id.*

D. Analysis and Conclusions

1. Proposal 2 is an appropriate arrangement.

The standards for assessing whether a proposal affects management's right to retain employees and whether a proposal constitutes an appropriate arrangement are set forth above. For purposes of this decision, we assume, without deciding, that Proposal 2 affects management's right to retain employees and, for the following reasons, conclude that the proposal is within the duty to bargain as an appropriate arrangement under § 7106(b)(3). *See AFGE, Council of Prison Locals 33*, 65 FLRA 142, 145 (2010) (*AFGE*) (assuming, without deciding, that the proposal affected a management right because the proposal was an appropriate arrangement).

The Union asserts that Proposal 2 is "no different" than a proposal – establishing the order for approving VSIPs – found negotiable as an appropriate arrangement in *Local 1827*. *See* Response at 5. By contrast, the Agency does not contest that Proposal 2 is an appropriate arrangement. *See* SOP at 9. Instead, the Agency relies solely on the arguments it made with regard to Proposal 1. *Id.* Specifically, the Agency contends that, by requiring the Agency to reoffer VSIP to employees who previously were offered, but not approved for, VSIP, the proposal violates the Agency's right to retain employees. *Id.* However, as the Union correctly argues, the proposal does not require the Agency to offer employees VSIP, but, rather, provides a means to determine which employees should receive VSIP if the number of applications for VSIP exceeds the number of slots authorized for VSIP. *See* Response at 5. Thus, the Agency's contention is misplaced. Further, as noted above, the Agency does not dispute the Union's assertion that Proposal 2 constitutes an appropriate arrangement. Section 2424.32(c)(ii)(2) of the Authority's Regulations provides that a party's "[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion." Therefore, because the Agency does not respond to or dispute the Union's assertion, based upon Authority precedent, that Proposal 2 constitutes an appropriate arrangement, we find that the proposal is an appropriate arrangement.

2. Proposal 2 is not inconsistent with an Agency regulation for which there is a compelling need.

The Agency maintains that Proposal 2 is inconsistent with the Instruction, an Agency regulation, for which there is a compelling need. SOP at 9-10. In order to show that a proposal is outside the duty to bargain because it conflicts with an agency regulation for which there is a compelling need, an agency must: (1) identify a specific agency-wide or primary-national-subdivision-wide regulation; (2) show that there is a conflict between its regulation and the proposal; and (3) demonstrate that its regulation is supported by a compelling need with reference to the Authority's standards set forth in § 2424.50 of its Regulations.[8] *E.g.*,

[8] Section 2424.50 of the Authority's Regulations provides:

> A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:

Prof'l Airways Sys. Specialists, 64 FLRA 474, 479 (2010) (*PASS*); *NAGE, Local R4-1*, 56 FLRA 214, 215 (2000).

With regard to the first requirement, there is no dispute that the Instruction is an Agency regulation. *See* SOP at 9-10 (claiming that the Instruction is an Agency regulation); Response at 5-6 (asserting only that the Agency has failed to establish a compelling need for the Instruction, an Agency regulation). Similarly, with respect to the second requirement, there is no dispute that the regulation and the proposal conflict. *See* SOP at 9-10 (maintaining that the proposal is contrary to the Instruction); Response at 5-6 (asserting only that the Agency has failed to establish a compelling need for the Instruction).

However, with regard to the third requirement, the Agency does not address the criteria for determining compelling need under § 2424.50 of the Authority's Regulations. *See PASS*, 64 FLRA at 479 (taking into account the fact that the agency did not address the criteria for determining compelling need under § 2424.50 in finding that the agency failed to establish that a proposal was contrary to an agency regulation for which there was a compelling need). Because the Agency does not address such criteria, the Agency has failed to show that there is a compelling need for the Instruction. *See U.S. DOD, Office of Dependents Sch.*, 40 FLRA 425, 443 (1991) (considering the fact that the agency failed to identify the Authority's compelling need criteria on which it relied and left for the Authority to guess how many of the arguments that the agency made related to any or all of those criteria in finding that the agency failed to establish a compelling need for its regulation); *cf. Ass'n of Civilian Technicians, Mont. Air Chapter No. 29*, 56 FLRA 674, 676 (2000) (concluding that the agency failed to establish a compelling need for its regulation, which based retention standing during a RIF primarily on performance ratings rather than length of service, because, in part, the agency did not assert that its more senior employees were less skilled or that they had received, or were more likely to receive, lower performance appraisals than more junior employees). Consequently, we find that the Agency has failed to establish that Proposal 2 is inconsistent with an Agency regulation for which there is a compelling need.[9]

Accordingly, we find that Proposal 2 is within the duty to bargain.

VI. Proposal 3

A. Wording

> VSIP notices will be sent out to affected employees following approval of VSIP applications. Employees approved for VSIP will be provided a minimum of sixty (60) days advance notice prior to the effective date.

Record at 2.

