68 FLRA No. 70

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
SSA GENERAL COMMITTEE
(Union)

and

SOCIAL SECURITY ADMINISTRATION
BALTIMORE, MARYLAND
(Agency)

0-NG-3221

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

March 27, 2015

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

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).[1] This case originally concerned eight proposals related to personal space heaters; however the parties have narrowed their dispute to four proposals: Proposals 3, 4, 5, and 8.[2] The Agency (SSA) filed a statement of position (statement), to which the Union filed a response. The Agency did not file a reply to the Union's response.

We must decide whether the proposals are contrary to Agency policy, a General Services Administration (GSA) regulation, or, with respect to Proposals 4, 5, and 8, the Agency's right to determine its internal security practices under § 7106(a)(1) of the Statute. The claim that the proposals conflict with Agency policy does not provide a basis for finding the proposals outside the duty to bargain, and except as to Proposal 4, Section 4, the proposals do not conflict with the GSA regulation. Moreover, Proposals 5 and 8 are appropriate arrangements under § 7106(b)(3) of the Statute. Accordingly, we find that Proposals 3, 5, and 8 are within the duty to bargain and that Proposal 4, as a whole, is outside the duty to bargain. Finally, we find that severance of Sections 1, 2, and 3 of Proposal 4 is appropriate, and that the severed sections do not interfere with the Agency's right to determine internal security, and are, as such, within the duty to bargain.

II. Background

After several small fires caused by personal space heaters, the Agency issued a "reminder"[3] that the use of personal space heaters was not permitted under most circumstances and announced that it would return to compliance with its policy. Contending that this reminder was actually a change in policy, the Union sought to bargain over the Agency's space-heater policy. The parties exchanged proposals but were unable to reach agreement even with the assistance of a third-party mediator.

The Union then requested the assistance of the Federal Service Impasses Panel (Panel). But before the Panel could resolve the impasse, the Agency implemented a policy that banned the use of personal space heaters and asserted that the Union's proposals were nonnegotiable. The Union then withdrew its request for assistance from the Panel and filed an unfair-labor-practice (ULP) charge with the Federal Labor Relations Authority's Chicago Regional Office. While the ULP charge was pending, the Union requested a written declaration of nonnegotiability from the Agency. The Agency did not provide one, and the Union filed a negotiability appeal with the Authority. The Union withdrew its ULP charge the same day that it filed this negotiability petition.

III. Preliminary Matter: It is unnecessary to resolve the Agency's objection to the contents of the record of the post-petition conference.

At the post-petition conference (the conference), the Agency declined to respond to certain proposals that the Union revised during the conference.[4] Under § 2424.23 of the Authority's Regulations, the Authority prepared and served a record of the conference (the record) on the parties.[5] In the Agency's statement, the Agency objects that the record mischaracterizes its reasons for declining to respond to the revised proposals during the conference.[6] But the Authority has not penalized the Agency for not responding to the revised proposals during the conference.[7] To the contrary, the

[1] 5 U.S.C. §§ 7101-7135.
[2] Record of Post-Petition Conference at 9 (Record) (withdrawing allegation of nonnegotiability as to Proposal 7); Statement of Position at 8-10 (Statement) (withdrawing allegation as to Proposals 1, 2, and 6).
[3] Statement at 2.
[4] Record at 3-4, 6-7, 9.
[5] 5 C.F.R. § 2424.23.
[6] Statement at 4-5.
[7] *See* 5 C.F.R. §2424.32(d).

