64 FLRA No. 186

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1770
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DOMESTIC DEPENDENT ELEMENTARY
AND SECONDARY SCHOOLS
FORT BRAGG SCHOOLS
NORTH CAROLINA DISTRICT
FORT BRAGG, NORTH CAROLINA
(Agency)

0-NG-3003

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

June 30, 2010

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members

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) and concerns the negotiability of five provisions of a collective bargaining agreement negotiated by the Union and the Agency, which were disapproved by the Agency head under § 7114(c) of the Statute. The Agency filed a statement of position (SOP). The Union filed a response, to which the Agency filed a reply.

For the reasons that follow, we find that none of the provisions is contrary to law.[1]

II. Preliminary Matters

A. The Agency head's disapproval was timely.

A dispute arose as to whether the Agency head's disapproval of the provisions was timely; accordingly, the Authority issued a Notice and Order to Show Cause (Notice). In the Notice, the Authority explained that a union's petition for review of negotiability issues in response to an untimely Agency head disapproval does not raise negotiability issues that the Authority may address under § 7117 of the Statute. Notice at 2. Instead, the Authority explained, absent a timely disapproval, "the agreement becomes effective on the 31st day after its execution, subject to the Statute and applicable law, rule, or regulation." *Id.* (citing AFGE, Local 3172, 46 FLRA 1515, 1515-16 (1993)).

The Union asserts that the thirty-day time period for disapproving the agreement began on either July 22, 2008, when the Union ratified the agreement, or on August 7, 2008, when the Union's negotiators signed the signature page. Union Response to Notice at 3. Therefore, the Union contends, the Agency head's disapproval of the agreement on September 18, 2008, was untimely. Id. at 4. The Agency contends that the Agency head disapproval was timely because the thirty-day period did not begin until August 21, 2008, the date on which both parties re-signed the agreement. Agency Response to Notice at 1-2.

As the Union explains, it submitted an undated version of the signature page to the Agency on August 7. Union Supp. Submission at 1. The Union explains that this was done in response to a message from an Agency negotiator stating, in part, "Don't date it; I'll fill in a date after everyone signs." Id. The Union contends that the Agency, by waiting two weeks before signing the agreement and submitting it to the Agency head, "gave itself an unreasonable extension between the date the contract should be considered to have been executed and the submission for [§] 7114 Agency Head Review." Id. at 1-2.

Under § 7114(c) of the Statute, an agreement between an agency and an exclusive representative shall be subject to approval by the head of the

1. Negotiability disputes exist either when there is a claim that "a proposal is outside the duty to bargain" or, as here, that there has been "an agency head's disapproval of a provision as contrary to law." 5 C.F.R. § 2424.2(c).

agency.[2] The agency head is required to act within thirty days from the date that the agreement is executed. If the agency head does not approve or disapprove the agreement within the thirty-day period, the agreement takes effect automatically on the thirty-first day. See, e.g., Patent Office Prof. Ass'n, 41 FLRA 795, 802 (1991) (POPA). Where an agency head timely disapproves an agreement under § 7114(c) of the Statute, the agreement does not take effect and is not binding on the parties. Id.

The date of execution that triggers the time limit for agency head review under § 7114(c)(2) relates to the date on which no further action is necessary to finalize a complete agreement. POPA, 41 FLRA at 803. The Authority has recognized that the date of execution normally is the date the parties sign the agreement. Fort Bragg Ass'n of Teachers, 44 FLRA 852, 857 (1992). Here, the agreement was not finalized until both parties signed it, which occurred on August 21, 2008, when the Agency signed the agreement and placed a date on it. See Bremerton Metal Trades Council, 32 FLRA 643, 644 (1988) (date appearing on the signature page is the best evidence of the execution date). Contrary to the Union's contention, § 7114(c) does not require one party to sign an agreement within a certain number of days after the other party has signed it and does not impose any deadline on contract execution.[3] Accordingly, we find that the Agency head's disapproval of the agreement was timely.

