69 FLRA No. 90

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

and

UNITED STATES
DEPARTMENT OF STATE
PASSPORT SERVICES
(Agency)

0-NG-3291

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

September 28, 2016

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

I. Statement of the Case

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] The case concerns the negotiability of four proposals – Proposals 3, 5, 8, and 22 – which concern procedures passport specialists use to adjudicate passport applications. The Agency filed a statement of position (statement), to which the Union filed a response (response). The Agency did not file a reply to the Union's response.

Regarding all of the Union's proposals, we must decide whether the proposals raise only a bargaining-obligation dispute. Because the proposals raise both negotiability and bargaining-obligation disputes, the answer is no.

Regarding Proposal 3, we must decide whether the proposal impermissibly affects management's right to determine its internal-security practices under § 7106(a)(1) of the Statute[2] or its right to assign work under § 7106(a)(2)(B) of the Statute.[3] Because Proposal 3 is an appropriate arrangement under § 7106(b)(3) of the Statute,[4] we find that Proposal 3 is within the duty to bargain.

Regarding Proposal 5, we must decide whether the proposal: (1) affects management's right to determine its internal-security practices under § 7106(a)(1); or (2) affects management's right to determine the technology, methods, and means of performing work under § 7106(b)(1) of the Statute.[5] Because the Agency fails to demonstrate how the proposal affects its internal security, or the technology, methods, or means of performing work, we find that Proposal 5 is within the duty to bargain.

Regarding Proposal 8, we must decide whether the proposal impermissibly affects management's right to discipline under § 7106(a)(2)(A) of the Statute.[6] Because Proposal 8 affects management's right to discipline and is not an appropriate arrangement under § 7106(b)(3), we find that Proposal 8 is outside the duty to bargain.

Regarding Proposal 22, we must decide whether the proposal affects management's right to assign work under § 7106(a)(2)(B), and whether the proposal is within the Agency's bargaining obligation. Because the Agency fails to explain how the proposal affects its assignment of work, and because the record does not support the Agency's bargaining-obligation-dispute claim, we find that Proposal 22 is within the duty to bargain.

Regarding all of the Union's proposals, we must decide whether the petition should be dismissed because the Union did not invoke bargaining within the timelines established under the parties' agreement, or whether the proposals are covered by the parties' agreement. Because the record does not support the Agency's bargaining-obligation-dispute claims, the answer is no.

[1] 5 U.S.C. § 7105(a)(2)(E).

[2] *Id.* § 7106(a)(1).
[3] *Id.* § 7106(a)(2)(B).
[4] *Id.* § 7106(b)(3).
[5] *Id.* § 7106(b)(1).
[6] *Id.* § 7106(a)(2)(A).

II. Background

The Union represents passport specialists (specialists) who process passport applications. The dispute arose between the parties when the Agency gave the Union a revised version of Appendix K of the Foreign Affairs Manual, which contains procedures used by specialists to adjudicate passport applications.

The Union submitted proposals to the Agency regarding the Appendix K revisions, and the parties began bargaining. Bargaining ended before the parties reached agreement on all outstanding issues. And the Agency declared the Union's proposals nonnegotiable. Subsequently, the Union filed a negotiability petition concerning nine proposals. However, the parties narrowed their dispute to four proposals: Proposals 3, 5, 8, and 22.[7]

III. Preliminary Matter: The Union's petition was timely filed.

The Agency claims that the Union's petition should be dismissed because it was untimely filed.[8] The Agency asserts that in mid-August 2015, it gave the Union allegations regarding the Agency's duty to bargain over the proposals at issue in this case, but that the Union did not file its petition for review until the end of September 2015.[9]

We find that the Union's petition was timely. The Agency acknowledges that the Union did not request the Agency's mid-August duty-to-bargain allegations.[10] Under § 2424.11(c) of the Authority's Regulations,[11] a union need not file a petition for review of such unrequested allegations, but may instead continue bargaining. That is what the Union did here. Subsequently, in mid-September 2015, the Agency gave the Union additional duty-to-bargain allegations concerning the proposals at issue in this case, and other proposals.[12] The Union's petition for review, filed at the end of September 2015, is indisputably timely as to those allegations.[13] Accordingly, we reject the Agency's claim that the Union's petition for review is untimely.