B. Meaning

The Union claims that the proposal "require[s] the Agency to wait at least sixty days before separating employees who have been approved for VSIP" and that the proposal is intended to provide employees whose VSIP applications are approved an opportunity to manage their financial affairs before separating from the Agency. *Id.* According to the Union, the proposal "appl[ies] to both the proposed [reoffer] of . . . VSIP discussed in Proposal 1, as well as future VSIP offers." *Id.* The Agency agrees with the Union's explanation of the proposal's intended meaning, operation, and impact. *Id.*

> (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency or primary national subdivision in a manner that is consistent with the requirements of an effective and efficient government.
> (b) The rule or regulation is necessary to ensure the maintenance of basic merit principles.
> (c) The rule or regulation implements a mandate to the agency or primary national subdivision under law or other outside authority, which implementation is essentially nondiscretionary in nature.

5 C.F.R. § 2424.50.

[9] Further, the Agency contends that, although the proposal provides priority consideration for VSIP in accordance with RIF regulations, 5 C.F.R. Part 351, the "proposal would contravene the necessary purpose of [those] regulation[s] by . . . encouraging the departure of employees with higher performance ratings" and by resulting in the retention of employees with lower performance ratings. SOP at 10. To the extent the Agency argues that the proposal conflicts with 5 C.F.R. Part 351, we reject the Agency's argument because the proposal does not concern how the Agency retains employees during a RIF. *See AFGE, AFL-CIO, Local 1923*, 31 FLRA 789, 790 (1988) (finding that the agency failed to demonstrate that the proposal conflicted with a government-wide regulation because the regulation was inapplicable); *AFGE, AFL-CIO, Meat Grading Council of Locals*, 22 FLRA 496, 498 (1986) (same).

C. Positions of the Parties

1. Agency

The Agency argues that Proposal 3 violates the Agency's right to retain employees under § 7106(a)(2)(A) of the Statute by requiring the Agency to reoffer VSIP to employees who previously were offered, but not approved for, VSIP. SOP at 11. In support of its claim that the proposal violates management's right to retain employees, the Agency relies on the same arguments that it raises to support its claim that Proposal 1 interferes with that right. *Id.*

2. Union

The Union asserts that Proposal 3 is negotiable. Response at 7. Specifically, the Union contends that the proposal does not violate the Agency's right to retain employees. *Id.* at 6. The Union also claims that the proposal constitutes a procedure and an appropriate arrangement. Petition at 4. According to the Union, the proposal does not require the Agency to offer employees VSIP. Response at 6. Rather, the Union argues that, by providing employees sixty days' notice, the proposal gives employees whose VSIP applications are approved an opportunity to manage their financial affairs before separating from the Agency. *See id.*; Petition at 4. Further, the Union maintains that providing employees with sixty days' notice is consistent with a RIF regulation. Response at 6-7 (citing 5 C.F.R. § 351.801(a)(1)).

D. Analysis and Conclusion: Proposal 3 is a negotiable procedure.

The standards for assessing whether a proposal affects management's right to retain employees are set forth above. For purposes of this decision, we assume, without deciding, that Proposal 3 affects management's right to retain employees under § 7106(a)(2)(A) of the Statute and, for the following reasons, conclude that the proposal is within the duty to bargain as a procedure under § 7106(b)(2). *Cf. AFGE*, 65 FLRA at 145 (assuming, without deciding, that the proposal affected management's right to retain employees because the proposal was an appropriate arrangement).

The Union contends in its petition that the proposal constitutes a procedure under § 7106(b)(2). *See* Petition at 4. The Agency did not address this claim in its SOP. *See* SOP at 11 (contending merely that, as with Proposal 1, the proposal does not constitute an appropriate arrangement because it excessively interferes with management's right to retain employees by requiring the Agency to reoffer VSIP to current employees). The Authority has found that, when an agency fails to address the union's claim that a proposal constitutes a procedure, the agency has conceded that the proposal is negotiable under § 7106(b)(2). *Cf. Local ZHU*, 65 FLRA at 744 (determining that, because the union claimed that the proposal constituted a procedure in its response, and the agency did not file a reply or address the union's claim in its SOP, the agency conceded that the proposal was a procedure). Therefore, we find that Proposal 3 constitutes a negotiable procedure. *See id.* (finding that, consistent with the agency's concession that the proposal constituted a negotiable procedure under § 7106(b)(2), the proposal was a procedure).

Accordingly, we find that Proposal 3 is within the duty to bargain.

VII. Proposal 4

A. Wording

> VSIP will be offered again to all NAIL bargaining[-]unit employees who were employed by DDRT in January 2011 who were previously offered a VSIP and who were in the NAIL bargaining unit when the settlement agreement to Case DA-CA-11-0184 was approved on Sept. 28, 2011.

Record at 3.