B. The Agency's request to file its reply is granted.

On March 17, 2009,[4] the Union filed a timely response to the SOP. On April 17, after the fifteen-day deadline specified in § 2424.26(b) of the Authority's Regulations had elapsed, the Agency requested a waiver of the five-day rule for requesting an extension of time[5] and an extension of time, to May 1, to file a reply.[6] The Agency's request was denied on April 22. The Agency then filed, as part of its reply, a motion to waive the expired time limit for filing a reply and a request to consider the late reply. Reply at 1-4. The Agency contended that extraordinary circumstances existed for waiving the expired deadline, pursuant to 5 C.F.R. § 2429.23(b), because it never received the Union's mailed response.[7] *Id*. at 3-4. Even though the Union properly addressed its response to the appropriate Agency contact, the response was returned to the U.S. Postal Service. *Id*. at 3. The Agency explained that it first learned of the Union's response when the Authority sent the response to the Agency via facsimile on April 10, one week before the Agency filed its waiver and enlargement request. *Id*. at 2-3. The Agency also explained that it had been unable to ascertain why postal delivery failed and that it was unable to locate any record of the Union's response in the U.S. Postal Service's Track and Confirm website, which provided only that "[t]here is no

2. Section 7114(c) provides, in pertinent part:

> (1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.
>
> (2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation . . . .
>
> (3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

3. Likewise, the ground rules governing the bargaining of the agreement contain no such requirement. Instead, they provide only that once the agreement is signed by the negotiating team members, it will be formally executed and submitted to the Agency head for review. Union Response to Notice at 3.

4. All subsequent dates took place in 2009 unless otherwise indicated.

5. Requests for extensions of time must be received no later than five days before the established time limit for filing. 5 C.F.R. § 2424.23(a).

6. 5 C.F.R. § 2424.26(b) provides, in pertinent part, that "[u]nless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, within fifteen (15) days after the date the agency receives a copy of the exclusive representative's response to the agency's statement of position, the agency may file a reply."

7. 5 C.F.R. § 2429.23(b) provides, in pertinent part, that the Authority may "waive any expired time limit in [5 C.F.R. §§ 2429.1 – 2429.29] in extraordinary circumstances."

record of this item." *Id*. at 1. The Union did not file an opposition to the Agency's request.[8]

In *Health and Human Services, Social Security Administration, Office of Hearings and Appeals, Region II, New York, New York*, 43 FLRA 1353, 1353 n.* (1992), the Authority granted the union's request for a waiver of an expired time limit, finding that the union had demonstrated extraordinary circumstances by showing that it received the Authority's show cause order after the deadline to respond had passed. Similarly, here, the Agency demonstrated the extraordinary circumstance of the Postal Service's failed delivery. In addition, the Agency filed its reply, dated April 24, by certified mail, and the Authority received it on April 27. Inasmuch as the Agency first received the Union's reply on April 10, its reply was timely filed when measured from that date. *See* 5 C.F.R. § 2429.21(b) (when a mailing has no postmark, it shall be presumed to have been mailed five days before receipt). Accordingly, we grant the Agency's waiver and extension request and accept its reply.

III. Provisions 1, 2, and 3

Provision 1

> In the event that Agency officials initiate a meeting during a recess covering bargaining under 5 U.S.C. § 7114, the Vice President will be paid at his/her normal hourly rate for the time required to attend the meeting.

Record of Post-Petition Conference at 3.

Provision 2

> Union representatives involved in bargaining (including reasonable preparation time) with the Agency, will be in a duty status and on official time for pay purposes, regardless of the time of the day or part of the calendar year.

Response at 3.

Provision 3

> Bargaining unit members of the Union bargaining team will be in a paid duty status on official time during all bargaining, regardless of the time of day or part of the year.

Id.

A. Meaning of the Provisions

According to the Union, Provisions 1, 2, and 3 must be read in the context of the particular bargaining unit, which consists of school system employees, many of whom work only during the school year and are placed in a nonpay status during most of the summer. *Id.* The Union and Agency agree that, under these provisions, Union representatives will be placed on official time and compensated at their regular rate of pay whenever they are involved in bargaining. Id.; SOP at 7.

B. Positions of the Parties

1. Agency

The Agency contends that Provisions 1, 2, and 3 are operationally identical because they require management to compensate the Union's designated representatives, who may include seasonal employees not in a duty status, for the sole purpose of performing representational activities. SOP at 6-7. As such, the Agency contends that the provisions interfere with management's right to assign work because they require management to assign representational functions to bargaining unit employees and preclude it from assigning any tasks that aid in accomplishing the mission of the Agency. Id. at 8-9. According to the Agency, the provisions eliminate management's discretion to determine which employees will perform duties that management needs to assign, when work assignments will occur, and to whom they will be assigned. Id. at 9.