IV. The proposals raise both bargaining-obligation and negotiability disputes.

The Agency argues that the petition should be dismissed because the Agency raises only a bargaining-obligation dispute.[14] Moreover, the Agency argues that it has no duty to bargain because the proposals constitute permissive subjects of bargaining.[15]

Under § 2424.2 of the Authority's Regulations, the Authority will consider a petition for review of a negotiability dispute only when the parties disagree "concerning the legality of a proposal."[16] And where a proposal raises both a bargaining-obligation dispute and a negotiability dispute, the Authority may resolve both disputes.[17] But where a proposal involves only a bargaining-obligation dispute, that dispute may not be resolved in a negotiability proceeding.[18]

The Agency misinterprets the law. The Agency argues that the proposals "excessively interfere[]" with a management right.[19] The Agency claims that this argument does not have the effect of alleging that the proposals are "inconsistent with law, rule, or regulation."[20] But a dispute over whether a proposal impermissibly affects a management right under § 7106(a) or (b)(1) – as the Agency argues, and the Union opposes, below, regarding each proposal – *is* a dispute "concerning the legality of a proposal."[21] Therefore, the parties raise a negotiability dispute. The Agency also contends that the proposals are "covered by" the parties' agreement,[22] which raises a bargaining-obligation dispute.[23] As the proposals raise both a bargaining-obligation dispute *and* a negotiability dispute, the Authority may resolve both disputes in the context of this negotiability proceeding.[24]

The Agency relies on *AFGE, Local 1164* (*AFGE*) to support its claim that the petition should be dismissed.[25] But *AFGE* is inapposite. In *AFGE*, the Authority considered whether a negotiability dispute existed on a proposal-by-proposal basis. As to one proposal, the Authority found that the agency challenged the proposal's legality – whether the proposal affected a

[7] Union's Resp. to Order to Show Cause (Oct. 21, 2015) at 2 (withdrawing petition as to Proposals 1, 14, 15); Union's Resp. to Order to Show Cause (Dec. 12, 2015) at 2 (withdrawing petition as to Proposal 4); Resp. at 17 (withdrawing petition as to Proposal 6).
[8] Statement at 4-5.
[9] *Id.*
[10] *See id.* at 2-3, 4.
[11] 5 C.F.R. § 2424.11(c).
[12] Statement, Attach. 11.
[13] *See* 5 C.F.R. § 2424.21(a)(1).
[14] Statement at 5-6.
[15] *Id.* at 6.
[16] 5 C.F.R. § 2424.2(c).
[17] *Id.* § 2424.30(b)(2).
[18] *Id.* § 2424.2(d).
[19] Statement at 6.
[20] *Id.*
[21] 5 C.F.R. § 2424.2(c).
[22] Statement at 6.
[23] 5 C.F.R. § 2424.2(a)(1).
[24] *Id.* § 2424.30(b)(2).
[25] Statement at 5-6 (citing *AFGE*, 65 FLRA 924 (2011)).

management right under § 7106(a) – and resolved that proposal's negotiability dispute.[26] As to the remaining proposal, the Authority did not resolve whether the proposal was within the duty to bargain because the agency's claim that the proposal was "covered by" the parties' agreement only presented a bargaining-obligation dispute.[27] Here, for the reasons discussed above, the parties raise both a bargaining-obligation dispute *and* a negotiability dispute regarding *each* proposal. Thus, the Agency's reliance on *AFGE* is misplaced.

The Agency also makes a general claim – aside from its position that Proposal 5 affects the methods and means of performing work, which we reject below – that the proposals in this case concern permissive subjects of bargaining, and it has elected not to bargain.[28] However, to the extent that the Agency raises a claim that the proposals constitute permissive subjects of bargaining, the Agency does not explain how any of the proposals, other than Proposal 5, constitutes permissive subjects. Accordingly, we reject the Agency's claim as a bare assertion.[29]

V. Proposal 3

A. Wording

SSA appendix steps that might otherwise be performed for adults do not need to be followed for minors in cases where performing the step will not affect the outcome to issue.[30]

B. Meaning[31]

The parties agree that this proposal would apply when specialists process a minor's passport application.[32] The proposal would permit specialists to skip some "SSA appendix steps" that they would perform for adult applicants because, in the case of a minor, those steps would be unnecessary, or an attempt to access information that does not exist.[33] The Union explains that the proposal seeks to clarify contradictions in the Foreign Affairs Manual.[34] The proposal clarifies that the Foreign Affairs Manual does not require employees to perform steps in situations where the outcome is already determined by other Foreign Affairs Manual language on procedures for minors.[35] But the proposal's plain language does not preclude the Agency from changing those other sections of the Manual – and the Agency does not make any claim to the contrary. So the proposal would not allow specialists to disregard any steps that the Agency, in a Manual section, requires specialists to follow, unless the Agency in another Manual section determines, essentially, that those steps are not necessary. The Union defined "SSA" as the U.S. Social Security Administration and "appendix steps" as passport-adjudication procedures in Appendix K that involve passport applicants' (applicants') Social Security numbers.[36]

C. Analysis and Conclusions

1. Proposal 3 does not impermissibly affect the Agency's right to determine its internal-security practices or its right to assign work.

a. We assume, without deciding, that Proposal 3 affects the Agency's right to determine its internal-security practices and its right to assign work.