Agency has had the opportunity to respond to the Union's revised proposals in its statement of position, and we have fully considered its response. Because the claimed errors have no bearing on the outcome of this proceeding, we find it unnecessary to resolve the Agency's objection to the contents of the record.[8]

IV. Proposal 3

A. Wording

> To this end, if and when the Agency seeks to order the removal of a personal space heater and/or similar device from a workplace, it will first:
>
> 1. Advise the [U]nion of its intent.
>
> 2. Attempt, to the extent possible, to remedy problems with heating, cooling, air flow, etc. that gave rise to the use of the subject equipment.
>
> 3. In the event that HVAC or other such correction is not possible, the Agency will provide, concurrent with the date of the personal equipment removal, a permissible replacement that accomplishes the same purpose as the personal equipment that is removed.
>
> 4. Give to each affected employee notice that, if the use of the to-be-banned equipment is related to a health and/or handicapping condition, the employee may raise the issue as a health concern with the supervisor and/or file a request for reasonable accommodation.[9]
>
> The parties dispute only the negotiability of Section 3.[10]

B. Meaning

The parties agree that the purpose of the proposal is to establish procedures for the Agency to use when it directs an employee to remove a space heater.[11] The parties also agree that the "permissible replacement . . . [for] the personal equipment that is removed," referenced in Section 3, would not necessarily have to be a personal space heater.[12] They also agree that Proposal 5 contemplates the creation of a list of approved space heaters, and that the "permissible replacement" referenced in Section 3 might be a heater from that list.[13] Finally, the Union clarified that "HVAC" stands for "heating, ventilation, and air conditioning."[14]

C. Analysis and Conclusions

1. Whether the proposal is contrary to Agency policy is irrelevant.

The Agency claims that it has an Agency-wide policy that prohibits space heaters and that the only exception to this policy is when a space heater is required as a reasonable accommodation under the Rehabilitation Act.[15] The Agency claims that the proposal conflicts with this policy by requiring the Agency to provide, in certain circumstances, a space heater even when a space heater is not required as a reasonable accommodation.[16]

But a proposal is not outside the duty to bargain merely because it conflicts with an agency-wide rule or regulation.[17] To establish that such a conflict relieves an agency of its duty to bargain, the agency must: (1) identify a specific agency-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 within the meaning of § 2424.11 of the Authority's Regulations.[18] Moreover, this exception does not apply where the proponent union represents a "majority of the employees . . . to whom the rule or regulation is applicable."[19]

Here, the Agency's statement does not address whether the space-heater policy rises to the level of a rule or regulation, or whether there is a "compelling need" for the policy.[20] Further, the Union states in its response that

[8] *See NLRB Union, NLRB Prof'l Ass'n*, 62 FLRA 397, 403 n.12 (2008) (finding it unnecessary to address agency's request to clarify record in light of decision to dismiss petition for review).
[9] Record at 3-4.
[10] Statement at 6, 8-9.
[11] Record at 4; Statement at 6.
[12] Record at 4; Statement at 6.
[13] Record at 4; Statement at 6.
[14] Record at 4.
[15] Statement at 6.
[16] *Id.*
[17] *See AFGE, Local 3824*, 52 FLRA 332, 336 (1996).
[18] *Id.*
[19] 5 U.S.C. § 7117(a)(3)
[20] *See* Statement at 6, 10-12.

the compelling-need exception does not apply, because the Union represents "considerably more than one-half of the [bargaining-unit] eligible employees of the Agency."[21] The Agency's statement does not address the share of employees represented by the Union, and, as noted above, the Agency did not submit a reply to the Union's response.

Under § 2424.32(c)(2) of the Authority's Regulations, the "[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."[22] Consistent with this regulation, the Agency has conceded that the compelling-need exception does not apply here because the Union represents "a majority of the employees . . . to whom the [policy] is applicable."[23] Accordingly, the Agency's claim that the proposal conflicts with its policy does not establish that the proposal is outside the duty to bargain.

