

71 FLRA No. 114

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
NATIONAL COUNCIL OF EEOC LOCALS No. 216
(Union)

and

UNITED STATES
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
(Agency)

0-NG-3416

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

February 27, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting in part)

I. Statement of the Case

In this case, we resolve ground-rules disputes between the parties. This matter is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).¹ The petition for review (petition) involves four proposals from a ground-rules memorandum of understanding between the parties (MOU), and the Union seeks review of a fifth proposal that was not included in the petition. The Agency filed a statement of position (statement), to which the Union filed a response (response), and the Agency filed a reply to the response (reply).

For the reasons that follow, we find that one of the proposals is within the duty to bargain, three proposals are outside the duty to bargain, and the fifth proposal was not properly submitted for review. Accordingly, we dismiss the petition, in part, and order the Agency to bargain, upon request, over one of the proposals.

II. Background

The parties are already subject to a term collective-bargaining agreement. However, they are negotiating a ground-rules MOU that would apply to mid-term bargaining. During MOU negotiations, the Agency declared several of the Union's proposals nonnegotiable, because of which the Union filed the petition.

The Authority conducted a post-petition conference in this case and issued a written record of that conference.² Further, the parties narrowed their dispute in their subsequent filings. There are currently five proposals at issue – four of which the Union included in the petition, and one of which the Union included only in an attachment to the petition.

III. Preliminary Matter: We will not consider the proposal that appeared only in an attachment to the petition.

During the post-petition conference, the Union asserted that a proposal concerning the locations of mid-term negotiations (the locations proposal) was properly before the Authority for review, even though the proposal did not appear in the petition.³ The Union asserted that the Authority should consider the locations proposal because it appeared in an attachment to the petition, and the attachment included all of the Union's proposals that the Agency declared nonnegotiable.⁴ The Agency objected to the Union's assertions.⁵

The Authority's Regulations require that a petition for review inform the Authority of "[t]he exact wording and explanation of the meaning of the proposal" for consideration.⁶ Even though the locations proposal appeared in an attachment containing all of the proposals that the Agency declared nonnegotiable, the mere appearance of the locations

² The Agency asserts that the conference record contains inaccuracies. Statement Form at 2. First, the Agency asserts that the record omits details regarding two of the proposals. *Id.* (arguing that record fails to mention that: (1) Proposal 1 requires the Agency head to provide a written list of negotiators and that the Agency head may delegate that authority to anyone in the Agency; (2) one proposal was not included in the petition). But because those details appear in the record, we reject this assertion. *See* Post-Pet. Conf. Record (Record) at 2, 4. Second, the Agency asserts that the Union should not have been permitted to modify the wording of the proposals at the conference. We address this assertion in note 22 below.

³ Record at 4.

⁴ *Id.*; *see also* Resp. at 11-12.

⁵ Record at 4.

⁶ 5 C.F.R. § 2424.22(b)(1); *see also id.* § 2424.22(a) (purpose of petition is to "inform the Authority of the exact wording and meaning of the proposal").

¹ 5 U.S.C. § 7105(a)(2)(E).

proposal in that attachment was insufficient to inform the Authority that the Union sought a negotiability determination on the locations proposal.⁷ Further, the Union has not contended that the locations proposal resulted from modifications to, or the severance of, one of the proposals that the Union included in the petition itself.⁸ Moreover, the Agency objects to the Authority's consideration of the locations proposal.⁹ Therefore, we find that the locations proposal is not properly before us, and we do not discuss it further.

IV. Proposal 1

A. Wording

3. Authority. The negotiating team for the Employer and the Union shall be authorized in writing by the Chair of the EEOC or designee and the President of the National Council of EEOC Locals No. 216, AFGE, AFL-CIO or designee, respectively, to negotiate all aspects of any Mid-Term bargaining, and to conduct negotiations pursuant to Title V of the Civil Service Reform Act of 1978 and the applicable provisions of Title 5 of the United States Code.¹⁰

B. Meaning

The parties agree that, as relevant here, the proposal requires the Agency's chair or designee "to provide the Union, in writing, a list of who is authorized to bargain on behalf of the Agency" during mid-term negotiations.¹¹ In addition, the Agency's chair

may delegate to anyone in the Agency the authority to provide the Union with a written list of authorized negotiators.¹²

- C. Analysis and Conclusion: The proposal is outside the duty to bargain because it affects management's right to assign work.