The Agency argues that Proposal 3 impermissibly affects the Agency's right to determine its internal-security practices under § 7106(a)(1),[37] and its right to assign work under § 7106(a)(2)(B).[38]

For purposes of this decision, we assume, without deciding, that Proposal 3 affects management's right to determine its internal-security practices and its right to assign work. We conclude, for the following reasons, that the proposal is within the duty to bargain as an appropriate arrangement under § 7106(b)(3).[39]

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[26] *AFGE*, 65 FLRA at 925-26.
[27] *Id.* at 927.
[28] Statement at 6, 8.
[29] *See AFGE, Local 1547*, 65 FLRA 911, 913 n.7 (2011); 5 C.F.R. § 2424.32(b).
[30] Record of Post-Pet. Conference (Record) at 3.
[31] The meaning we adopt for the various proposals would apply in other proceedings, unless modified by the parties through subsequent agreement. *See AFGE, Local 1164*, 60 FLRA 785, 786 n.3 (2005).
[32] Record at 3.
[33] *Id.*
[34] Pet. at 3; *see* Resp. at 10-11.
[35] Pet. at 3; *see* Resp. at 10-11.
[36] Record at 3.
[37] Statement at 10-11.
[38] *Id.* at 9.
[39] *NAIL, Local 5*, 67 FLRA 85, 89 (2012) (*NAIL*) (assuming, without deciding, that proposal affected management right because proposal was appropriate arrangement); *AFGE, Council of Prison Locals 33*, 65 FLRA 142, 145 (2010) (same).

b. Proposal 3 is an appropriate arrangement.

The Union asserts that the proposal is an appropriate arrangement under § 7106(b)(3).[40] 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).[41] 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.[42] The claimed arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.[43] 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.[44] 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.[45]

When an agency does not dispute a union claim that a proposal is an arrangement, the Authority will find that the agency concedes that the proposal constitutes an arrangement.[46] Consistent with this precedent, as the Agency does not contest the Union's allegation that Proposal 3 constitutes an arrangement, we find that Proposal 3 is an arrangement.[47]

Regarding whether the arrangement is appropriate, the Union asserts that the proposal would benefit specialists by increasing their ability to meet production quotas.[48] That is, by avoiding those adjudication procedures involving minor applicants' Social Security numbers that other sections of the Foreign Affairs Manual "make clear are unnecessary," specialists would have more time to process other applicants.[49] The Agency argues, regarding the right to assign work, that the proposal would prevent the Agency from assigning specialists "to perform certain types of SSA-related checks when adjudicating minors' passport applications."[50] Additionally, the Agency argues, regarding its right to determine internal-security practices, that the proposal restricts the Agency from using fraud controls related to database checks for minors, and "undermine[s] the integrity of the U.S. passport."[51]

The record demonstrates that any burden on management's rights would be mitigated because the proposal would not limit *all* adjudication procedures involving minor applicants' Social Security numbers.[52] Rather, the proposal only limits those procedures where the outcome is already determined by other Foreign Affairs Manual language on procedures for minors.[53] In fact, the Agency acknowledges that it currently does not require specialists to conduct "some [SSA] security checks" for minors that "return no results[,] or records that would not be useful[,] for minor applicants."[54] Moreover, as discussed above, the proposal would not allow specialists to disregard any steps that the Agency in a Manual section requires them to follow, unless the Agency in another Manual section determines, essentially, that those steps are not necessary. Balancing the benefits to specialists and the burdens on the Agency's exercise of its management rights, we find that Proposal 3 does not excessively interfere with management's rights. Therefore, we find that Proposal 3 is within the duty to bargain as an appropriate arrangement under § 7106(b)(3).

[40] Resp. at 11.
[41] *E.g.*, *NAIL*, 67 FLRA at 89; *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*).
[42] *KANG*, 21 FLRA at 31.
[43] *NTEU, Chapter 243*, 49 FLRA 176, 184-85 (1994) (Member Armendariz concurring in part, dissenting in part).
[44] *KANG*, 21 FLRA at 31-33.
[45] *Id.*
[46] *NAIL*, 67 FLRA at 87 (finding that, because agency did not dispute that proposal was arrangement, proposal constituted arrangement); *NATCA, Local ZHU*, 65 FLRA 738, 740, 742 (2011) (same).
[47] *See* Statement at 9-11 (arguing merely that proposal "excessively interferes" with management's right to determine its internal-security practices and right to assign work).
[48] Resp. at 11.
[49] *Id.*
[50] Statement at 9.
[51] *Id.* at 10-11.
[52] Record at 3.
[53] Pet. at 3.
[54] Statement at 10.

