69 FLRA No. 85

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND
AEROSPACE WORKERS
FEDERAL DISTRICT 1
FEDERAL LOCAL 1998
(Union)

and

UNITED STATES
DEPARTMENT OF STATE
PASSPORT SERVICES
BUREAU OF CONSULAR AFFAIRS
(Agency)

0-NG-3288

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

September 26, 2016

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

I. Statement of the Case

This case is before the Authority on a negotiability appeal (petition) filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).[1] We must decide upon the negotiability of three proposals – Proposals 1, 2, and 5 – which address changes to Appendix N of the Foreign Affairs Manual (Appendix N). Appendix N sets forth the procedures for adjudicating emergency-passport applications. The Agency filed a statement of position (statement), to which the Union filed a response (response). The Agency filed a reply to the Union's response (reply).

The Agency presents three arguments challenging its duty to bargain all of the Union's proposals. First, the Agency claims the changes to Appendix N did not "tangibly" alter conditions of employment.[2] Because the Agency fails to support this argument, we dismiss this argument. Second, the Agency claims the Union had notice of the changes approximately eighteen months before the Agency formally provided notice of the changes to the Union, and as a result waived its right to bargain by failing to request bargaining in a timely fashion. Because there is no indication that the Union clearly and unmistakably waived its right to bargain, we reject this argument. Third, we must decide whether the revisions to Appendix N are de minimis such that there is no duty to bargain, because they affect only a small number of bargaining-unit employees, and because they impact only a fraction of those employees' regular duties. Because the number of employees affected by changes to conditions to employment is not determinative of whether the changes are de minimis, and because the changes at issue in this case could have significant impacts on employees' lives, the answer is no.

Regarding Proposal 1, we must decide whether the proposal impermissibly affects management's rights to assign work under § 7106(a)(2)(B) of the Statute[3] and to carry out its mission during emergencies under § 7106(a)(2)(D) of the Statute.[4] Because Proposal 1 constitutes an appropriate arrangement under § 7106(b)(3) of the Statute,[5] we find that Proposal 1 is negotiable.

Regarding Proposal 2, we must decide whether the proposal impermissibly affects: (1) management's right to determine internal security practices under § 7106(a)(1) of the Statute;[6] or (2) management's right to assign work under § 7106(a)(2)(B) of the Statute.[7] Because the Agency fails to demonstrate that the proposal affects either its right to determine internal security practices or its right to assign work, we find that Proposal 2 is negotiable.

Regarding Proposal 5, we must decide whether the proposal impermissibly affects management's right to assign work under § 7106(a)(2)(B) of the Statute.[8] Because Proposal 5 affects management's right to assign work, and because Proposal 5 is not an arrangement, we find that Proposal 5 is nonnegotiable.

[1] 5 U.S.C. § 7105(a)(2)(E).

[2] Statement of Position (Statement) at 6.
[3] 5 U.S.C. § 7106(a)(2)(B).
[4] *Id.* § 7106(a)(2)(D).
[5] *Id.* § 7106(b)(3).
[6] *Id.* § 7106(a)(1).
[7] *Id.* § 7106(a)(2)(B).
[8] *Id.*

II. Background

Certain employees called field duty officers (FDOs) are stationed at twenty-seven of the Agency's twenty-nine regional offices, where they assist applicants by adjudicating passport applications. The Agency made revisions to Appendix N, which sets forth the procedures for adjudicating emergency-passport applications that must be processed after normal office hours or on weekends.

Emergency-passport applications arise when members of the public who lack valid passports contact the Agency with purportedly urgent travel needs. The Agency's national duty officer (NDO) assesses the nature of the alleged emergency situation and any evidence the applicant might have regarding the merits of the emergency. Under the proposed changes to Appendix N, when the NDO determines that life or death emergencies, matters of national interest, or other extreme circumstances warrant immediate consideration of a passport application, the NDO will refer the applicant to the closest FDO. The FDO is then required to assist the applicant, and open the local Agency office if necessary, at a time designated by the NDO.

On June 17, 2015, the Union requested the opportunity to bargain, and submitted proposals to the Agency, regarding the Appendix N revisions. On August 12, 2015, the Agency provided the Union with allegations of nonnegotiability for all of the Union's proposals, and stated that it did not intend to bargain. On September 8, 2015 the Union requested via email that the Agency provide it with a formal allegation concerning the duty to bargain. The Agency replied on September 10, 2015, stating that it had already provided its allegations on August 12, 2015. The Union filed a negotiability petition on September 21, 2015 concerning five proposals. However, in its response to the Agency's statement of position, the Union withdrew Proposals 3 and 4.[9] Thus, the only proposals before us are Proposals 1, 2, and 5.

[9] *See* Resp. at 16.

III. Preliminary Matters

A. We will consider the Agency's reply.

The Agency submitted a request for leave to file a reply, styled as a "rebuttal," to the Union's response.[10] Under § 2424.26 of the Authority's Regulations, an agency is permitted to file a reply to a union's response within fifteen days of receiving the union's response.[11] As the Agency's reply was timely filed, we will consider it to the extent that it raises arguments that respond to arguments made for the first time in the Union's response.[12]

B. The Union's petition was timely filed.

The Agency claims that the Union's petition should be dismissed because it was untimely filed.[13] The Agency asserts that it gave the Union its allegations of nonnegotiability concerning the proposals at issue in this case on August 12, 2015.[14] However, the Union did not file its petition for review until September 21, 2015, forty days later.[15] Accordingly, the Agency requests that the Union's petition be dismissed as untimely.