The Agency also contends that the provisions interfere with management's right to select and assign employees for mission-related work because they permit the Union to select and assign those employees who will be performing representational functions instead. Id. at 10-12. The Agency contends further that these provisions are non-negotiable because they pertain to representational duties and, therefore, do not concern "conditions of employment" as that term is defined in § 7103(a)(14) of the Statute. Id. at 12-13. In addition, the Agency

8. There is no indication of a Union opposition in the Record of Post-Petition Conference, which was issued one month after the Agency filed its request to waive the time limit. Nor did the Union express any opposition in the Union Supplemental Submission that it filed after the post-petition conference.

contends that these provisions interfere with management's right to determine its organization by requiring management to bring back seasonal employees chosen by the Union to perform the representational duties. Id. at 13-14.

The Agency also contends that the provisions interfere with management's right to determine its budget by requiring management to place off-duty Union officials on its payroll to perform activities that will not result in the accomplishment of agency work. Id. at 14. In addition, the Agency contends that the provisions contravene § 7131 of the Statute, and thus are nonnegotiable, by requiring management to return off duty employees to a duty status and then grant them official time. Id. at 15-16. Further, the Agency contends that the provisions violate the Antideficiency Act and "Federal Fiscal Law" by requiring management to spend appropriated funds for purely Union activities that are not "work" of the Agency and, thus, are not expressly provided for by legislative appropriations. Id. at 17-18. Finally, the Agency contends that the provisions are contrary to 5 C.F.R. § 340.402, a government-wide regulation that, it claims, "envisions that [seasonal] employees will be returned to duty status and assigned to 'other work' of the Agency during a layoff period and not to perform union representational activities." Id. at 18-19.

2. Union

In response to the Agency's contentions that Provisions 1, 2, and 3 interfere with management's rights to assign work, select and assign employees, and determine its organization and budget, the Union argues that the provisions concern official time under § 7131(d) of the Statute and, thus, are negotiable. Response at 3-4. The Union cites the Authority's decision in NTEU, 45 FLRA 339, 346-48 (1992), in support of its argument that § 7131(d) carves out an exception to § 7106(a). Response at 4-5.

In the alternative, the Union, applying the Authority's test in NAGE, Local R14-87, 21 FLRA 24 (1986) (KANG), contends that the provisions are appropriate arrangements for adversely affected employees. Response at 5. First, the Union identifies two groups of adversely affected employees: (1) Union representatives in a nonpay status who would not be paid while engaging in representative activity and (2) the entire bargaining unit, which suffers if representatives are unable to fulfill their representational duties because they are not paid. Id. at 5-6. Second, the Union contends that employees have no control over the circumstances giving rise to the adverse effects. Id. at 6. Third, the Union argues that the provisions do not interfere with management's right to assign work any more than any other provision regarding the use of official time under § 7131(d). Id. With regard to the Agency's claim that the provisions interfere with its management right to assign employees, the Union notes that the provisions address only the performance of representational duties, and that the Union, not the Agency, has the right to select union representatives. Id. at 7. The Union also argues that, contrary to the Agency's contentions, the provisions do not address Agency organization or prescribe any program to be included, or any amount to be allocated, in the Agency's budget. Id. at 7-8.

Fourth, the Union argues that any negative impact on management is outweighed by the benefits derived from compensating Union representatives for representing the bargaining unit. Id. at 8. Fifth, the Union argues that the provisions enhance the right of employees to bargain collectively and the ability of the Union to select its own representatives. Id. at 9.

Regarding the Agency's argument that the provisions violate the Antideficiency Act, the Union notes that the Agency provides no support for its contention that the provisions would require an expenditure in excess of funds appropriated for a fiscal year. Id. As for the Agency's argument that the provisions violate an unidentified "Federal Fiscal Law" because representation activities are not the work of the agency, the Union contends that this argument would prohibit an agency from granting official time to any union representatives and, therefore, "is absurd on its face" and contradictory to § 7131. Id. at 10 (quoting SOP at 17). With regard to the Agency's argument that the provisions would violate 5 C.F.R. § 340.402, the Union contends that this regulation contains no prohibition on seasonal employees performing representational duties on official time. Id.