The Agency argues that the proposal affects management's right to assign work under § 7106(a)(2)(B) of the Statute because it requires the Agency's chair to provide a written list of negotiators to the Union, or designate another employee to do so.¹³

The Authority has previously recognized that contract wording that requires a particular official to take action, or to designate another individual to take action, affects the right to assign work.¹⁴ Here, the proposal would require the Agency's chair to act or designate

⁷ We note that unions are not obligated to file negotiability petitions on proposals that are declared nonnegotiable, and unions sometimes choose to omit or withdraw certain proposals from their petitions. *E.g.*, *NAGE, Local RI-203*, 55 FLRA 1081, 1081 n.3 (1999) (union's petition initially included approximately 170 proposals that agency had declared nonnegotiable, but union later withdrew 130 of those proposals from its petition). Thus, the fact that the Agency declared certain proposals nonnegotiable did not, by itself, inform the Authority that the Union sought negotiability determinations on *all* of those proposals.

⁸ The Union also contends that the Agency would not be harmed by the Authority determining the negotiability of the locations proposal, Resp. at 11-12, but the absence of harm does not excuse the Union's failure to properly file the locations proposal in the petition. *Cf. AFGE, Local 1812*, 59 FLRA 447, 447 n.3 (2003) (absence of harm did not excuse union's failure to timely file its response).

⁹ Record at 4; Statement Form at 17; Reply Form at 12.

¹⁰ Pet. at 4; Record at 2 (parties agree that wording of Proposal 1 is accurately set forth in the petition).

¹¹ Record at 2.

¹² *Id.*

¹³ Statement Form at 6.

¹⁴ *E.g.*, *Bremerton Metal Trades Council*, 32 FLRA 643, 651 (1988) (*Bremerton*) ("The designation of a particular management official to perform specified tasks is inconsistent with management's right to assign work [And] by assigning to the Department Director the authority to designate . . . someone [else to act, the wording] interferes with management's right to assign work" (citation omitted)); *see also NAGE, Local RI-144, Fed. Union of Scientists & Eng'rs*, 38 FLRA 456, 484 (1990) (*NAGE*) (concerning Proposal 8: "It is not clear from the record whether 'Activity Head Designee' refers to a specific agency official or simply to whatever official has been designated by the Activity Head. Under either interpretation, the proposal directly interferes with management's right to assign work."), *remanded as to other proposals, U.S. Dep't of the Navy, Naval Underwater Sys. Ctr., Newport, R.I. v. FLRA*, No. 91-1045, 1991 WL 164563, at *1 (D.C. Cir. July 23, 1991) (per curiam) (unpublished).

another employee to act.¹⁵ Thus, we find that the proposal affects the right to assign work.¹⁶

The Union argues that the proposal is similar to one concerning an “[a]gency[-]head designee” that the Authority found negotiable in *IFPTE, Local No. 1 (IFPTE)*.¹⁷ However, the Authority found that the proposal in *IFPTE* was a negotiable procedure under § 7106(b)(2) of the Statute,¹⁸ and the Union has not argued that Proposal 1 is such a procedure.¹⁹ Separately, the Union contends that the proposal is merely “discretionary,”²⁰ but we reject that contention because the proposal’s plain wording *mandates* the authorization of negotiating teams in writing. In sum, Proposal 1 affects management’s right to assign work, and, because the Union has failed to argue that an exception to management’s rights applies,²¹ we find this proposal outside the duty to bargain.

V. Proposal 2

A. Wording

4. The parties may identify who performs the following and has the authority to:

- a. Bind the Union and Agency on the finality of a memorandum of understanding (MOU);
- b. Call caucuses;
- c. Reach tentative agreements;
- d. Initial, date, and sign agreed-upon sections of an MOU;
- e. Request assistance from the Federal Mediation and Conciliation Service (FMCS);
- f. Request assistance from the Federal Service Impasses Panel (FSIP);
- g. Address any scheduling or logistics modifications to the negotiation sessions;
- h. Determine their respective bargaining team members, including alternates; and,
- i. Mutually agree to the presence of observers, subject matter experts, or technical advisors during bargaining.²²

B. Meaning

The parties agree that the proposal “creates a process that the parties can use to identify who on the bargaining team has the authority to perform the duties . . . listed in the proposal.”²³ But the parties disagree on the proposal’s operation. The Union asserts that the parties’ use of the process in the proposal is “discretionary.”²⁴ Specifically, the Union argues that the proposal “provides nothing [to] be done by either

¹⁵ See *AFGE, Local 1547*, 70 FLRA 303, 304-05 (2017) (Member DuBester concurring) (“It . . . [is a] basic tenet of labor law that parties have a nearly unfettered prerogative to determine the organization of, and delegation of duties within, their respective negotiating teams.”).