VI. Proposal 5

A. Wording

> 7 FAM 1351 App. K (a)(3)(a) – Propose a number of options be allowed in this situation: The specialist may a) explain why it is necessary to submit a SSN, b) have the applicant read the Federal Tax Law and Other Uses of Social Security Numbers, or c) ask the applicant if they are aware of the requirements, etc.[55]

B. Meaning

The parties agree that the proposal would require a specialist to use one of the three options listed in the proposal to convince an applicant to provide a Social Security number in situations where the applicant initially refuses.[56] The parties also agree that, currently, when an applicant refuses to provide his or her Social Security number, the specialist must ask the applicant to read certain legal information on the back of the passport application.[57] This practice is captured by option "b" of the proposal.[58]

C. Analysis and Conclusions

1. Proposal 5 does not affect management's right to determine its internal-security practices.

The Agency contends that Proposal 5 affects management's right to determine its internal-security practices under § 7106(a)(1).[59] An agency's right to determine its internal-security practices includes the authority to determine the policies and practices that are part of the agency's plan to secure or safeguard its personnel, property, and operations.[60] Where an agency shows a link or reasonable connection between its goal of safeguarding personnel or property, or preventing disruption of agency operations, and the disputed practice, the Authority will find that the practice constitutes the agency's exercise of its right to determine its internal-security practices.[61]

Section 2424.24(a) of the Authority Regulations provides that an agency's statement of position to the Authority must, "among other things, . . . supply all arguments and authorities in support of its position."[62] As explained in § 2424.24(c)(2), an agency must set forth its position on any relevant matters, including a "statement of the arguments and authorities supporting . . . negotiability claims."[63] The Authority has rejected arguments where an agency fails to explain why a proposal affects management's right to determine its internal-security practices.[64]

The Agency confirms that the procedure listed as the proposal's option "b" is the procedure that the Agency currently requires specialists to use as an effective way to identify fraud.[65] As to options "a" and "c," the Agency argues that those options would "alter" the actions a specialist would take in response to an applicant refusing to provide a Social Security number.[66] But the Agency does not explain why, and it is not otherwise apparent how, allowing specialists to exercise the proposal's "a" and "c" options would alter the Agency's ability to identify fraud. Thus, the Agency fails to establish a link between its goal of identifying fraud and having specialists exercise only option "b," rather than permitting specialists to exercise any of the proposal's three options.[67] Consistent with Authority Regulations and precedent, we find that the Agency's internal-security-practice argument is unsupported, and we reject it as a bare assertion.[68]

2. Proposal 5 does not affect management's right to determine the technology, methods, and means of performing work.

The Agency contends that Proposal 5 affects management's right to determine the methods and means of performing work under § 7106(b)(1).[69] In determining whether a proposal concerns the methods or means of performing work under § 7106(b)(1), the Authority has construed "method" to refer to the way in which an agency performs its work, and has construed "means" to refer to any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for

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[55] Record at 4.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] Statement at 12-13.
[60] *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 128 (2011) (*NFFE*); *see also, e.g., SSA*, 65 FLRA 523, 526 (2011).
[61] *NFFE*, 66 FLRA at 128.
[62] 5 C.F.R. § 2424.24(a).
[63] *Id.* § 2424.24(c)(2).
[64] *NFFE*, 66 FLRA at 128.
[65] Statement at 12.
[66] *Id.*
[67] *See NFFE*, 66 FLRA at 128.
[68] *Id.*
[69] Statement at 13.

the accomplishment or furtherance of the performance of its work.[70]

If the proposal "concerns" a method or a means, then the Authority employs a two-part test to determine whether the proposal "affects" the management right.[71] In this connection, it must be shown that: (1) there is a direct and integral relationship between the method or means the agency has chosen and the accomplishment of the agency's mission; and (2) the proposal would directly interfere with the mission-related purpose for which the method or means was adopted.[72] Where a party fails to support its claim that a proposal affects a method or means of performing work, the Authority rejects the claim as a bare assertion.[73]

The Agency asserts that its procedure – requiring a specialist to ask an applicant who refuses to provide his or her Social Security number to read certain legal information on the back of the passport application – furthers the Agency's goal of identifying fraud.[74] We find that the Agency identifies a method or means that the proposal "concerns" – having the applicant read the back of the passport application.[75] But we further find that the Agency's arguments do not satisfy the Authority's method or means "affects" test.[76]

Even assuming that this method or means has a direct and integral relationship to the accomplishment of the Agency's mission under the first prong, the Agency fails to demonstrate that the second prong of the test is satisfied.[77] In this regard, the Agency asserts that Proposal 5 "would weaken the Agency's ability to identify fraud."[78] However, the Agency does not discuss the effect of options "a" or "c" on the Agency's goal of identifying fraud – the mission-related purpose for which the Agency adopted option "b." In these circumstances, we find that the Agency fails to explain how Proposal 5's options "a" or "c" would be any less effective than option "b" in achieving the Agency's mission-related purpose of identifying fraud. The Agency therefore fails to demonstrate that Proposal 5 would directly interfere with the mission-related purpose for which the method or means incorporated in option "b" was adopted.[79] As the Agency has not met its burden of providing a record to support its assertion that Proposal 5 affects the Agency's management right, we reject the Agency's claim that the proposal is outside the duty to bargain on this ground.