2. The proposal is not contrary to 41 C.F.R. § 102-74.190.

The Agency also claims that the proposal conflicts with a GSA regulation, specifically, 41 C.F.R. § 102-74.190, which states, "[f]ederal agencies are prohibited from operating portable heaters, fans, and other such devices in [g]overnment-controlled facilities unless authorized by the [f]ederal agency buildings manager."[24] The Agency claims that the proposal is therefore "inconsistent with [a] government[-]wide regulation prohibiting space heaters not approved by the Federal Buildings Manager . . . , since the [building manager] at [the Agency has] banned space heaters absent a reasonable accommodation."[25]

The Union acknowledges that § 102-74.190 requires the approval of the building manager.[26] But it responds that, because the Agency's Office of Budget, Finance, Quality, and Management is the federal building manager for the Agency, the regulation effectively gives the Agency discretion to approve space heaters.[27] The Union further argues that because the Agency's discretion is not "sole and exclusive," the Agency is obligated to negotiate over the exercise of that discretion.[28]

Authority precedent establishes that where a statute or regulation gives an agency discretion over a matter concerning conditions of employment, the agency is required to bargain over how it will exercise its discretion unless its discretion is "sole and exclusive."[29] Here, the Union states that the text of the regulation does not indicate that the Agency's discretion to approve space heaters, or to manage its facilities in general, is intended to be sole and exclusive, and it notes that the Agency has submitted nothing to indicate otherwise.[30]

As noted above, the Authority's Regulations provide that a failure to respond to an argument may be deemed a concession.[31] Thus, by failing to respond to the Union's argument that its discretion to permit space heaters is not sole and exclusive, the Agency has conceded that the Statute requires it to bargain over the exercise of that discretion.

Accordingly, we find that the proposal does not conflict with 41 C.F.R. § 102-74.190 and is, therefore, within the duty to bargain. In light of this determination, we find it unnecessary to address the Union's request to sever the individual sections of Proposal 3.[32]

V. Proposal 4

A. Wording

> Employees seeking to introduce new personal space heaters (and/or certain yet-to-be-specified other appliances) into their workplaces as a reasonable accommodation or other permissible purpose, will seek approval from the building manager. The parties will jointly create a procedure to follow.
>
> 1. This procedure will include language that reflects the intent of the language in B.1.-4. above [i.e., Proposal 3].
>
> 2. SSA will provide personnel and resources to allow a quick and efficient approval process.
>
> 3. Any request for approval that is not decided within [thirty] calendar days will be referred

[21] Union's Resp. at 3 (Resp.).
[22] 5 C.F.R. § 2424.32(c)(2).
[23] 5 U.S.C. § 7117(a)(3).
[24] 41 C.F.R. § 102-74.190.
[25] Statement at 6.
[26] Resp. at 4.
[27] *Id.*
[28] *Id.*
[29] *E.g.*, *AFGE, Locals 3807 & 3824*, 55 FLRA 1, 4-5 (1998); *AFGE, Nat'l Border Patrol Council*, 51 FLRA 1308, 1335 (1996).
[30] Resp. at 4.
[31] *See supra* section IV.C.1 (discussing 5 C.F.R. § 2424.32(c)(2)).
[32] *See AFGE, Local 1164*, 65 FLRA 836, 840 n.3 (2011).

> to the controlling Union/Management Health and Safety Committee, or other Union/Management health and safety arrangement for its action.
>
> 4. Any request for approval that is not decided within [sixty] calendar days of the original request will be deemed approved.[33]
>
> The parties dispute the negotiability only of Sections 3 and 4.[34]

B. Meaning

The parties agree that the proposal would require the creation of a procedure that an employee could invoke to request permission to use an unapproved personal heater (or other device).[35] The Union explained that the term "building manager" has the same meaning as that term is used in GSA regulations.[36] The parties agree that the Agency's Office of Budget, Finance, Quality, and Management is the building manager for the Agency.[37]

The Union explained that the "Union/Management Health and Safety Committee, or Union/Management health and safety arrangement" referred to in Section 3, would encompass both multi-member committees and one-on-one collaboration.[38] The Union also clarified that Section 4 would not apply if it would be illegal for the Agency to approve a particular heater in a particular circumstance.[39] The Agency did not contest either of these explanations in its statement.[40]