Under § 2424.11(c) of the Authority's Regulations, a union is not required to file a negotiability petition in response to an agency's unsolicited allegation of nonnegotiability.[16] Rather, a union may ignore the unsolicited allegation and instead elect to request a written allegation from the agency.[17] If a union requests, and the agency provides, a written allegation of nonnegotiability, the union must file its petition for review within fifteen days of service of the agency's written allegation of nonnegotiability.[18]

Here, the Union maintains that it did not request the Agency's August 12, 2015 allegations of nonnegotiability.[19] Record evidence shows that the August 12, 2015 allegations of nonnegotiability were made in response to the Union's June 17, 2015 request to *bargain* over the proposals at issue. In this regard, the

[10] Agency's Request for Leave to File Rebuttal.
[11] 5 C.F.R. § 2424.26.
[12] *E.g.*, *id.* § 2424.26(c) ("You must limit your reply to matters that the exclusive representative raised for the first time in its response.").
[13] Statement at 4-6.
[14] *Id*. at 5.
[15] Pet. at 1, 10.
[16] 5 C.F.R. § 2424.11(c); *see AFGE, Local 3928*, 66 FLRA 175, 175 (2011) (*Local 3928*) (citing 5 C.F.R. § 2424.11(c); *AFGE, Local 3369*, 49 FLRA 793, 794 (1994) (*Local 3369*)).
[17] *Local 3928*, 66 FLRA at 175 (citing *Local 3369*, 49 FLRA at 795).
[18] *Id*. (citing 5 C.F.R. § 2424.21(a)).
[19] Resp. at 3.

Union's request to bargain did not include a request for *allegations of nonnegotiability*.[20]

Additionally, the Agency asserts that the August 12, 2015 allegations were in response to a request by the Union, because Article 12, Section 14 of the parties' agreement constitutes a "standing request" for allegations of nonnegotiability.[21] Article 12, Section 14 states: "If [m]anagement believes a written Union proposal is nonnegotiable, it will raise the issue of negotiability early, so that attempts can be made to correct the problem."[22] The Agency alleges that this provision is "a standing request by the Union that the Agency provide allegations of nonnegotiability promptly upon receipt of any Union proposal it believes to be nonnegotiable."[23] In support of this argument, the Agency cites to *NTEU* (*PTO Arlington*).[24]

The Agency misconstrues *PTO Arlington*. In that case, the parties' agreement included an appendix listing several specific proposals that the agency had determined to be nonnegotiable, and that the union had contemplated appealing as of the date the agreement was executed.[25] The Authority held that, because the parties acknowledged that the agency considered the proposals to be nonnegotiable, and because the union indicated its intent to file a petition for review over the proposals as of the execution of the agreement, this provision of the parties' agreement constituted a written request by the union for an allegation of nonnegotiability.[26]

Those circumstances are clearly distinguishable from the circumstances in this case. Article 12, Section 14 of the parties' agreement does not list any proposals that the Agency had declared nonnegotiable. It merely states that the Agency will raise the issue of negotiability "early" after deeming any Union proposals to be nonnegotiable.[27] The Agency fails to support, through relevant case law or facts, its argument that this provision constitutes a standing request for allegations of nonnegotiability.

Therefore, the Union was free to ignore the August 12, 2015 allegations and subsequently to request written allegations of nonnegotiability regarding its proposals, which the Union did on September 8, 2015.[28] The Agency responded on September 10, 2015.[29] Under § 2424.21 of the Authority's Regulations, the timeliness of the Union's petition is measured from that date.[30] There is no dispute that the Union's petition was filed within fifteen days of the Agency's September 10, 2015 response.[31]

In the alternative, the Agency argues that even if its allegations were unrequested, under § 2424.11(c) the Union was required to "continue to bargain" as demonstrated by "one or more affirmative acts" until it submitted its written request to the Agency.[32] The Agency asserts that the Union took no "affirmative" action to bargain over Appendix N before filing its petition, and was therefore prohibited from filing its petition for review.[33]

However, the Agency cites no case law to support this interpretation of § 2424.11(c). Section 2424.11(c) provides, in pertinent part, that "[i]f an agency provides an exclusive representative with an unrequested written allegation concerning the duty to bargain, then the exclusive representative may either file a petition for review . . . , or continue to bargain and subsequently request in writing a written allegation concerning the duty to bargain, if necessary."[34] The Authority has previously construed § 2424.11(c) to mean that a union may "ignore" an unsolicited allegation.[35] The Authority has never held that § 2424.11(c) requires a union to undertake an "affirmative act" indicative of bargaining between its receipt of unrequested allegations and its subsequent written request, and we decline to do so in this case.

Accordingly, we reject the Agency's arguments that the Union's petition is untimely.

[20] *See* Statement, Attach. 3, June 17, 2015 email from Union.
[21] Reply at 8.
[22] *Id*.
[23] *Id*. at 9.
[24] 48 FLRA 919 (1993).
[25] *Id.* at 923.
[26] *Id*. at 922-23.
[27] Reply at 8.
[28] Resp. at 2.
[29] Resp., Attach. 2, Sept. 10, 2015 email from Agency.
[30] 5 C.F.R. § 2424.21(a).
[31] *See* Pet. at 1; *see also* Statement at 1.
[32] Statement at 5 (citing 5 C.F.R. § 2424.11(c)).
[33] *Id*.
[34] 5 C.F.R. § 2424.11(c).
[35] *Local 3928*, 66 FLRA at 175 (citing *Local 3369*, 49 FLRA at 795).

IV. The Agency's bargaining-obligation-dispute arguments are without merit.

The Agency makes three arguments that, based on the specific circumstances of this case (as distinct from the content of the proposals themselves), it has no duty to bargain over the Union's proposals.[36] These arguments raise bargaining-obligation disputes.[37] Where a proposal raises both a negotiability dispute and a bargaining-obligation dispute, the Authority may resolve both disputes.[38] We address the Agency's three arguments separately below.

A. The Agency fails to support its argument that the revisions to Appendix N do not "tangibly" alter conditions of employment.

The Agency claims that the revisions to Appendix N "did not tangibly alter [bargaining-unit employees'] conditions of employment."[39] However, the Agency does not otherwise elaborate on its claim that the changes do not "tangibly alter" conditions of employment.