The Agency also argues that Proposal 5 affects management's right to determine the technology of performing work under § 7106(b)(1) of the Statute.[80] But the Agency does not explain how the proposal affects this right. Consequently, the Agency's claim is unsupported, and we reject it as a bare assertion.[81]

VII. Proposal 8

A. Wording

> Passport Specialists will not be negatively impacted for passport frauds they have issued in error due in part to:
>
> - Late-issued social security numbers issued prior to 1950
> - False "Match" returns generated by the TDIS system[82]

B. Meaning

The parties agree that Proposal 8 identifies two inquiries that specialists make that might uncover indicators of fraud, but that the results of these inquiries are not always reliable.[83] The Union explained that "TDIS" refers to the "Travel Document Issuance System," an electronic system that provides information on each applicant.[84] "TDIS" may fail to recognize one indicator of fraud: "[l]ate-issued [S]ocial [S]ecurity numbers" – referring to Social Security numbers issued after the applicant was no longer a minor – issued prior to 1950.[85] TDIS may also fail to recognize another indicator of fraud: a Social Security number that is not a "match" to data drawn from the Social Security Administration.[86] When that occurs, TDIS may instead generate a "False Match."[87] The parties agree that Proposal 8 would prohibit the Agency from taking any disciplinary or performance-based actions against a

[70] *Ass'n of Civilian Technicians, Evergreen Chapter*, 55 FLRA 591, 593 (1999).
[71] *E.g.*, *NTEU, Chapter 83*, 64 FLRA 723, 725 (2010) (*Chapter 83*).
[72] *E.g.*, *Prof'l Airways Sys. Specialists*, 56 FLRA 798, 803 (2000).
[73] *See, e.g.*, *NFFE*, 66 FLRA at 131; *accord* 5 C.F.R. § 2424.26(c)(1)(i).
[74] Statement at 13.
[75] *Id.*
[76] *E.g.*, *Chapter 83*, 64 FLRA at 725-26.
[77] *See NFFE*, 66 FLRA at 131.
[78] Statement at 13.
[79] *See NFFE*, 66 FLRA at 131; *accord* 5 C.F.R. § 2424.26(c)(1)(i).
[80] Statement at 13.
[81] *See AFGE, Local 1547*, 65 FLRA at 913 n.7; 5 C.F.R. § 2424.32(b).
[82] Pet. at 5.
[83] Record at 5.
[84] *Id.*; Pet. at 5.
[85] Pet. at 5.
[86] *Id.*
[87] *Id.*

specialist if either of the inquiries results in – or should have resulted, but did not result in – a fraud indicator, and a specialist issued a "passport fraud."[88] The Union defines a "passport fraud[]" as a passport that is issued to an applicant because of fraudulent information provided by that applicant.[89] The Union clarified that performance-based actions include increased audits, performance-improvement plans, demotions, or terminations.[90]

C. Analysis and Conclusions

1. Proposal 8 impermissibly affects the Agency's right to discipline.

a. Proposal 8 affects the Agency's right to discipline.

The Agency contends that Proposal 8 affects management's right to discipline under § 7106(a)(2)(A).[91] According to the Agency, the proposal affects this management right because it restricts the Agency from considering information regarding certain passport issuances made in error when making disciplinary decisions.[92]

The Authority has found that proposals immunizing employees from discipline for specified conduct affect management's right to discipline.[93] In addition, the Authority has found that proposals that prevent management from taking action based on certain types of information affect management's right to discipline.[94]

Here, there is no dispute that Proposal 8 would immunize employees from discipline or performance-based action for issuing "passport frauds" when one of the inquiries identified in Proposal 8 either resulted in – or should have resulted, but did not result in – a fraud indicator. Therefore, Proposal 8 affects management's right to discipline employees under § 7106(a)(2)(A).[95]

b. Proposal 8 is not an appropriate arrangement.

The standards for assessing whether a proposal constitutes an appropriate arrangement are set forth above.

Even assuming that the proposal is an arrangement, we find that it is not appropriate because it excessively interferes with management's right to discipline employees.[96] Regarding the proposal's benefits to specialists, the proposal is intended to ensure that specialists will not be "negatively impacted" by "[TDIS] flaws beyond their control" that may lead to a specialist issuing a "passport fraud[]" in error.[97] Specifically, the proposal would protect employees from adverse consequences relating to disciplinary or performance-based actions, such as "increased audits, performance[-]improvement plans, demotions, or terminations."[98] With regard to the proposal's burdens on management's right, the proposal would completely preclude management from disciplining and holding employees accountable for their work performance[99] for issuing "passport frauds . . . in error due" – even "in part" – to faults with either of the two indicators of fraud identified in the proposal.[100] The proposal contains no exception that takes into account the seriousness of the "passport frauds" issued in error or deficiencies not identified in the proposal contributing, in part, to the "passport frauds" issued in error.[101] Therefore, the burdens on management's exercise of its rights are significant.