¹⁶ The dissent neither addresses, nor distinguishes, previous Authority decisions recognizing that a proposal that requires an official to designate another to act affects the right to assign work. Dissent at 12-13; see *NAGE*, 38 FLRA at 484; *Bremerton*, 32 FLRA at 651. As for the dissent’s contention that, based on the Union’s statement of intended meaning, Proposal 1 does not require the Agency’s chair to act personally, Dissent at 12-13, that assertion is inconsistent with the plain wording of the proposal, which specifically names the Agency’s chair. Thus, Proposal 1 here has the same effect as Proposal 8 in *NAGE*, 38 FLRA at 484, and we do not base our negotiability determination on the dissent’s understanding of Proposal 1. See, e.g., *IFPTE, Local 3*, 51 FLRA 451, 458-59 (1995) (Authority did not rely on union’s explanation of proposal that was inconsistent with proposal’s plain wording).

¹⁷ Resp. at 5 (citing *IFPTE*, 38 FLRA 1589, 1602-03 (1991)).

¹⁸ *IFPTE*, 38 FLRA at 1602.

¹⁹ See Resp. at 4-6 (Union’s arguments concerning the negotiability of Proposal 1).

²⁰ *Id.* at 4.

²¹ When a union does not argue that a proposal that affects a management right under § 7106(a)(2) constitutes an exception to management rights under § 7106(b) or enforces an applicable law, the Authority finds that the proposal is outside the duty to bargain. *AFGE, Local 1164*, 65 FLRA 924, 926 (2011); *NLRB Union*, 62 FLRA 397, 402-03 (2008).

²² This is the wording of Proposal 2 as modified at the post-petition conference. Record at 2. Regarding Proposals 2 and 4, the Agency argues that the Union modified their wording at the post-petition conference in a manner that prejudiced the Agency. Statement Form at 9. Because the Agency had opportunities to fully brief the Authority on the negotiability of the modified wording, we find that the Agency has not suffered prejudice. See *AFGE, Local 3928*, 66 FLRA 175, 176 (2011) (*Local 3928*). The Agency also argues that the Union acted contrary to § 2424.23(b)(1) of the Authority’s Regulations by modifying some proposals in ways that altered their meaning. Statement Form at 9. But the Authority has interpreted § 2424.23 as recognizing a “union’s *right* to modify the wording of disputed proposals at post-petition conferences,” even if the modifications affect a proposal’s meaning. *Local 3928*, 66 FLRA at 176 (emphasis added). And that practice is consistent with § 2424.23(b)(3) of the Regulations, under which the parties may “*resolve . . . [n]egotiability[-]dispute objections*” during the conference. 5 C.F.R. § 2424.23(b)(3) (emphasis added). Thus, we reject the argument that the Union’s modifications violated the Regulations.

²³ Record at 2.

²⁴ *Id.*

party.”²⁵ In contrast, the Agency asserts that “the proposal will impermissibly require the Agency to assign the specific duties listed in the proposal to an Agency representative.”²⁶

Where the parties disagree over a proposal’s meaning, the Authority looks first to the proposal’s plain wording and the union’s statement of intent.²⁷ If the union’s explanation of the proposal’s meaning comports with the proposal’s plain wording, then the Authority adopts that explanation for the purposes of determining what the proposal means and, based on that meaning, deciding whether the proposal is within the duty to bargain.²⁸

Here, the Union asserts that the Agency need not follow the process in the proposal, and that the proposal requires “*nothing*” of either party.²⁹ Further, the proposal’s use of the word “may” is consistent with the Union’s statement of intent.³⁰ Therefore, we adopt the Union’s statement of the meaning of the proposal to determine its negotiability.