Under § 2424.24(c) of the Authority's Regulations, an agency must set forth in its statement of position "[a] statement of the arguments and authorities supporting any bargaining[-]obligation or negotiability claims."[40] As such, the Authority will not consider a position that a party does not support.[41] Here, the Agency cites to a case from the U.S. Court of Appeals for the D.C. Circuit (the D.C. Circuit) addressing whether the duty to bargain may be triggered by de minimis changes to conditions of employment.[42] However, that case does not set forth the standard relied upon by the Agency; namely, that changes to conditions of employment must "tangibly alter" those conditions. And the Agency offers nothing further to support its argument that the revisions to Appendix N must "tangibly alter" conditions of employment in order to trigger the duty to bargain. As the Agency does not make further any arguments in support of its claim that the changes do not "tangibly" affect conditions of employment, we dismiss this argument as a bare assertion.[43]

Further, to the extent that the Agency is arguing that it made *no* changes in conditions of employment[44] – on the ground that the revisions to Appendix N "merely synthesized and incorporated previously applicable policy from other sources, and made grammatical, syntactical, and other immaterial changes to" existing wording[45] – the only supporting evidence that the Agency provides are a January 2014 memo[46] and a document purportedly showing that the changes at issue here made only minor revisions to that January 2014 memo.[47] However, as discussed in Section IV.C. below, we find that the Agency's reliance on the January 2014 memo does not excuse its duty to bargain. Therefore, we find that the Agency's argument here does not provide a basis for concluding that it has no duty to bargain.

B. The changes to conditions of employment are more than de minimis.

The Agency argues that it has no duty to bargain because the revisions to Appendix N have only a de minimis impact on conditions of employment.[48] In general, an agency is not required to bargain over the impact and implementation of a change unless the change will have more than a de minimis effect.[49] In assessing whether the effect of a change is more than de minimis, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining-unit employees' conditions of employment.[50]

The Authority has found changes to have only a de minimis effect where they have little significance and impact, such as the reassignment of an employee from one position back to the employee's previous, substantially similar, position, or the discontinuation of

[36] Statement at 6-10.
[37] *See* 5 C.F.R. § 2424.2(a) (defining a bargaining-obligation dispute, in pertinent part, as "a disagreement . . . concerning whether, in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable.").
[38] 5 C.F.R. § 2424.30(b)(2); *see AFGE, Local 1164*, 65 FLRA 924, 927 (2011).
[39] Statement at 6.
[40] 5 C.F.R. § 2424.24(c)(2).
[41] *AFGE, ICE Nat'l Council 118*, 68 FLRA 910, 910 (2015) (citing *AFGE, Local 723*, 66 FLRA 639, 644 (2012); *AFGE, Local 221*, 64 FLRA 1153, 1158 n.7 (2010)).
[42] Statement at 6 (citing *Ass'n of Admin. Law Judges, et al. v. FLRA*, 397 F.3d 957, 960 (D.C. Cir. 2005)).
[43] *See AFGE, Nat'l Council of Field Labor Locals, Local 2139*, 57 FLRA 292, 295 n.7 (2001) (Authority summarily dismissed "bare assertion" that proposal was nonnegotiable because agency made no arguments in support of its claim).
[44] *See* Statement at 6 (asserting that the revisions to Appendix N "[c]ontained no [c]hanges in [c]onditions of [e]mployment").
[45] *Id.* at 6-7.
[46] *See* Statement, Attach. 6.
[47] *See* Statement, Attach. 1.
[48] Statement at 9-10.
[49] *AFGE, Nat'l Council 118*, 69 FLRA 183, 187 (2016) (Member Pizzella dissenting, in part) (citing *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 173 (2009)).
[50] *Id.* at 187-88 (citing *U.S. Dep't of the Treasury, IRS, Wage & Inv. Div.*, 66 FLRA 235, 240 (2011)).

an assignment involving only a small amount of work.[51] Conversely, the Authority has found a change to have a greater than de minimis effect when it involves a change in conditions of employment that is more significant, such as where: employees are assigned additional tasks which they did not perform before, employees' workloads are increased significantly,[52] or employees' regular schedules or work hours are altered.[53]

Here, the Agency claims that the changes are de minimis because they impact only six bargaining-unit employees.[54] The Union disputes the Agency's claim that only six bargaining-unit employees are affected by these changes and notes that the Agency offers no support for this claim.[55]

Even if the Agency were correct that only six bargaining-unit employees are impacted, the Authority has held that the number of employees affected by a change is not dispositive of whether the change is more than de minimis.[56] In fact, the Authority has held that a change in conditions of employment affecting only *one* employee was more than de minimis.[57] Accordingly, the possibility that these changes affect only a small number of employees does not provide a basis, in and of itself, for finding them to be de minimis.

The Agency also argues that emergency-passport-application adjudications constitute a miniscule proportion of the number of applications adjudicated each year by bargaining-unit employees.[58] As such, the Agency claims that the changes to Appendix N "affect[] a microscopically smaller proportion of . . . duties" than in previous cases in which the Authority found changes to be de minimis.[59]

Although the Authority has previously considered the percentage of work hours consumed by new duties when assessing whether changes are de minimis,[60] such cases differ from the circumstances here, in that the revisions to Appendix N could require FDOs to process emergency-passport applications at unusual and unpredictable hours outside of the normal workday. For example, the Union cites the risk associated with traveling late at night to offices located in dangerous neighborhoods,[61] as well as the intrusion that these assignments can have on employees' private lives and time with their families[62] – arguments the Agency makes no effort to refute or does not successfully challenge. Thus, even if the increase in new duties would consume only a small percentage of the FDOs' work load, these other impacts must be considered.[63]

After a review of the record, we conclude that the changes in conditions of employment seen here are more than de minimis. These changes have the potential to significantly impact the hours worked by FDOs, as processing emergency-passport applications can require them to perform work outside of regular hours,[64] and they have the potential to present safety issues. Given these potential impacts, we reject the Agency's argument that the changes to conditions of employment are de minimis.