B. Meaning

The Union asserts that the proposal requires the Agency to offer VSIP to all employees who were: (1) employed by the Agency in January; (2) previously offered VSIP; and (3) in the bargaining unit when the settlement agreement for the VSIP ULP became final. *Id.* The Union claims that the forty employees who were transferred to the Army satisfy these three criteria and that Proposal 4 is intended to minimize the effect of the transfer on these employees by requiring the Agency to offer them VSIP. *Id.* The Agency agrees with the Union's explanation of the intended meaning, operation, and impact of the proposal. *Id.*

C. Positions of the Parties

1. Agency

The Agency first asserts that Proposal 4 is nonnegotiable because it would require the Agency to bargain over the duties and conditions of employment of non-bargaining-unit employees. SOP at 11-12. Specifically, the Agency contends that the proposal would require the Agency to offer VSIP to employees

who are now part of a different agency, namely the Army, and are represented by a different union. *Id.* at 11. The Agency also argues that Proposal 4 is contrary to the DOD's right to retain employees, *id.* at 12, and that Proposal 4 conflicts with a DOD regulation for which there is a compelling need, *id.* at 13 (citation omitted).

2. Union

The Union asserts that Proposal 4 is similar to Proposal 1 except that it also requires the Agency to offer VSIP to the employees who were transferred to the Army. Response at 7. In support of its claim that the proposal is negotiable, the Union relies on the same arguments that it raised to support its claim that Proposal 1 is negotiable – that Proposal 4 concerns employees who were "adversely affected" by the Agency's VSIP offer and that the proposal is "tailored specifically" to employees who were offered VSIP in January/February. *Id*. The Union claims that the proposal places employees in the same position they were in when the Agency offered VSIP to them in January/February. *Id.*

The Union also argues that Proposal 4 is negotiable because the Agency and the Army are both components of DOD. *Id.* The Union further asserts that the proposal addresses the Agency's "bad faith" during the previous VSIP offer. *Id.* Specifically, the Union contends that some of the transferred employees may have applied for, and accepted, VSIP had the Agency provided employees with accurate information at the time of the initial offer. *Id*.

D. Analysis and Conclusion: Proposal 4 concerns the conditions of employment of employees who are represented by another union.

The Agency argues that Proposal 4 is nonnegotiable because it concerns the conditions of employment of employees who are represented by another union in a different agency. SOP at 11-12. Proposals that directly determine the conditions of employment of employees who are represented by another union are outside the duty to bargain. *NAGE, Local R1-109*, 61 FLRA 593, 597 (2006) (*NAGE*) (citation omitted). The United States Court of Appeals for the District of Columbia Circuit explained that allowing bargaining over such proposals "would violate the fundamental principle that a union is the exclusive representative of employees in the certified or recognized unit, *and those employees only*." *U.S. Dep't of the Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA*, 952 F.2d 1434, 1442 (D.C. Cir. 1992) (*Cherry Point*) (emphasis added). Applying *Cherry Point*, the Authority has agreed that "[a]n agency is not required under the Statute to bargain with one exclusive representative about conditions of employment in a unit represented by another union because such a requirement would run afoul of the principle of exclusive recognition." *AFGE, Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1276 n.11 (1998) (Member Wassermen dissenting as to other matters) (citation omitted); *see also U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Newport News, Va.*, 65 FLRA 1052, 1054 (2011) (citations omitted), *aff'd sub nom., NAIL v. FLRA*, 680 F.3d 839 (D.C. Cir. 2012) (concluding that contract provision that determined conditions of employment of employees who were represented by another union was unenforceable).

Proposal 4 requires the Agency to offer VSIP to employees who were transferred to the Army. Response at 7; Record at 3. The Union does not dispute the Agency's assertion that these employees are represented by the National Federation of Federal Employees rather than the Union. SOP at 3, 11. Proposal 4, therefore, directly determines the conditions of employment of employees who are represented by another union. Because such proposals are outside the duty to bargain, we find that Proposal 4 is similarly outside the duty to bargain.[10] *See, e.g., NAGE*, 61 FLRA at 597 (citation omitted) (finding several proposals were outside the duty to bargain because they determined conditions of employment for employees who were represented by another union).

VIII. Order

We dismiss the Union's petition with respect to Proposals 1 and 4. The Agency shall, upon request, or as otherwise agreed to by the parties, negotiate with the Union over Proposals 2 and 3.[11]

[10] Based on our determination that Proposal 4 is nonnegotiable because it concerns the conditions of employment of employees who are represented by another union, we find that it is unnecessary to address the Agency's assertions that the proposal is contrary to DOD's right to retain employees and a DOD regulation. *See AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 937 & n.5 (2012) (citation omitted) (finding it unnecessary to address whether proposal was contrary to agency's rights under § 7106(b)(1) or whether it conflicted with a government-wide regulation because proposal was nonnegotiable on other grounds).

[11] In finding that Proposals 2 and 3 are within the duty to bargain, we make no judgment as to their merits.