C. Analysis and Conclusion: Proposal 2 is outside the duty to bargain.

The U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has held that “a proposal that purports to have no meaning whatsoever [cannot] be within the scope of the statutory duty to bargain.”³¹ Here, because we have adopted the Union’s statement of meaning, even if the parties agreed to the proposal, it would require “nothing” from either party.³² Consequently, consistent with the court’s reasoning, we find that Proposal 2 is outside the duty to bargain because it is effectively meaningless.

²⁵ Resp. at 6.

²⁶ Record at 2.

²⁷ *NTEU*, 70 FLRA 691, 692 (2018) (citing *NAGE, Local R-109*, 66 FLRA 278, 279 (2011); *NAGE, Local R1-100*, 61 FLRA 480, 480 (2006)).

²⁸ *Id.*

²⁹ Resp. at 6 (emphasis added).

³⁰ See, e.g., *POPA*, 56 FLRA 69, 92-93 (2000) (where proposal stated that agency “may permit unit members to use the paper files” under certain conditions, Authority found that union’s explanation that agency “‘may, or may not’ permit” the use of paper files was consistent with proposal’s plain wording).

³¹ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779, 787 (D.C. Cir. 2013).

³² Resp. at 6.

VI. Proposal 3

A. Wording

6. Official Time and Scheduling of Union Team Members.

....

e. Travel for negotiators will be in accordance with Article 7.05, Section (c) of the Collective Bargaining Agreement (“CBA”) during negotiations as well as anytime the Parties are participating in mediation sessions under the auspices of [the Federal Mediation and Conciliation Service (FMCS)] or sessions directed by [the Federal Service Impasses Panel (FSIP)].³³

B. Meaning

As relevant here, the parties agree that the proposal requires the Agency to pay travel costs under Section 7.05 of the parties’ collective-bargaining agreement in connection with proceedings before the FMCS and FSIP.³⁴

C. Analysis and Conclusion: Proposal 3 is covered by Article 7 of the parties’ agreement.

The Agency claims that the proposal is outside the duty to bargain because the proposal is “covered by” Article 7 of the parties’ agreement,³⁵ and is contrary to various government-wide regulations.³⁶ 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.”³⁷ Where a proposal raises *both* a

³³ For reasons that are unclear, the parties agreed at the post-petition conference that this wording – which the Union labeled as § 6.e. in its proposed MOU – was set forth in the petition. Record at 3 & n.6. In fact, the petition set forth the wording of § 6.b. from the proposed MOU. Pet. at 4. However, all of the parties’ filings after the conference address the negotiability of § 6.e. See Statement Br. at 10 (quoting § 6.e.); Resp. at 7 (same); Reply Form at 9 (discussing § 6.e.). In keeping with the parties’ agreement at the conference and their filings, we will address the negotiability of § 6.e. But, because both § 6.b. and § 6.e. concern proceedings before the FMCS and FSIP, we note that the same covered-by analysis would apply to § 6.b.

³⁴ Record at 3.

³⁵ Statement Form at 11.

³⁶ *Id.* at 11-12.

³⁷ *NFFE, IAMAW, Fed. Dist. 1, Local 1998*, 69 FLRA 626, 627 & n.16 (2016) (citing 5 C.F.R. § 2424.2(c)).

bargaining-obligation dispute and a negotiability dispute, the Authority may resolve both disputes,³⁸ or the Authority may resolve only the bargaining-obligation dispute if doing so establishes that the proposal is outside the duty to bargain.³⁹ For the reasons below, resolving the Agency's covered-by objection fully disposes of Proposal 3, so we need not address the Agency's remaining arguments.⁴⁰

The covered-by doctrine has two prongs,⁴¹ but here we discuss only the first. Under the first prong, the Authority examines whether the subject matter of the change to conditions of employment is expressly contained in the agreement.⁴² The Authority does not require an exact congruence of language.⁴³ Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute.⁴⁴

Article 7, Section 7.05 concerns the procedures for local and national negotiations between the parties.⁴⁵ Subsection (c) states that, "[i]f a negotiating session is requested and such a meeting is scheduled, the EMPLOYER shall pay the travel and per diem of one (1) UNION negotiator for national negotiations."⁴⁶ Further, subsection (e) explains that "[i]f, after discussion of the proposals, agreement cannot be reached, either Party may inform the other Party in writing that it is initiating the statutory procedures provided in" § 7119 of the Statute and its implementing regulations⁴⁷ – which govern the resolution of negotiation impasses before the FMCS and FSIP.