3. Agency's Reply

The Agency contends that the essence of the Union's argument that Provisions 1, 2, and 3 are negotiable is that § 7131(d) of the Statute "provides an infinite source of entitlement to official time[.]" Reply at 6. This argument, according to the Agency, is not supported by Authority precedent and is inconsistent with restrictions that "Federal Fiscal Law" imposes on the use of appropriated funds. *Id.* at 14-15. Instead, the Agency contends, § 7131(d) applies only to employees who are released from a duty status to use official time. *Id.* at 8. Further, the

Agency contends that the provisions are not appropriate arrangements under *KANG* because the Union has not identified any right that management has exercised to produce the alleged adverse effects. Instead, the Agency alleges, the Union is attempting to secure a pay benefit to which employees are not entitled under the false pretense of establishing an "arrangement" and, therefore, the provisions do not promote effective and efficient government operations. *Id*. at 9-14.

C. Analysis and Conclusions

Provisions 1, 2, and 3 seek official time for bargaining unit employees who are conducting Union business with the Agency, even when they otherwise would be in a nonduty status. These provisions are similar to a proposal considered by the Authority in United States Department of Defense, Fort Bragg Dependent Schools, Fort Bragg, North Carolina, 49 FLRA 333, 345 (1994). That proposal provided that all union business conducted during vacations, leave, or weekends be on official time, as provided for in § 7131(d)(2) of the Statute, for all unit employees involved. Contrary to the Agency's contention here, in that case, the Authority expressly found that § 7131(d) does not require that an employee be in a duty status to receive official time.[9] *See* 49 FLRA at 346 ("The Authority previously has held that section 7131(d) of the Statute does not require that an employee be in a duty status in order to receive official time . . . ."); *U.S. Dep't of Commerce, NOAA, Nat'l Weather Service*, 36 FLRA 352, 358 (1990) (same).

Section 7131(d) carves out an exception to management rights under § 7106(a) of the Statute. See U.S. Dep't of Def., Army & Air Force Exch. Serv., 51 FLRA 1371, 1374 (1996) (Chairman Segal concurring in part and dissenting in part) (BATF) (citing NTEU, 45 FLRA at 346-48 (Member Armendariz concurring in part and dissenting in part)); Military Entrance Processing Station, L.A., Cal., 25 FLRA 685 (1987) (MEPS); *c*f. U.S. INS v. FLRA, 4 F.3d 268, 272 n.7 (4th Cir. 1993) (In addressing an agency's contention that § 7106(a)(2)(B) proscribes granting official time generally, the court stated that "[r]eading the various management rights in § 7106(a) in such a categorically broad way would remove all but the most trivial matters from the bargaining table."). Under the carve-out exception, matters that pertain to "'the use of official time under section 7131(d) -- that is, its amount, allocation and scheduling -- [are] negotiable absent an emergency or other special circumstances . . . .'" BATF, 45 FLRA at 347 (quoting MEPS, 25 FLRA at 689).

The Agency does not contest the carve-out doctrine itself; rather, it contests only its application to the facts here. The Agency, however, has not asserted or demonstrated the existence of an emergency or other special circumstances. Accordingly, we find that Provisions 1, 2, and 3 do not impermissibly interfere with the Agency's exercise of its management rights under § 7106(a).

The Agency contends that the provisions are nonnegotiable as contrary to the Antideficiency Act and unidentified "Federal Fiscal Law" because they require the Agency to spend appropriated funds on activities that are not the work of the Agency.

The Antideficiency 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. *See* 31 U.S.C. § 1341(a)(1)(A) and (B). *See, e.g., Ass'n of Civilian Technicians, Evergreen & Rainier Chapters*, 57 FLRA 475, 483 (2001). The Agency, which did not claim that Provisions 1, 2, or 3 would require it to expend funds in excess of its appropriation for a given fiscal year or to expend funds prior to their appropriation, has failed to establish that the provisions are contrary to the Antideficiency Act.

Nor has the Agency demonstrated that the provisions are contrary to other federal fiscal laws. In § 7131(d), Congress expressly authorized official time for matters covered by the Statute. This demonstrates that Congress expressly authorized the use of appropriated funds for this activity. Office of the Adjutant General, N.H. Nat'l Guard, Concord, N.H., 54 FLRA 301, 309 (1998). Finally, contrary to the Agency's claim, 5 C.F.R. § 340.402 -- the government-wide regulation governing seasonal employment -- does not prohibit the Agency from

9. Section 7131(d) provides:

> Except as provided in the preceding subsections of this section --
>
> (1) any employee representing an exclusive representative, or
>
> (2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,
>
> shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

granting official time during seasonal layoff periods.[10]

The Agency makes the additional argument that Provisions 1, 2, and 3 do not concern a condition of employment under the Statute and, thus, are not negotiable. Section 7103(a)(14) defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions . . . ." The provisions pertain to official time, which "shall be considered hours of work." ACT, Old Hickory Chapter, 55 FLRA 811, 813 (1999) (quoting 5 C.F.R. § 551.424(b)). Therefore, we reject this argument.