Finally, the Agency argues that Section 3 would "transfer the authority to approve or disapprove requests for approval of a space heater out of the [building manager]'s purview."[41] However, in its response, the Union clarifies that Section 3 "does not give a Health and Safety Committee or other body the authority to act *for* the Building Man[a]ger, and approve or disapprove requests on its own."[42] Rather, the Union explains that the committee's action would entail things such as requesting an update on the status of the request, making a recommendation to the building manager, or meeting with the building manager to discuss the request.[43]

Where the parties disagree over the meaning of a proposal, the Authority looks first to the proposal's wording and the union's statement of intent.[44] If the union's explanation of the proposal's meaning comports with the wording, then the Authority relies on that explanation to assess whether the proposal is within the duty to bargain.[45] Here, Section 3 states that after thirty days, requests "will be referred to the . . . Health and Safety Committee . . . for its *action*."[46] The Union's explanation of the proposal – that "action" does not include approving a request[47] – is consistent with the plain wording of the proposal. Accordingly, we adopt the Union's explanation for purposes of assessing the negotiability of the proposal.

C. Analysis and Conclusions

1. The proposal, as a whole, is contrary to 41 C.F.R. § 102-74.190.

The Agency argues that Section 4 is contrary to GSA regulations because, under 41 C.F.R. § 102-74.190, only the building manager may approve space heaters.[48] We agree. Section 102-74.190 prohibits space heaters, "unless authorized by the [f]ederal agency buildings manager."[49] By treating all requests not acted upon within sixty days as approved, Section 4 would permit the use of heaters that were not authorized by the building manager. As such, Section 4 is contrary to § 102-74.190.

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[33] Record at 5.
[34] *See* Statement at 6-7, 9.
[35] Record at 5; Statement at 9.
[36] Record at 5-6; *see also* 41 C.F.R. § 102–71.20 ("*Federal agency buildings manager* means the buildings manager employed by GSA or a [f]ederal agency that has been delegated real property management and operation authority from GSA.").
[37] *See* Statement at 2 & 2 n.1; Resp. at 4.
[38] Record at 6.
[39] *Id.*
[40] *See* Statement at 6-7, 9.
[41] *Id.* at 6.
[42] Resp. at 6.
[43] *Id.*
[44] *E.g.*, *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 819, 825 (2012) (*Local 506*) (citing *NAGE, Local R-109*, 66 FLRA 278, 278 (2011) (*Local R-109*)), *enforced in part, vacated in part sub nom. U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779 (D.C. Cir. 2013).
[45] *Id.* (citing *Local R-109*, 66 FLRA at 278).
[46] Record at 5 (emphasis added).
[47] Resp. at 6.
[48] Statement at 7.
[49] 41 C.F.R. § 102-74.190.

Accordingly, we find that the proposal, as a whole, is outside the duty to bargain.

> 2. We grant the Union's request for severance, and find that, without Section 4, the proposal is within the duty to bargain.

The Union requests that "in the event that the Authority finds that any part of Proposal 4 is nonnegotiable . . . the Authority sever each numbered sub-part . . . and consider the negotiability of each severed sub-part as a separate proposal."[50] The Agency opposes the Union's request for severance, claiming that the numbered subparts cannot be read without the unnumbered introductory sentences.[51]

As relevant here, "[s]everance means the division of a proposal . . . into separate parts having independent meaning, for the purpose of determining whether any of the separate parts is within the duty to bargain."[52] "In effect, severance results in the creation of separate proposals[,] . . . [and] applies when some parts of [a] proposal . . . are determined to be outside the duty to bargain."[53] A union "must support its [severance] request with an explanation of how the severed portion(s) of the proposal . . . may stand alone, and how such severed portion(s) would operate."[54] Generally, a union meets this burden, and the Authority will grant the union's severance request, if the union explains how each severed portion may stand alone and operate independently.[55]

Although the Agency argues that the numbered sections of the proposal "cannot be read without" the proposal's introductory sentences,[56] we find that, based on the way in which the Union explains the individual, numbered sections in the record[57] and its response,[58] the Union is requesting that we sever the numbered sections from one another, rather than from the unnumbered introductory sentences. Moreover, the Union has explained how each of the numbered sections would operate and how the numbered sections can operate independently from one another. Accordingly, we grant the Union's request to sever the numbered sections from one another. Further, the Agency has conceded that the proposal's unnumbered introduction and Sections 1 and 2 are within the duty to bargain,[59] and we have determined that Section 4 is outside the duty to bargain, so we are left with the question of whether Section 3 is within the duty to bargain.