[88] Record at 5.
[89] *Id.*
[90] *Id.*
[91] Statement at 15-16.
[92] *Id.* at 15.
[93] *See AFGE, Local 1164*, 67 FLRA 316, 318 (2014) (*Local 1164*) (holding that proposal immunizing employees from discipline for specified conduct excessively interfered with management's right to direct, discipline, and assign work); *see also NATCA, AFL-CIO*, 62 FLRA 174, 181 (2007) (*NATCA*) (holding that proposal immunizing employees for specified conduct excessively interfered with management's right to discipline); *POPA*, 48 FLRA 129, 147 (1993) (*POPA*) (Member Armendariz dissenting) (holding that proposals immunizing employees from accountability for their work performance for specified conduct, regardless of circumstances of that conduct, excessively interfered with management's rights to direct employees and to assign work).
[94] *NATCA*, 61 FLRA 341, 346 (2005).
[95] *See Local 1164*, 67 FLRA at 318; *NATCA*, 62 FLRA at 181; *POPA*, 48 FLRA at 147.
[96] *See AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 932 (2012) (assuming that proposal was arrangement, but finding it excessively interfered with management's right to determine internal-security practices).
[97] Resp. at 17; *see also* Pet. at 5.
[98] Record at 5.
[99] *See Local 1164*, 67 FLRA at 318.
[100] Pet. at 5.
[101] *See Local 1164*, 67 FLRA at 318.

Weighing the burdens placed on the Agency against the benefits to specialists, we find that the proposal excessively interferes with management's right to discipline under § 7106(a)(2)(A).[102] Accordingly, we find that the proposal is not an appropriate arrangement and, therefore, is outside the duty to bargain.[103]

The Agency also argues that Proposal 8 affects its right to assign work,[104] and the Union contends that the proposal does not affect the exercise of that right.[105] Because we have found that Proposal 8 excessively interferes with management's right to discipline, the proposal is outside the duty to bargain even if it does not affect the exercise of management's right to assign work.[106] Accordingly, we find it unnecessary to address the Agency's argument regarding management's right to assign work, and the Union's claim that Proposal 8 does not affect that right.

VIII. Proposal 22

A. Wording

The Parties recognize that the Specialist has no power to force the applicant to write in "refused" in the SSN block, except for rejecting the application, and the policy is not to reject the application based on this issue.[107]

B. Meaning

The parties agree that, currently, when an applicant refuses to provide his or her Social Security number, the specialist must ask the applicant to write "refused" in the portion of the application where the applicant would otherwise provide a Social Security number.[108] Under this proposal, the parties agree that the Agency would not charge the specialist with an error if the applicant does not write "refused."[109] Moreover, the proposal would allow the specialist to make a notation, elsewhere on the application, that the applicant refused to provide a Social Security number and declined to write "refused" on the application.[110]

C. Analysis and Conclusions

1. Proposal 22 does not impermissibly affect management's right to assign work.

The Agency argues that Proposal 22 impermissibly affects management's right to assign work under § 7106(a)(2)(B).[111] The Agency states in this connection that it "has exercised its right to assign work by directing . . . specialists" to ask an applicant who refuses to provide a Social Security number to write "refused" in the "S[ocial] S[ecurity] N[umber] block" of the application form.[112] But the Agency does not explain, and it is not otherwise apparent, how the proposal affects that requirement. And the Agency fails to otherwise support its claim with an explanation of how management's right is affected. Therefore, we reject this argument as a bare assertion.[113]

Because we have found that Proposal 22 does not affect management's right to assign work, we find it unnecessary to reach the Union's argument that the proposal is also an appropriate arrangement under § 7106(b)(3).[114]

2. The Agency does not support its bargaining-obligation-dispute claim that Proposal 22 is outside the Agency's duty to bargain because the proposal has "no nexus" to any revisions to Appendix K pertinent to this case.

The Agency also asserts that its obligation to bargain does not extend to Proposal 22 because there is "no nexus" between any pertinent revisions to Appendix K and the proposal.[115] However, the Agency fails to support its assertion. The Authority's test for determining whether an agency has an obligation to bargain over a proposal that purports to address a change in conditions of employment is whether the proposal is

[102] *See id.*
[103] *See id.*
[104] Statement at 15.
[105] Resp. at 18.
[106] *See Local 1164*, 67 FLRA at 319.
[107] Pet. at 7.
[108] Record at 5.
[109] *Id.* at 6.
[110] *Id.*
[111] Statement at 17.
[112] *Id.*
[113] *See NTEU*, 60 FLRA 367, 380 (2004) (Authority declined consideration of an argument where agency presented "no explanation of how [the proposal] would affect its right to assign work"), *pet. for review granted on other grounds, decision remanded in part, & rev'd in part sub nom. NTEU v. FLRA*, 437 F.3d 1248 (D.C. Cir. 2004); *AFGE, Nat'l Council of Field Labor Locals, Local 2139*, 57 FLRA 292, 295 n.7 (2001) (Authority summarily dismissed "bare assertion" that proposal interfered with management's right to determine its mission because agency made no arguments in support of claim).
[114] Resp. at 19.
[115] Statement at 17.