Based on the foregoing, we find that Provisions 1, 2, and 3 are not contrary to law.

IV. Provisions 6 and 7[11]

Provision 6

> When scheduling overtime and/or compensatory time, the parties agree that overtime and/or compensatory time will be distributed in a fair and equitable manner among employees by position title and duty location at [Fort Bragg Schools].

Response at 10.

Provision 7

> School year or seasonal extracurricular duty assignments will be made on a fair and equitable basis.

Id. at 12.

A. Meaning of the Provisions

The parties agree that Provisions 6 and 7 mean that management is to assign overtime, compensatory time, and extracurricular duties solely on a "fair and equitable basis." SOP at 21, 22; Response at 10, 13. At the post-petition conference, and later in its response, the Union explained that Provisions 6 and 7 require management to assign overtime, compensatory time, and extracurricular assignments equitably among equally qualified employees. Record of Post-Petition Conference at 3. The Agency disagreed with this interpretation, noting that the term "equally qualified" does not appear in either provision. *Id*.

In interpreting a disputed provision, the Authority looks to its plain wording and any union statement of intent. *NTEU*, 53 FLRA 539, 542 (1997). If the union's explanation is consistent with the plain wording, the Authority adopts the explanation for the purpose of construing what the provision means and, based on its meaning, whether it is, or is not, contrary to law. *Id*. When a provision is silent as to a particular matter, a union's statement clarifying the matter will be adopted if it is otherwise consistent with the wording of the provision. *Id*. at 542-43. Here, the provisions are silent as to whether assignments are to be made equitably among equally qualified employees, and the Union's explanation of the provisions' meaning is otherwise consistent with the wording. Therefore, we adopt the Union's explanation of the meaning of Provisions 6 and 7.

B. Positions of the Parties

1. Agency

Citing the Authority's decision in NTEU, 46 FLRA 696 (1992) (Provisions 25, 26, 27), the Agency contends that the requirement in Provisions 6 and 7 that overtime, compensatory time, and extracurricular duty assignments be distributed on a "fair and equitable" basis establishes a substantive criterion for assigning work that "excessively interferes" with the exercise of its management rights. SOP at 21-23.

2. Union

The Union does not dispute the Agency's claim that Provisions 6 and 7 affect the exercise of management rights. Response at 11. Instead, the Union contends that they are appropriate arrangements under KANG. First, the Union contends that employees can be adversely affected by the exercise of management's right to assign overtime work or extracurricular duties because this work can interfere with employees' ability to conduct personal business. According to the Union, this adverse affect would occur when the benefits and burdens are not shared appropriately among employees qualified to perform the assignments. Response at 11, 13. Second, the Union contends that

10. 5 C.F.R. § 340.402(b) provides, in pertinent part, that "[t]o minimize the adverse impact of seasonal layoffs, an agency may assign seasonal employees to other work during the projected layoff period."

11. The Union withdrew Provisions 4 and 5. *See* Response at 10.

employees, who cannot assign themselves to overtime work, have no control over the circumstances giving rise to the adverse effects. Id. at 11. Third, the Union contends that the provisions preserve managerial judgment by allowing the Agency to determine which employees are qualified for a particular assignment. Id. at 12, 13. Fourth, the Union contends that the benefits that the provisions would confer on employees outweigh any restriction on the exercise of management rights. Id. at 12. Fifth, the Union contends that the provisions support effective and efficient government by improving employee morale and reducing employee fatigue. Id.

3. Agency's Reply

The Agency contends that Provisions 6 and 7 are not arrangements because they do not address an adverse impact, but instead are intended to establish the benefit of the "appropriate" assignment of overtime, compensatory time, and extracurricular duty assignments. Reply at 16-18, 23. The Agency notes that the Authority, consistent with *United States Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service v. FLRA*, 960 F.2d 1068 (D.C. Cir. 1992) (*IRS v. FLRA*), held that a provision that addresses only the denial of a negotiated benefit does not constitute an arrangement under § 7106(b)(3) of the Statute. Reply at 17-18 (citing *NTEU*, 45 FLRA 1256, 1259 (1992)).