Considering the wording of Section 7.05 above, we find that the parties have bargained over when the

Agency will pay for travel and per diem in connection with negotiations, and how the parties will bring their negotiation impasses to the FMCS or FSIP for assistance. Indeed, Proposal 3 references and incorporates Section 7.05 of the existing agreement, and the Union asserts that the proposal "exten[ds]" the reach of Section 7.05.⁴⁸ Both of these features show that Proposal 3 concerns a matter that is expressly contained in the agreement. The Union argues that there is "no evidence [that] the parties ever contemplated travel and per diem . . . during FMCS and FSIP proceedings" when negotiating Section 7.05,⁴⁹ but the D.C. Circuit has held that "whether the parties intended a particular outcome does not resolve the 'covered-by' analysis."⁵⁰ Thus, the Union's argument fails to overcome the plain wording of Section 7.05(c) and (e) of the agreement, which indicates that Proposal 3's subject matter is covered by Article 7. Accordingly, Proposal 3 is outside the duty to bargain.

VII. Proposal 4

A. Wording

7. Procedure:

. . . .

b. No transcript or recording device of any kind shall be made of the negotiation sessions. However, the Union and the Employer may take their own notes.⁵¹

c. Only the authorized bargaining team member(s), or his or her designee, for each team, is authorized to commit his/her team to a course of action. However, regular bargaining team members may participate fully through their respective authorized bargaining team member(s). Neither the Union nor the Employer may cause any unreasonable delays.⁵²

d. Either party may call a caucus during negotiations without the consent of the other.⁵³

³⁸ *Id.* at 627 & n.17 (citing 5 C.F.R. § 2424.30(b)(2)).

³⁹ *See, e.g., NATCA*, 66 FLRA 213, 217-18 & n.6 (2011) (citing *NATCA, AFL-CIO*, 62 FLRA 174, 179 n.7 (2007)) (where agency alleged that proposal was unlawful and covered by parties' agreement, Authority found proposal covered by agreement and dismissed petition as to that proposal without evaluating the proposal's legality).

⁴⁰ *See id.*

⁴¹ *NTEU*, 70 FLRA 941, 942 (2018) (*NTEU*) (Member DuBester dissenting) (citing *U.S. Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000) (to determine whether a matter is covered by an agreement, the Authority examines whether the matter is (1) expressly contained in the agreement, or (2) inseparably bound up with a subject expressly covered by the agreement)).

⁴² *Id.*

⁴³ *Fed. BOP v. FLRA*, 654 F.3d 91, 94-95 (D.C. Cir. 2011).

⁴⁴ *NTEU*, 70 FLRA at 942 (citing *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1018 (1993)).

⁴⁵ *See* Statement, Attach., Collective-Bargaining Agreement (CBA) at 10 (Art. 7, § 7.05).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Resp. at 7.

⁴⁹ *Id.*

⁵⁰ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 674 (D.C. Cir. 2017).

⁵¹ Pet. at 4 (wording of § 7.b.); Record at 3 (parties agree that wording of part b. of Proposal 4 is accurately set forth in the petition).

⁵² This is the wording of part c. of Proposal 4 as modified at the post-petition conference. Record at 3.

⁵³ This is the wording of part d. of Proposal 4 as modified at the post-petition conference. *Id.* at 3-4.

B. Severance

The Union requests to sever parts b., c., and d. of Proposal 4 into three separate proposals. The Agency opposes the Union's severance request because the Agency argues that the parts of Proposal 4 "should not be separated from the 'Procedures' section" of the MOU.⁵⁴ But we find this objection unpersuasive because the Authority's determination of the negotiability of any part of Proposal 4 will not require the parties to exclude that part from the "Procedures" section of their MOU. Further, as the Union explained at the conference how the parts of Proposal 4 would operate independently,⁵⁵ we grant the Union's severance request.⁵⁶ All references to "Proposal 4" below refer only to part b.