C. The Union did not constructively waive its right to bargain by not responding to the Agency's January 22, 2014 Memorandum.

The Agency argues, in the alternative, that, even assuming that the revisions to Appendix N changed bargaining-unit employees' conditions of employment, all of the Union's proposals are outside of the duty to bargain for another reason.[65] Specifically, the Agency contends that these revisions were implemented nearly a year and a half prior in a memorandum sent in January of 2014, and that this memorandum gave the Union a form of constructive notice of the changes.[66] According to the

[51] *NTEU*, 64 FLRA 462, 464 (2010) (*IRS*) (citing *Portsmouth Naval Shipyard, Portsmouth, N.H.*, 45 FLRA 574, 577-78 (1992)).
[52] *Id.* (citing *U.S. Dep't of HUD*, 58 FLRA 33, 34-35 (2002); *SSA, Malden Dist. Office, Malden, Mass.*, 54 FLRA 531, 536-37 (1998); *SSA, Gilroy Branch Office, Gilroy, Cal.*, 53 FLRA 1358, 1369-70 (1998)).
[53] *U.S. Dep't of the Air Force, 355th MSG/CC Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 90 (2009) (*Davis-Monthan AFB*); *Veterans Admin. Med. Ctr., Phx., Ariz.*, 47 FLRA 419, 424 (1993) (*Med. Ctr. Phx.*).
[54] Statement at 9.
[55] Resp. at 2-3.
[56] *SSA*, 69 FLRA 363, 367 (2016) (Member Pizzella concurring) (citing *U.S. Dep't of the Air Force, 913th Air Wing, Willow Grove Air Reserve Station, Willow Grove, Pa.*, 57 FLRA 852, 857 (2002); *Med Ctr. Phx.*, 47 FLRA at 424).
[57] *Med Ctr. Phx.*, 47 FLRA at 424.
[58] Statement at 9.
[59] *Id.* (citing *IRS*, 64 FLRA at 462).
[60] *See IRS*, 64 FLRA at 465; *U.S. DOJ, INS, U.S. Border Patrol, San Diego Sector, San Diego, Cal.*, 35 FLRA 1039, 1047 (1990).
[61] Resp. at 9; *see also* Resp., Attach. 6 (notice of shooting death of employee).
[62] Resp. at 9.
[63] *Cf. Med. Ctr. Phx.*, 47 FLRA at 422; *IRS*, 64 FLRA at 464.
[64] *See Davis-Monthan AFB*, 64 FLRA at 87, 90 (finding that new duties consuming one to three hours a day were more than de minimis); *Med. Ctr. Phx.*, 47 FLRA at 422 (finding that a one-hour change in employee's regular shift time was more than de minimis); *Veterans Admin., Med. Ctr. Prescott, Ariz.*, 46 FLRA 471, 475-76 (1992) (finding that requiring employees to report at times that they were regularly off duty is more than de minimis).
[65] Statement at 7.
[66] *Id.*

Agency, the Union waived its opportunity to bargain by failing to request bargaining at that time.[67]

In support of this argument, the Agency cites *SSA, Office of Hearings & Appeals, Boston Regional Office, Boston, Massachusetts* (*SSA Boston*).[68] However, that decision is inapposite. *SSA Boston* concerned whether the union had actual notice of formal discussions in the form of interviews of employees by the agency's contractor, as required under § 7114(a)(2)(A) of the Statute.[69] In other words, the question of "actual notice" in *SSA Boston* arose in an entirely different context than the negotiability proceeding before us,[70] and that case does not provide an appropriate framework for assessing whether the Union waived its right to bargain.

It is well-established that before making changes to conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain.[71] The Union asserts, and the Agency does not dispute, that the Agency "did not provide the [January 2014] memo to the Union at that time," and as such, "[t]he Union could not request bargaining until it was notified of the changes."[72] Moreover, the Agency's June 2, 2015 email to the Union, which provided the proposed revisions to Appendix N, informed the Union that "[t]his is the point in the process at which it is appropriate for you to request bargaining and submit proposals."[73] This June 2, 2015, email demonstrates that the Agency acknowledged it was only then providing notice to the Union of its opportunity to request bargaining.[74]

The Authority has long held that "[a] waiver of the [u]nion's statutory right to bargain on conditions of employment must be clear and unmistakable."[75] The Agency does not demonstrate that the Union ever made such a clear and unmistakable waiver, and the Agency's own email message stating that this was the point in time at which it was "appropriate for [the Union] to request bargaining"[76] undercuts the Agency's argument as presented here.

Accordingly, we reject the Agency's argument that the Union waived its right to request bargaining.

V. Proposal 1

A. Wording

> The Field Duty Officer (FDO) may contact local management at any time regarding questionable emergency-passport requests.[77]

B. Meaning

The Union proposes to insert this sentence after the second sentence in subsection (c) of Appendix N.[78] The Union explains that this proposal would clarify that an FDO does not have to wait until the day after an emergency passport has been issued to notify local management about any concerns regarding emergency-passport requests.[79] The parties agree that the intent of this proposal is to allow FDOs to contact local management at any time after they have been instructed by the NDO to adjudicate an emergency-passport application.[80]

C. Analysis and Conclusion: Proposal 1 is negotiable.

1. Proposal 1 affects the Agency's right to assign work.

The Agency argues that Proposal 1 impermissibly affects the Agency's right to assign work under § 7106(a)(2)(B) of the Statute.[81]

An agency's right to assign work encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.[82] The Authority has previously held that this right is affected by proposals that would allow a bargaining-unit employee to determine when during the day assigned work will be performed,[83] or that would require an agency to wait for