"reasonably related" to the change.[116] Although the Agency provides a copy of Appendix K as revised, the Agency does not provide, and the record does not otherwise include, any documents that highlight the particular revisions to Appendix K that led to the bargaining at issue in this case. Consequently, even if the Agency's assertion is sufficient to raise a bargaining-obligation dispute, the record does not provide a sufficient basis for the Authority to resolve it. We therefore reject the Agency's claim that Proposal 22 is outside the Agency's duty to bargain.

Accordingly, the proposal is within the duty to bargain.

IX. The Agency's bargaining-obligation-dispute claims that the Union's petition should be dismissed for timeliness and "covered-by" reasons lack merit.

The Agency claims that the petition should be dismissed because the Union did not invoke bargaining, and submit proposals, within the timelines established under Article 12, Section 9 (Article 12-9) of the parties' agreement.[117] The Union opposes the Agency's claim.[118]

The record does not support the Agency's claim based on Article 12-9. Article 12-9, Subsection a (Article 12-9a) provides, in relevant part: "The Employer agrees to give . . . written notice to the Union and the opportunity to negotiate any new or change in personnel policy or practice affecting working conditions of bargaining[-]unit employees . . . . Notification may include a final date for the Union to request negotiations with respect to the proposed change."[119] Article 12-9, Subsection c (Article 12-9c) provides, in relevant part: "*Invoking The Union's Right To Bargain:* If the Union desires to negotiate with respect to a proposed change, the Union shall notify the Management official from whom the notification was received. Such notification will be in writing, prior to the deadline."[120] And Article 12-9, Subsection e (Article 12-9e) provides, in relevant part: "The Union's proposals shall be submitted within twenty . . . days after the Union invokes bargaining."[121]

Read together, by their plain terms, Articles 12-9a and c provide that the Union may invoke its right to bargain by responding to the Agency's notice of a proposed change within the time frame set in the Agency's notice.

Here, the record reflects that on March 23, 2015, an Agency representative emailed the Union president regarding the proposed changes to Appendix K.[122] This notification specified a fifteen-day deadline for the Union to request bargaining.[123] On April 7, 2015 – within fifteen days from the Agency's March 23 notice – the Union president emailed the same Agency representative, requesting bargaining on the Appendix K revisions.[124] Moreover, in an email to the Union president on May 28, 2015, the Agency representative acknowledged that the Agency "received [the Union's] request to bargain [on the revisions to] . . . Appendix K."[125] Therefore, consistent with Article 12's plain terms, the Union properly invoked bargaining within the contractual timeframes.

The record also reflects that the Union met Article 12-9e's requirement that the Union submit proposals within twenty days after the Union invokes bargaining. As discussed above, the Union invoked bargaining on April 7, 2015. On April 27, 2015 – within twenty days from the Union's request to bargain – the Union submitted proposals to the Agency that, after the parties began bargaining, led to the proposals at issue in this proceeding.[126] Therefore, also consistent with Article 12's plain terms, the Union properly submitted proposals within the contractual timeframes. Accordingly, we find that the record does not support the Agency's bargaining-obligation-dispute claim based on Article 12.

Further, regarding the Agency's "covered-by" claim, we note that to the extent that the Agency argues that the proposals are "covered by" the parties' agreement,[127] this claim is not supported by any arguments or explanations. Consequently, we reject the Agency's "covered-by" claim as a bare assertion.[128]

Finally, we reject our dissenting colleague's claim that the Union's petition as to all of the proposals should be dismissed because the proposals are not related to any changes that the Agency made to Appendix K. Not even the Agency makes this assertion (except regarding Proposal 22, which we discuss above).

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[116] *E.g.*, *POPA*, 66 FLRA 247, 253 (2011).
[117] Statement at 6.
[118] Resp. at 7-8.
[119] *Id.*, Attach. 6 (Collective-Bargaining Agreement) at 31.
[120] *Id.*
[121] *Id.*
[122] Statement, Attach. 1; *see also* Resp., Attach. 7.
[123] Statement, Attach. 1.
[124] Resp., Attach. 9 ("[The Union] requests bargaining as appropriate on this revision.").
[125] Resp., Attach. 11.
[126] Resp., Attach. 10.
[127] Statement at 6.
[128] *See, e.g.*, *AFGE, Local 1164*, 55 FLRA 999, 1000 (1999) (bare assertions that proposals were § 7106(b)(2) procedures); *NAGE, Local R1-109*, 54 FLRA 521, 528 (1998) (bare assertions that proposals were electively negotiable under § 7106(b)(1)).