The Agency argues that Section 3 is contrary to 41 C.F.R. § 102-74.190 because under the regulation only the building manager may approve space heaters.[60] It claims that "[a]llowing a union-management committee to authorize the use of space heaters or other appliances would directly violate this regulation."[61] Similarly, it argues that allowing a labor-management committee to approve the use of space heaters interferes with its right to determine its internal security practices under § 7106(a)(1) of the Statute.[62] Finally, as with Proposal 3, the Agency claims that Section 3 of this proposal is contrary to Agency policy.[63]

As discussed above, we have adopted the Union's explanation that Section 3 does not permit the health-and-safety committee to approve the use of space heaters.[64] Accordingly, we find that Section 3 is not contrary to 41 C.F.R. § 102-74.190 or to the Agency's right to determine its internal security practices. And, as we have explained in connection with Proposal 3, the Agency's claim that Proposal 4, Section 3 conflicts with Agency policy does not establish that the proposal is outside the duty to bargain.[65]

Accordingly, we find that Sections 1, 2, and 3 of Proposal 4 are within the duty to bargain.

VI. Proposals 5 and 8

A. Wording

Proposal 5

> 1. The Agency and the Union will jointly establish, and the Agency will update yearly, lists of types, makes, and models of personal space heaters approved by the building manager for use in SSA facilities, for distribution to bargaining unit SSA employees.

[50] Record at 5.
[51] Statement at 6.
[52] 5 C.F.R. § 2424.2(h) (emphasis omitted).
[53] *Id.*
[54] *Id.* § 2424.25(d).
[55] *See NATCA*, 61 FLRA 341, 343 (2005).
[56] Statement at 6.
[57] Record at 5-6.
[58] Resp. at 5-11.
[59] Statement at 9.
[60] *Id.* at 7.
[61] *Id.*
[62] *Id.* at 6.
[63] *Id.* at 7.
[64] *See supra* section V.B.
[65] *See supra* section IV.C.1.

2. This distribution will also include advice such as is listed in Attachment A, below, after the Agency has prepared the advice and the Union has agreed to it.[66]

The parties dispute only the negotiability of Section 1.[67]

Proposal 8

Attachment A

1. Personal space heaters (PSHs) must be electrically powered and must not take more than 110 volts of electricity to operate.

2. Damaged PSHs are not to be used.

3. Any PSH used must be UL (Underwriters Laboratory) approved, or carry an equivalent safety certification.

4. PSHs must be so designed that they cannot automatically restart when they have been turned off.

5. PSHs should be placed on a stable, level surface, where they will not be knocked over.

6. PSHs must have a tip-over shutdown feature. If a PSH is knocked over, the unit must automatically shut off.

7. PSHs must be kept the distance(s) required by the manufacturer away from combustible material.

8. Nothing should ever be placed on top of or touching the sides of a PSH.

9. A PSH's cord should never be run underneath rugs or carpeting.

10. If the plug, outlet, cord or faceplate of a PSH is hot, it should be disconnected and checked by an electrician, along with the outlet.