The Agency also contends that the provisions are not tailored to address adversely affected employees because a "fair and equitable" standard would apply to all employees, regardless of whether they are denied overtime or receive more overtime than others. Reply at 20, 23. Therefore, according to the Agency, the provisions are nonnegotiable under the holding of the U.S. Court of Appeals for the D.C. Circuit in *Department of the Interior, Minerals Management Service v. FLRA*, 969 F.2d 1158 (D.C. Cir. 1992) (*Minerals Mgmt.*).

Finally, the Agency argues, as it did in its SOP, that the provisions excessively interfere with management's right to assign work because they impose a "fair and equitable" standard on the assignment of work. Reply at 21-22.

C. Analysis and Conclusions

The Union concedes that Provisions 6 and 7 affect the exercise of management rights but argue that they are negotiable as appropriate arrangements. The test for determining whether a proposal is within the duty to bargain under § 7106(b)(3) is set out in *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. *KANG*, 21 FLRA at 31. An arrangement must seek to mitigate adverse effects "flowing from the exercise of a protected management right." *IRS v. FLRA*, 960 F.2d at 1073. 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. *See KANG*, 21 FLRA at 31. Proposals that address speculative or hypothetical concerns do not constitute arrangements. *See, e.g., NFFE, Local 2015*, 53 FLRA 967, 973 (1997). The alleged arrangement also must be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights. *See, e.g., AFGE, Local 2280, Iron Mountain, Mich.*, 57 FLRA 742, 743 (2002); *AFGE, Local 1687*, 52 FLRA 521, 523 (1996). If a proposal is an arrangement, the Authority then determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with the relevant management rights. *See KANG*, 21 FLRA at 31-33.

The Union has established that the provisions are intended to be an arrangement that mitigates the adverse effects suffered by employees who are assigned too much, as well as too little, overtime work and extracurricular duties. In this regard, these provisions are distinguishable from that involved in *IRS v. FLRA*, which required supervisors to refrain from scheduling temporary assignments to avoid compensating employees at a higher level. There, the D.C. Circuit found, and the Authority agreed, that the union failed to explain how a temporary assignment to a higher-level position had an adverse effect on employees. *See IRS v. FLRA*, 960 F.2d at 1073; *NTEU*, 45 FLRA at 1259. Here, however, the Union has explained the adverse effects that Provisions 6 and 7 are intended to mitigate, and the Agency does not deny the existence of these effects. Accordingly, we find that the provisions are arrangements.

We also find that the provisions satisfy the second "arrangement" requirement -- i.e., that they be sufficiently tailored. The Authority has held that proposals "intended to eliminate the possibility of an adverse effect, may constitute appropriate arrangements negotiable under section 7106(b)(3)[.]" *NTEU, Chapter 243*, 49 FLRA 176, 191 (1994). Moreover, an arrangement need not "target in advance the very individual employees who will be adversely affected." Minerals Mgmt., 969 F.2d

at 1163. The instant provisions are prophylactic in that they would eliminate the possibility that employees will be adversely affected by either too much or too little overtime work and extracurricular duties. The Agency has failed to establish how the provisions could be tailored more narrowly.

The Agency contends that the "fair and equitable" criterion in the provisions "excessively interferes" with the exercise of its management rights, SOP at 21-23, but provides no basis for its contention. Specifically, the Agency does not contend that it would be burdened in the exercise of any management right by treating employees fairly and consistently and thereby avoiding favoritism, arbitrariness or consideration of reasons not relating to merit or mission. The Agency does contend that the provisions would require it to select unqualified employees to perform work. Reply at 17, 21-22. However, as discussed *supra*, the Authority adopts the Union's explanation that the provisions would permit management to determine whether employees to be assigned the work are qualified to perform it. Thus, the Agency has failed to demonstrate that the provisions excessively interfere with management rights. See NTEU, 61 FLRA 871, 876 (2006) (proposal that agency apply its rules, regulations, and policies in a fair and consistent manner was an appropriate arrangement); *AFGE, Local 3258*, 48 FLRA 232, 236-37 (1993) (proposal that workload "be redistributed in a fair and equitable manner" found negotiable as an appropriate arrangement); *AFGE, AFL-CIO, Local 32*, 3 FLRA 784, 790-793 (1980) (proposal that required management to apply performance standards it had established in a fair and equitable manner found negotiable as an appropriate arrangement).

Accordingly, we find that Provisions 6 and 7 are not contrary to law.

VI. Order

The Agency shall rescind its disapproval of the provisions.