But even if the issue that the dissent raises were properly before us, the dissent's claim is unfounded. The dissent bases his claim on the view that it is the Union's burden to show that all of its proposals are related to changes that the Agency made to Appendix K. The Authority's Regulations provide otherwise. Section 2424.24(a) of the Authority's Regulations[129] provides that an agency in a negotiability case must, "among other things . . . supply all arguments and authorities in support of its position."[130] As explained in § 2424.24(c)(2), an *agency* must set forth its position on any relevant matters, including a "statement of the arguments and authorities supporting any bargaining[-]obligation or negotiability claims[, including] . . . specific citation to any . . . authority that [the agency] rel[ies] on[,] and a copy of any such material."[131] Thus, had the Agency claimed that the Union's petition should be dismissed because the Union's proposals are not related to any changes that the Agency made to Appendix K, it would have been the Agency's burden to provide the Authority with "material[s]" supporting its claim.[132] But, as discussed in Section VIII.C.2., above, the record does not include any documents that highlight the particular revisions to Appendix K that led to the bargaining at issue in this case. Therefore, in addition to raising an issue not before the Authority, our dissenting colleague's claim is unfounded.

X. Order

We order the Agency to bargain, upon request, over Proposals 3, 5, and 22. We dismiss the petition as to Proposal 8.

[129] 5 C.F.R. § 2424.24(a).
[130] *Id.*
[131] *Id.* § 2424.24(c)(2).
[132] *Id.*

Member Pizzella, dissenting:

This much is clear. A federal agency – in this case, the Passport Services Directorate of the U.S. Department of State – has the absolute right to determine how its employees will execute its mission and establish internal-security practices to protect the nation.[1]

The Department of State's Foreign Affairs Manual defines how Passport Services employees will adjudicate and process passport applications. Pursuant to its absolute right to determine the best way to protect the security of the nation in the adjudication of passport applications, the Agency made changes to certain sections of Appendix K of the Foreign Affairs Manual.[2]

As required by the parties' collective-bargaining agreement, the Agency notified the Union of these changes on March 23, 2015. In response, the Union submitted twenty-two (22) proposals to the Agency and asked to bargain. According to the Union, its proposals are appropriate arrangements under 5 U.S.C. § 7106(b)(3).

In the end, after extensive communications and the withdrawal of several proposals, the Union and Agency could not agree on what to do with four proposals.

Contrary to the majority, I would dismiss the Union's petition because the Agency is under no obligation to bargain with the Union on these proposals.[3] Although each of the Union's proposals suggests changes to certain sections of the Foreign Affairs Manual, the Union does not demonstrate that the sections its proposals target were sections that were changed by the Agency on March 23, 2015. Rather, it appears that the Union simply decided that it would request a wholesale negotiation over any provision of the Foreign Affairs Manual that it did not like.

It is well-established that "an agency is obligated to bargain *only* over proposals that are *reasonably related to the proposed change* in conditions of employment. An agency, therefore, is *not required* to bargain over proposals *that go beyond* the scope of a proposed change."[4] Therefore, under our Regulations, it is incumbent upon *the Union* to properly "initiate a negotiability proceeding *and provide the agency with notice* . . . that a proposal . . . is *within* the duty to bargain."[5]

Because the record is devoid of any evidence, and the Union provided none to prove, that the Union's proposals address sections of the Foreign Affairs Manual which were *actually* changed, we have no basis to render *any* determination on these proposals, regardless of whether the Agency made such an argument and whether the record "include[s] any documents that highlight the particular revisions."[6]

Thus, despite the majority's attempt to jump over the Union's responsibilities under § 2424.22(a) and improperly shift the burden onto the Agency, our precedent does not establish that the Agency carries a responsibility to produce *before* the Union bothers to allege or show that its proposals are "reasonably related to the proposed change[s]."[7]

When I read my copy of our regulations, § 2424.22 comes *before* § 2424.24. Under the rationale employed by the majority herein, if the Union failed to "provide copies of materials that support [its] position,"[8] the majority would require the Agency to provide the missing copies in order to argue that the Union's petition was flawed.

Accordingly, I would dismiss the Union's petition because it falls outside of the Agency's obligation to bargain.

Thank you.

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[1] 5 U.S.C. § 7106(a)(1).
[2] *See* Majority at 2-3.
[3] As I noted in *AFGE, National Council 118*, 69 FLRA 183, 196 n.62 (2016) (*Council 118*) (Dissenting Opinion of Member Pizzella) and more recently in *U.S. Department of the Treasury, IRS, Ogden Service Center*, 69 FLRA 599, 605-07 (2016) (Dissenting Opinion of Member Pizzella), I welcome my legally trained colleagues' disagreement, but I would once again remind my colleagues that I am not a party to these proceedings but am an equal "Member of this body [and]***my viewpoint*** is not a simple ***claim*** which [they] may . . . summarily dismiss[]," *Council 118*, 69 FLRA at 196 n.62, as "unfounded," Majority at 17.
[4] *POPA*, 66 FLRA 247, 253 (2011) (*POPA*) (emphases added) (citations omitted).
[5] 5 C.F.R. § 2424.22(a) (emphases added).
[6] Majority at 15.
[7] *POPA*, 66 FLRA at 253.
[8] 5 C.F.R. § 2424.22(a).