11. PSHs must be turned off when the area being heated is expected to be unoccupied for more than 15 minutes.

12. Work stations with PSHs will be marked with a small, but easily visible, sign or logo.[68]

B. Meaning

Proposal 5

The parties agree that Section 1 would require the parties to develop and maintain a list of space heaters that are approved by the building manager, and to distribute the list annually.[69] The Union further explains – and the Agency does not contest[70] – that Section 2 would require the parties to develop a guide regarding the safe use of space heaters to distribute with the list provided for in Section 1.[71]

Proposal 8

The parties also agree that the proposal is meant to provide a list of possible product-specification, safety, and usage suggestions and requirements.[72] They agree that these suggestions could be included in the negotiated advice to which Proposal 5, Section 2 refers, if the parties agree to negotiate and distribute such advice.[73]

C. Analysis and Conclusions

1. It is irrelevant whether Proposals 5 and 8 are contrary to Agency policy.

As with Proposals 3 and 4, the Agency claims that Proposal 5 and 8 conflict with the Agency policy limiting the use of space heaters.[74] As discussed above,

[66] Record at 6.
[67] Statement at 7.
[68] Petition at 13-14; *see also* Record at 9.
[69] Record at 7; Statement at 7.
[70] *See* Statement at 7.
[71] Record at 7.
[72] *Id.* at 9-10; Statement at 7.
[73] Record at 9-10; Statement at 7.
[74] Statement at 7.

this claim does not establish that the proposals are outside the duty to bargain.[75]

2. Proposals 5 and 8 are not contrary to 41 C.F.R. § 102-74.190.

The Agency claims that the proposals conflict with 41 C.F.R. § 102-74.190. It does not elaborate upon the conflict between the regulation and Proposal 5 and, with respect to Proposal 8, it asserts simply that the proposal conflicts with § 102-74.190, because that provision "prohibits the use of items such as portable heaters . . . in government-controlled facilities unless authorized by the [f]ederal [a]gency buildings manager."[76] As with Proposal 3, this argument does not establish that the proposals conflict with § 102-74.190.[77]

3. Proposals 5 and 8 are not contrary to the Agency's right to determine its internal security practices.

a. Proposals 5 and 8 affect the Agency's right to determine its internal security practices.

The Agency argues that the proposals interfere with the Agency's right to determine its internal security practices under § 7106(a)(1) of the Statute.[78] Specifically, the Agency argues that "[t]he right to determine internal security practices includes an agency's right to determine policies used by an agency to prevent fires and to protect its employees and property from fires," and that the Union's proposals interfere with that right.[79]

An agency's right to determine its internal security practices includes the authority to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel, physical property, or operations against internal and external risks.[80] Moreover, the right to determine an agency's internal security practices includes the right to adopt policies to safeguard against fires.[81] Where an agency shows a link or reasonable connection between its security objective and a policy or practice designed to implement that objective, a proposal that conflicts with the policy or practice affects this management right.[82]

Here, the Agency claims that it restricts the use of space heaters to prevent fires,[83] and it submits evidence that space heaters have caused fires in the past.[84] Accordingly, we find that the proposals affect the Agency's right to determine its internal security practices under § 7106(a)(1).

b. Proposals 5 and 8 are appropriate arrangements.

The Union argues that even if Proposals 5 and 8 affect the Agency's right to determine its internal security practices, they are nevertheless negotiable because they are appropriate arrangements under § 7106(b)(3) of the Statute.[85] A proposal that would affect management's rights under § 7106(a) of the Statute is negotiable if it constitutes an appropriate arrangement within the meaning of § 7106(b)(3).[86] To determine whether a proposal constitutes an appropriate arrangement, the Authority first considers whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right.[87] The claimed arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.[88] If the Authority finds the proposal to be an arrangement, then the Authority will determine whether it is appropriate or whether it is inappropriate because it excessively interferes with management's rights.[89] In doing so, the Authority weighs the benefits afforded to employees under the arrangement against the intrusion on the exercise of management's rights.[90]

Here, the Union argues that the proposals are appropriate arrangements for employees affected by the Agency's decision to limit the use of space heaters.[91] It argues that its proposals will help to mitigate the discomfort, and associated reduced productivity, experienced by employees when their work areas are too cold.[92] The Union also argues that its proposals will