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[67] *Id.*
[68] Reply at 10 (citing 59 FLRA 875 (2004)).
[69] *SSA Boston*, 59 FLRA at 878-80 (citing 5 U.S.C. § 7114(a)(2)(A)).
[70] *See generally id*. at 879.
[71] *U.S. Dep't of the Interior, U.S. Geological Survey, Great Lakes Science Ctr., Ann Arbor, Mich.*, 68 FLRA 734, 737 (2015) (citing *U.S. Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 81 (1997); *U.S. Dep't of VA, Veterans Admin. Med. Ctr., Memphis, Tenn.*, 42 FLRA 712, 713 (1991)).
[72] Resp. at 6-7.
[73] *See* Statement, Attach. 1, June 2, 2015 email from Agency.
[74] *Id*.
[75] *U.S. DOJ, INS, Wash., D.C., & U.S. DOJ, INS, Portland, Me., Dist. Office Portland, Me., & Immigration Serv., St. Albans Sub-Office, St. Albans, Vt.*, 43 FLRA 241, 249 (1991).
[76] Statement, Attach. 1, June 2, 2015 email from Agency.
[77] Record of Post-Pet. Conference (Record) at 2.
[78] *Id*.
[79] *Id*.
[80] *Id*.
[81] Statement at 11-14; 5 U.S.C. § 7106(a)(2)(B).
[82] *NTEU*, 66 FLRA 584, 585 (2012) (*Nat'l Credit*) (citing *AFGE, Local 3392*, 52 FLRA 141, 143 (1996) (*Local 3392*)).
[83] *Int'l Ass'n of Fire Fighters*, 59 FLRA 832, 833-34 (2004) (*IAFF*).

thirty minutes before assigning employees to conduct interviews with agency customers.[84]

Here, the Agency argues that Proposal 1 would impermissibly allow FDOs to delay assignments handed down by the NDO, because it would permit FDOs to contact local management to express any qualms they have about the merits of emergency-passport applications before adjudicating them.[85] The Agency asserts that it has the right to direct FDOs to adjudicate such applications immediately, without allowing FDOs to first express their disapproval of the NDO's instruction to local management.[86] The Agency notes that the changes to Appendix N allow for FDOs to express such concerns to local management the following work day after complying with the NDO's instructions.[87] In response, the Union argues that Proposal 1 "still allows for the Agency's work to be accomplished, in the same manner, and with the same speed," and that it merely "allows [FDOs] to promptly report irregularities up the chain of command."[88]

We find that Proposal 1 affects management's right to assign work because it affects the Agency's right to determine when work assignments will occur.[89] In particular, the proposal permits employees to unilaterally decide whether to delay the performance of their assignments. Although the Union argues that Proposal 1 allows assignments to be completed without interruption, the proposal allows FDOs to delay completion of their duties while they contact local management. As the proposal allows FDOs to exercise discretion regarding whether to delay (even briefly) assignments handed down from the NDO, we find that Proposal 1 affects the Agency's right to assign work under § 7106(a)(2)(B) of the Statute.[90]

2. Proposal 1 is an appropriate arrangement.

The Union asserts that Proposal 1 is negotiable as an appropriate arrangement under § 7106(b)(3) of the Statute.[91] A proposal that would affect management's rights under § 7106(a) of the Statute is nonetheless negotiable if it constitutes an appropriate arrangement under § 7106(b)(3).[92]

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.[93] The claimed arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.[94] If the Authority finds that the proposal is an arrangement, then the Authority will determine whether it is appropriate, or whether it is inappropriate because it excessively interferes with management's rights.[95] In doing so, the Authority weighs the benefits afforded to employees under the arrangement against the proposal's burden on the exercise of management's rights.[96]

When an agency does not dispute that a proposal is an arrangement, the Authority will find that the agency concedes that the proposal constitutes an arrangement.[97] Here, although the Agency argues that Proposal 1 "is not a proper impact and implementation proposal,"[98] the Agency does not dispute that the proposal is an arrangement. Accordingly, as the Agency does not contest the Union's allegation that Proposal 1 constitutes an arrangement, we find that Proposal 1 is an arrangement.[99]

[84] *AFGE, Local 1164*, 54 FLRA 1327, 1339 (1998) (*Local 1164*).
[85] Statement at 11-13.
[86] *Id*. at 13.
[87] Reply at 12.
[88] Resp. at 9-10.
[89] *See Nat'l Credit*, 66 FLRA at 585 (citing *AFGE, AFL-CIO, Local 2263*, 15 FLRA 580, 583 (1984)).
[90] *See, e.g.*, *id.*; 5 U.S.C. § 7106(a)(2)(B).
[91] Resp. at 9.
[92] *E.g.*, *NAIL, Local 5*, 67 FLRA 85, 89 (2012) (*NAIL*); *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*).
[93] *KANG*, 21 FLRA at 31; *see also AFGE, SSA Gen. Comm.*, 68 FLRA 407, 413 (2015); *NATCA*, 66 FLRA 213, 216 (2011) (citing *NATCA, Local ZHU*, 65 FLRA 738, 740 (2011) (*Local ZHU*).
[94] *AFGE, Local 2058*, 68 FLRA 676, 679 (2015) (citing *NTEU*, 55 FLRA 1174, 1187 (1999); *NAGE, Local R5-184*, 55 FLRA 549, 551-52 (1999); *NAGE, Local R14-23*, 53 FLRA 1440, 1443-44 (1998); *AFGE, Nat'l Border Patrol Council*, 51 FLRA 1308, 1317-19 (1996)); *NTEU, Chapter 243*, 49 FLRA 176, 184 (1994) (*Chapter 243*).
[95] *KANG*, 21 FLRA at 31-33.
[96] *Id*.
[97] *NAIL*, 67 FLRA at 87; *Local ZHU*, 65 FLRA at 740, 742; 5 C.F.R. § 2424.32(c)(2).
[98] Statement, Attach. 3, Aug. 12, 2015 Agency's Resp. to Union's Proposals.
[99] *See generally* Statement at 11-14; Reply at 11-12.

Regarding whether the arrangement is appropriate, the Union asserts that the negative impacts of the Agency's proposed changes include increased "intru[sion] on the employee's private life, reducing the amount of time employees spend with their families."[100] The Union also points to the safety risk posed to FDOs in the event that they are required to return to the office late at night.[101]

We find that Proposal 1 has the potential to benefit employees by ameliorating the adverse effects that the Union cites. The Authority has previously found proposals and provisions to be appropriate arrangements when they "attempt[ed] to ameliorate the adverse effects [of conditions arising at the workplace] . . . [by] bring[ing] employees' concerns to management's attention so that management may take appropriate action."[102] Here, allowing an FDO to notify local management before adjudicating a case would permit the FDO to involve local management before the fact, rather than waiting until after the FDO has already adjudicated the case (and possibly experienced the harms that the Union alleges). Allowing local management to weigh in would, at the very least, increase the chance that the NDO will reconsider and that the FDO will not need to adjudicate a case unnecessarily.

Moreover, the potential benefits of this proposal outweigh any burden on management's rights. Although the Agency claims that Proposal 1 allows FDOs to delay the completion of their assignments,[103] the proposal does not allow an FDO to delay the assignment for any longer than it allows the FDO to contact local management. When gauging this short delay in the performance of duties against the benefits spelled out by the Union, we find that the benefits of Proposal 1 outweigh the burdens on the exercise of management's rights.

Accordingly, we find that Proposal 1 constitutes an appropriate arrangement for management's right to assign work.

The Agency also argues that Proposal 1 impermissibly affects its right to carry out its mission during emergencies under § 7106(a)(2)(D) of the Statute.[104] In this regard, the Agency claims that when it decides that an application merits immediate adjudication, the Agency has determined that an emergency exists, and that the FDO must adjudicate the application immediately.[105] Even assuming that the Agency has demonstrated that Proposal 1 affects this management right, any degree of interference with that right is relatively minor because, as discussed above, the proposal does not allow an FDO to delay the assignment for any longer than it allows the FDO to contact local management. Therefore, we find that the potential benefits to employees outlined above outweigh any possible effect on management's right to determine internal security practices, and we find that the arrangement is appropriate.

Finally, the Union argues that Proposal 1 is a negotiable procedure.[106] Because we have found Proposal 1 to be negotiable as an appropriate arrangement, it is unnecessary to resolve whether it also is a procedure.[107]

VI. Proposal 2

A. Wording

Propose addition of the line: "If the FDO may be forced to change the time recommended by the National Duty Officer (NDO) due to safety reasons, the unknown time it may take a secondary officer to arrive, or due to problems gaining entrance to Agency space at that time, the FDO will promptly advise the NDO or local Management."[108]

B. Meaning

This proposal would apply to subsection (b) of Appendix N.[109] The parties agree that the proposal would address situations where an FDO is assigned to process an emergency-passport request after normal duty hours, and that it would allow FDOs to notify local management or the NDO of any existing impediments that would prevent an employee from assisting an applicant for an emergency passport at the time decided by the NDO.[110]

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[100] Resp. at 9.
[101] *Id*.
[102] *U.S. DOJ, U.S. Fed. BOP, U.S. Penitentiary, Lewisburg, Pa.*, 39 FLRA 1288, 1304-05 (1991); *see also Tidewater, Va. Fed. Emps. Metal Trades Council*, 42 FLRA 845, 855 (1991) (proposal that "simply require[d] th[e agency to] *attempt*[] . . . to place employees" in other areas before requiring them to take forced leave was an appropriate arrangement (emphasis added)).
[103] *See* Statement at 12-13.
[104] *Id.* at 14-15.
[105] *Id.*
[106] Resp. at 9.
[107] *E.g.*, *NTEU*, 61 FLRA 871, 875 n.6 (2006) ("in view of [our] determination that the proposal constitutes a negotiable appropriate arrangement, we need not address the question of whether the proposal constitutes a negotiable procedure").
[108] Record at 2.
[109] *Id*.
[110] *Id*.

C. Analysis and Conclusion: Proposal 2 is negotiable.

The Agency argues that Proposal 2 impermissibly affects the Agency's right to determine its internal security practices under § 7106(a)(1) of the Statute.[111] Specifically, the Agency claims that a policy permitting an FDO to decide to delay opening of the Agency center would constitute an internal security practice, and that the Agency has the right not to adopt such a practice.[112]

The Agency also argues that Proposal 2 impermissibly affects the Agency's right to assign work under § 7106(a)(2)(B) of the Statute.[113] Specifically, the Agency argues that this proposal would unilaterally allow employees to delay assignments handed down by the NDO, thereby abdicating the Agency's right to decide when work assignments are completed.[114] In response, the Union asserts that Proposal 2 does not prevent or delay the completion of assigned work; rather, it merely "spells out the notification options if the unforeseen creates hurdles in meeting the applicant."[115]

We find that Proposal 2 does not affect the Agency's rights to determine internal security practices and to assign work. The Agency premises its management-rights arguments on the belief that the proposal allows FDOs to unilaterally choose when to delay performance.[116] But the Union disputes the Agency's interpretation, arguing that it does not prevent or delay the assigned work, and that it just spells out "notification options."[117] The Union's interpretation is not inconsistent with the plain wording of the proposal, which discusses what notification the FDO will give "*[i]f*" he or she may be forced to change the NDO-recommended time.[118] As the Union's explanation is consistent with the plain wording of the proposal, we adopt the Union's explanation of the proposal's meaning for the purposes of our analysis.[119]

Consequently, we reject the premise of the Agency's argument – namely, that the proposal would permit FDOs to unilaterally delay tasks assigned by management. We therefore conclude that the Agency has failed to demonstrate that Proposal 2 affects management's rights to determine internal security practices and to assign work, and we find that Proposal 2 is negotiable.