[75] *See supra* section IV.C.1.
[76] Statement at 7.
[77] *See supra* section IV.C.2.
[78] Statement at 7.
[79] *Id.* at 11 (citing *NFFE, Local 1214*, 45 FLRA 1121, 1125 (1992) (*Local 1214*)).
[80] *Local 506*, 66 FLRA at 822 (quoting *AFGE, Local 1547*, 63 FLRA 174, 175-76 (2009) (*Local 1547*)).
[81] *Local 1214*, 45 FLRA at 1125.
[82] *Local 506*, 66 FLRA at 822 (quoting *Local 1547*, 63 FLRA at 176).
[83] Statement at 11.
[84] *Id.*, Attach. 3.
[85] Resp. at 12, 16.
[86] *E.g., NAIL, Local 5*, 67 FLRA 85, 89 (2012) (*NAIL*); *NAGE, Local R14-8*, 21 FLRA 24, 31 (1986) (*KANG*).
[87] *KANG*, 21 FLRA at 31.
[88] *NTEU, Chapter 243*, 49 FLRA 176, 184 (1994)
[89] *KANG*, 21 FLRA at 31-33.
[90] *Id.*
[91] Resp. at 13, 16.
[92] *Id.*

benefit both employees and the Agency by providing a streamlined process to permit the safe use of space heaters[93] and that any burden on the Agency's right to determine its internal security practices will be slight given that the Agency already allows space heaters as a reasonable accommodation.[94] According to the Union, the proposals are inherently tailored because "only those employees who wish to use personal space heaters will derive any benefit."[95]

The Agency argues that "the Union's proposals . . . would excessively interfere with the [A]gency's right to determine its internal security."[96] However, the Agency does not elaborate on how either proposal would burden its right to determine its internal security practices under § 7106(a)(1).[97] Weighing the benefits of the proposals, as claimed by the Union, against the absence of any specifically identified burdens on the Agency's right to determine its internal security practices, we find that Proposals 5 and 8 are appropriate arrangements.[98]

Accordingly, we find that Proposals 5 and 8 are within the duty to bargain.

VII. We deny the Agency's request to dismiss the petition on bargaining-obligation grounds.

The Agency also "requests that the Authority decline to order the parties to negotiate further over this matter even if [we] find some of the new proposals are negotiable."[99] In support of this request, the Agency argues that ordering the parties to bargain would be inconsistent with Authority "precedent that an agency may implement at its peril."[100] And it claims that an order to bargain would undermine the stability that the Statute is intended to promote because the Union should have sought bargaining over space heaters during the negotiation of the parties' 2012 collective-bargaining agreement.[101]

It is unclear why the Agency argues that an agency may implement a proposed change in conditions of employment "at its peril."[102] The Authority has held that an agency does not commit a ULP when it implements a change in working conditions before the completion of bargaining, if a union has submitted proposals and all of the proposals are nonnegotiable.[103] But this is not a ULP proceeding, and the Union submitted negotiable proposals. Therefore, the Agency's argument does not raise any issues that affect any obligation it has to bargain over the Union's proposals. Moreover, to the extent that the Agency suggests that the Union waived its right to bargain when it withdrew its ULP charge, over the Agency's implementation of the space-heater policy, our procedures permit a union to withdraw a ULP allegation in order to file a negotiability appeal.[104]

Likewise, the Agency's argument that the Union should have sought to bargain over the space-heater policy during term negotiations does not establish that the proposals are outside the duty to bargain. Under the Authority's covered-by doctrine, a party is not required to bargain over terms and conditions of employment that have already been resolved by bargaining.[105] But, for the covered-by doctrine to apply, the subject matter of the disputed proposals must be either "expressly contained in" the parties' collective-bargaining agreement, or "inseparably bound up with," and thus "plainly an aspect of" a subject expressly covered by the agreement.[106] Here, the Agency does not claim that the parties' agreement expressly addresses space heaters or that the agreement contains a "zipper" clause.[107] Rather, it claims simply that term negotiations would have been a more opportune time for the Union to raise the space-heater policy and that ordering the parties to bargain over the Union's proposals "would be inconsistent with the intent of Statute . . . to promote stability."[108] However, this argument does not establish that the proposals are nonnegotiable.