VII. Proposal 5

A. Wording

> [FDOs] will not be pressured to approve applications that do not meet the requirements for issuance.[120]

B. Meaning

The Union states that this proposal would apply to subsection (b), and potentially subsection (c), of Appendix N.[121] The Union states that it believes that changes to Appendix N imply that the emergency-passport-issuance decision is out of the hands of FDOs.[122] The parties agree that the intent of the proposal is to ensure that if an FDO believes that an application does not comply with the Agency's standards and procedures for issuing passports, that the FDO will not be pressured into issuing a passport.[123]

C. Analysis and Conclusion: Proposal 5 is nonnegotiable.

1. Proposal 5 affects management's right to assign work.

The Agency argues that Proposal 5 affects its right to assign work under § 7106(a)(2)(B) of the Statute.[124] As explained above in relation to Proposal 1, an agency's right to assign work encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.[125]

The Agency acknowledges that Proposal 5 merely restates current Agency policy.[126] In this regard, the Agency notes that the FDO, and not the NDO, is the only employee vested with the authority to adjudicate emergency-passport applications, and that no one from the Agency pressures FDOs regarding such adjudications.[127] However, the Agency argues that it "possesses the authority to assign work, in the future, in a

[111] Statement at 17-18; Reply at 19-22; 5 U.S.C. § 7106(a)(1).
[112] Statement at 18.
[113] *Id.* at 16-17 (citing *Nat'l Credit*, 66 FLRA at 585; *IAFF*, 59 FLRA at 833-34); Reply at 15-19.
[114] *See* Statement at 16.
[115] Resp. at 14.
[116] *See* Statement at 16-18.
[117] Resp. at 14.
[118] Record at 2 (emphasis added).
[119] *See, e.g.*, *NATCA*, 61 FLRA 437, 438 (2006) (citing *AFSCME, Local 2830*, 60 FLRA 671, 671 (2005)).
[120] Pet. at 7.
[121] Record at 3.
[122] *Id*.
[123] *Id*.
[124] Statement at 21-22; Reply at 22-25.
[125] *Nat'l Credit*, 66 FLRA at 586 (citing *Local 3392*, 52 FLRA at 143).
[126] Statement at 21.
[127] *Id*. at 22.

manner different from – and inconsistent with – Proposal [5]."[128] Accordingly, the Agency asserts that Proposal 5 violates its right to assign work because it would restrict the Agency's ability to establish different standards for adjudicating emergency-passport applications in the future.[129]

The Authority has consistently held that proposals that are nonnegotiable because they interfere with a management right do not become negotiable because they simply restate an existing agency policy or practice.[130] Because the inclusion of such a policy or practice in an agreement would prevent an agency from changing it during the life of the agreement, proposals restating that policy or practice interfere with the applicable management rights.[131]

Here, the Union acknowledges that the intent of the proposal is to ensure that the FDO is the sole employee with decision-making authority over emergency-passport applications.[132] However, an agency's right to assign work encompasses the right to assign particular duties to specific agency employees.[133] This would include any future determination by the Agency to grant decision-making authority over emergency-passport applications to employees other than FDOs. Although the Agency currently grants FDOs complete authority in adjudicating emergency-passport applications, Proposal 5 – if it becomes part of the parties' agreement – would prevent the Agency from reallocating that authority to the NDO (or any other employee) during the life of the agreement.

The Union argues that Proposal 5 does not affect management's rights because it "does not attempt to change the work, the timing that the work is done, or who performs the work."[134] The Union also cites to a case from the D.C. Circuit which states that the term "assign work" was not meant to be so expansive as to encompass any and all management actions.[135] However, the Union does not explain how that holding applies to the instant case, nor does it offer any further arguments regarding whether Proposal 5 affects the Agency's right to assign work. Accordingly, the Union does not sufficiently rebut the Agency's argument that Proposal 5 affects management's right to assign work.

As Proposal 5 would impede the Agency's right to assign particular duties to specific Agency employees, we find that Proposal 5 affects the Agency's right to assign work.

2. Proposal 5 is not an arrangement.

The Union argues that Proposal 5 constitutes an exception to management rights as an appropriate arrangement under § 7106(b)(3).[136] As set forth above, 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.[137] The claimed arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.[138] Moreover, a union "must articulate how employees will be detrimentally affected by management's actions and how the matter proposed for bargaining is intended to address or compensate for the actual or anticipated adverse effects of the exercise of the management right."[139]

The Union asserts in its response that the adverse effects suffered by FDOs include "being called out unnecessarily and/or more frequently for after-hours cases," which "intrudes unnecessarily upon the FDO[s'] private li[ves], possibly compelling the[m] . . . to travel downtown at night by themselves, and reducing their time with their famil[ies]."[140] However, the Union does not explain how Proposal 5 would in any way address or alleviate these concerns, or how requiring the Agency to comply with passport-issuance regulations would reduce the frequency of after-hours assignments or lessen the intrusion into FDOs' private lives. As the Union has not demonstrated how Proposal 5 would ameliorate the adverse impacts identified in its response, the Union does not offer a basis for finding that Proposal 5 is an arrangement.

Accordingly, because the Union has failed to show that Proposal 5 constitutes an appropriate arrangement, we conclude that the proposal is nonnegotiable.

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[128] *Id*.
[129] *Id*.; Reply at 23.
[130] *Nat'l Credit*, 66 FLRA at 585 (citing *Local 1164*, 54 FLRA at 1339; *AFGE Local 900*, 46 FLRA 1494, 1503 (1993) (*Local 900*)).
[131] *Local 900*, 46 FLRA at 1503 (citing *Prof'l Airways Sys. Specialists*, 38 FLRA 149, 161-62 (1990)).
[132] Pet. at 7 (Proposal 5 "is intended to remove any doubt [regarding] which employee has the decision-making authority on the case.").
[133] *Nat'l Ass'n of Agric. Emps.*, 48 FLRA 1323, 1326-27 (1994) (citing *AFGE, Local 1760*, 46 FLRA 1285, 1289 (1993); *AFGE, AFL-CIO, Social Security Local No. 1760*, 9 FLRA 813, 813-14 (1982)).
[134] Resp. at 17.
[135] *Id*. (quoting *NTEU v. FLRA*, 793 F.2d 371, 374-75 (D.C. Cir. 1986)).
[136] *Id.*
[137] *KANG*, 21 FLRA at 31.
[138] *Chapter 243*, 49 FLRA at 184.
[139] *KANG*, 21 FLRA at 32.
[140] Resp. at 17.

VIII. Order

We order the Agency to bargain, upon request, over Proposals 1 and 2. We dismiss the petition as to Proposal 5.

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

I agree with the majority that the Union's petition was filed timely and that Proposal 5 is not negotiable. And although I agree that Proposal 2 is negotiable as a procedure, I do not agree with the majority's conclusion that the proposal does not affect management's right to assign work.[1]

An agency's right to assign work encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.[2] Authority precedent has made clear that the right to assign work is affected by proposals that allow bargaining-unit employees to determine *when during the day* assigned work will be performed[3] or that require an agency to wait a certain period of time (e.g., thirty minutes) before assigning work.[4]

On this point, the Union argues that Proposal 2 does not prevent or postpone the assigned work because it merely "spells out . . . notification options."[5] The question of whether or not that interpretation is, as the majority concludes, consistent with the plain language of the proposal[6] is quite irrelevant because the proposal itself interferes with management's right to assign work.

Regardless of how Proposal 2 is interpreted, it permits FDOs to "*change the time* [of an assignment] recommended by the [NDO]."[7] In *International Association of Fire Fighters*[8] and *AFGE, Local 1164*,[9] the Authority held that granting employees the power to delay assignments impermissibly affects an agency's right to assign work.

Nonetheless, I would conclude that Proposal 2 is negotiable as a procedure under § 7106(b)(2) of the Statute[10] because it addresses situations when FDOs are unable to act at the time determined by the NDO due to obstacles that are outside of their control and sets forth the procedures for addressing those circumstances.

I also do not agree with the majority that Proposal 1 is negotiable as an appropriate arrangement.

In order for a proposal to constitute an appropriate arrangement, a union "must articulate how employees will be detrimentally affected by management's actions and how [the proposal] address[es] or compensate[s] for the actual or anticipated adverse effects of the exercise of the management right."[11] In other words, the Union must prove the specific harms employees will suffer and then explain how its proposal will resolve those harms.

The Union asserts that the changes to how emergency passport applications will be processed will "intrude[] on the employee's private life, reducing the amount of time employees spend with their families"[12] and that returning to the office late at night to process emergency applications pose certain safety risks. The Union, however, provides no explanation whatsoever how Proposal 1 – which allows FDOs to contact local management before adjudicating emergency passport applications – would alleviate those concerns or that the proposal is tailored to address those concerns.[13]

The Union concedes, however, that Proposal 1 is *not* tailored to reduce intrusions into FDOs' private lives and that, even with its proposal, FDOs still would be required to process the emergency passport application *regardless* of whether they are able to reach local management.[14]

The majority ignores the Union's concession on this point. The majority concludes instead that permitting FDOs to contact local management would somehow "*increase the chance* . . . that [an] FDO *will not need to adjudicate* a case unnecessarily"[15] but then also concludes that *any delay* would be "[no] longer than it allows the FDO to contact local management."[16] In other words, any delay would be insignificant. But both of these conclusions cannot be true.

Nonetheless, even if I agreed that Proposal 1 ameliorates adverse effects of the change, I would still conclude that it is not negotiable because the burdens on management's rights far outweigh any possible benefit to

[1] 5 U.S.C. § 7106(a)(2)(B).
[2] *NTEU*, 66 FLRA 584, 585 (2012) (citing *AFGE, Local 3392*, 52 FLRA 141, 143 (1996)).
[3] *Int'l Ass'n of Fire Fighters*, 59 FLRA 832, 833-34 (2004).
[4] *AFGE, Local 1164*, 54 FLRA 1327, 1339 (1998).
[5] Resp. at 14.
[6] *See* Majority at 15.
[7] Record of Post-Pet. Conference at 2 (emphasis added).
[8] 59 FLRA at 833-34.
[9] 54 FLRA at 1339.
[10] 5 U.S.C. § 7106(b)(2).
[11] *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*).
[12] Resp. at 9.
[13] *See id*.
[14] *See id.* ("[T]he proposal still allows for the Agency's work to be accomplished[] in the same manner.").
[15] Majority at 13 (emphasis added).
[16] *Id.*

employees.[17] As the majority acknowledges, Proposal 1 would allow FDOs to delay as long as it takes them to contact local management.[18] What my colleagues miss, however, is that contacting a local management official may prove to be difficult particularly in the middle of the night – deep-sleeping supervisors, uncharged phone batteries, etc. Given that the assignments at stake – processing *emergency* passport applications – involve *emergency* situations that are inherently time-sensitive, even a tiny delay while contacting local management could prove fatal to the Agency's mission. Permitting FDOs to delay an assignment *indefinitely*, while the FDO purportedly attempts to contact a local manager, creates an unnecessary obstacle in a time-sensitive emergency crisis.

As discussed above, the proposal significantly interferes with management's right to assign work. The timely processing of an emergency passport application is just that – an emergency which may involve a matter of national security, a matter of life and death, or mean the difference between an applicant being able to attend to a family emergency.

Contrary to the majority, I would find that Proposal 1 is not negotiable.

Thank you.

[17] *See KANG*, 21 FLRA at 31-33 (the impact on management rights must not be disproportionate to the benefits derived from a proposed arrangement).
[18] Majority at 13.