Accordingly, we deny the Agency's request that we dismiss the petition on bargaining-obligation grounds.

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[93] *Id.* at 13, 17.
[94] *Id.*
[95] *Id.* at 14.
[96] Statement at 12.
[97] *See id.* at 6-7, 10-11.
[98] *See NATCA, Local ZHU*, 65 FLRA 738, 740 (2011).
[99] Statement at 5.
[100] *Id.* at 5 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fairton, N.J.*, 62 FLRA 187, 194 (2007) (*Fairton*) (ALJ decision rejected by Authority); *U.S. Dep't of HUD*, 58 FLRA 33, 34 (2002) (*HUD*)).
[101] *Id.* at 12.
[102] *Id.* at 5 (citing *Fairton*, 62 FLRA at 194; *HUD*, 58 FLRA at 34 (2002)).
[103] *HUD*, 58 FLRA at 34.
[104] *See NAIL*, 67 FLRA at 86 ("[W]hen 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.'") (quoting 5 C.F.R. § 2424.30(a)) (citing *NTEU*, 62 FLRA 267, 268-69 (2007); *NTEU*, 59 FLRA 978, 978 (2004)).
[105] *NATCA, AFL-CIO*, 62 FLRA 174, 176 (2007).
[106] *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993).
[107] *See NTEU v. FLRA*, 399 F.3d 334, 341-43 (D.C. Cir. 2005) (discussing zipper clauses).
[108] Statement at 12.

VIII. Order

We order the Agency to bargain, upon request, over Proposals 3, 5, and 8, and Sections 1, 2, and 3 of Proposal 4. We dismiss the petition for review as to Proposal 4, as a whole.

Member Pizzella, dissenting, in part:

I agree that Proposals 3, 5, and 8 are within the duty to bargain. Likewise, I agree that Proposal 4, as a whole, is outside the duty to bargain. But I must part ways from my colleagues when it comes to whether to grant the Union's request to sever Sections 1, 2, and 3 of Proposal 4.

Our Regulations provide that when a union requests severance, it must explain how the severed portion of the proposal may stand alone, and how it would operate as a stand-alone provision.[1] Further, a union "must respond to any agency arguments regarding severance made in the agency's statement of position."[2]

Here, the Union requests that we "sever each numbered [section of Proposal 4] . . . and consider the negotiability of each severed [section] as a separate proposal."[3] But it does not request severance of Proposal 4's introductory sentences, nor does it respond to the Agency's claim that severance is not appropriate because the numbered subparts lack meaning without the unnumbered introduction.[4] But, even if considering each numbered section as a standalone proposal would be an overly literal reading of the Union's request, the Union does not explain how Proposal 4 would operate without Section 3 or Section 4 (or without both).

As proposed, Proposal 4 sets forth a coherent procedure for the approval of space-heater requests – albeit one that conflicts with a government-wide regulation. But without its ultimate section, the result is more akin to an existentialist play.[5] Rather than assume that the Union intended the health-and-safety committee to take responsibility over requests that it can neither decide nor dispose of, I would find that the Union's severance request fails to comply with the regulatory requirements. Accordingly, I would deny the Union's request for severance.[6]

Thank you.

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[1] *See* 5 C.F.R. § 2424.22(b) (requirements for requests made in petitions); *id.* § 2424.25(c) (requirements for requests made in responses).
[2] *Id.* § 2425(d).
[3] Record at 5; *see also* Response at 5.
[4] *See* Statement of Position at 6; Response at 5.
[5] *See, e.g.*, Jean-Paul Sartre, *No Exit (Huis Clos)*, *in No Exit and Three Other Plays* 1 (Stuart Gilbert trans., Vintage Int'l 1989) (1947).
[6] *See NATCA*, 66 FLRA 213, 214 (2011).