C. Meaning

The parties agree that Proposal 4 prevents either party from recording negotiating sessions, but it also permits the parties to take their own notes at those sessions.⁵⁷ However, the parties are not required to take their own notes.⁵⁸ Moreover, the Union asserts that the word "transcript" "means a verbatim accounting" of a negotiating session,⁵⁹ and because the Agency does not dispute that assertion, we adopt that definition of "transcript" for purposes of determining the proposal's negotiability.⁶⁰

D. Analysis and Conclusion: Proposal 4 is within the duty to bargain.

The Agency argues that Proposal 4 affects management's rights to assign work under

§ 7106(a)(2)(B)⁶¹ and to determine the methods and means of performing work under § 7106(b)(1) of the Statute.⁶² Moreover, the Agency asserts that a party's decision about whether to "refuse or allow the recording or transcription of negotiations" is a permissive subject of bargaining, over which the Agency chooses not to negotiate.⁶³

In *SPORT Air Traffic Controllers Organization (SATCO)*, the Authority recognized that parties have the "right to condition continuation of the negotiations on the absence of a recording device" or official reporter⁶⁴ because producing a transcript of negotiations tends to inhibit free and open discussion.⁶⁵ Therefore, the Authority held that the decision to allow recording devices or official reporters during negotiating sessions is a permissive subject of bargaining.⁶⁶

In a later case – *AFGE, Local 12* – an agency asked the Authority to find that, under *SATCO*, a proposal stating that "[t]here will be no official record of any negotiation session"⁶⁷ concerned a permissive subject of bargaining.⁶⁸ Instead, the Authority in *AFGE, Local 12* held that a proposal that prohibited making an official record of a negotiation session, but allowed the parties to take notes, concerned a mandatory subject of bargaining because such a proposal would not tend to inhibit free and open discussion.⁶⁹ The Agency has not asked us to reconsider *AFGE, Local 12*, so we apply it to Proposal 4.

Turning to the Agency's arguments, we reject the contention that Proposal 4 infringes upon management's right to assign work because the proposal merely requires that the Agency avoid violating Authority precedent,⁷⁰ according to which either party may insist on the absence of recording devices or official

⁵⁴ Statement Br. at 7.

⁵⁵ Record at 3-4; see 5 C.F.R. §§ 2424.22(c) (when a union requests severance in its petition for review, the union "must support its request with an explanation of how each severed portion of the proposal or provision may stand alone, and how such severed portion would operate"), 2424.25(d) (same requirements for severance requests in union's response).

⁵⁶ The Union also requests to withdraw part c. of Proposal 4 from the petition, Resp. at 11, and we grant that request. In addition, the Agency withdraws its allegation of nonnegotiability as to part d. of Proposal 4. Statement Form at 4. As a result, only part b. of Proposal 4 remains in dispute.

⁵⁷ Record at 3.

⁵⁸ *Id.*

⁵⁹ Resp. at 10.

⁶⁰ Our interpretation of the meaning of this proposal, unless modified by the parties, would apply in other disputes, such as arbitration proceedings, where the construction of the proposal is at issue. See *Prof'l Airways Sys. Specialists*, 64 FLRA 492, 494 n.6 (2010) (citing *Ass'n of Civilian Technicians, Evergreen & Rainier Chapters*, 57 FLRA 475, 477 n.11 (2001)).

⁶¹ Statement Form at 14 (arguing "Proposal 4 would impermissibly prohibit the Agency from assigning the task of transcribing negotiations" to an employee).

⁶² *Id.* at 13 (arguing Proposal 4 infringes on management's right to determine the methods of performing work by prohibiting a recording device while allowing note-taking, which, according to the Agency, "is a method of transcribing the negotiation").

⁶³ *Id.* at 15 (citing *SPORT Air Traffic Controllers Org. (SATCO)*, 52 FLRA 339, 345-46 (1996)).

⁶⁴ 52 FLRA at 349 (emphasis added).

⁶⁵ *Id.* at 351.

⁶⁶ *Id.*

⁶⁷ 61 FLRA 209, 224 (2005).

⁶⁸ *Id.* at 216-17.

⁶⁹ *Id.* at 217.

⁷⁰ Chairman Kiko notes that the Authority's decision in *SATCO* rested on a negative policy-based assessment of recording bargaining sessions, and that assessment is open to question. But as neither party has argued in favor of reconsidering *SATCO*, Chairman Kiko does not see a reason to reevaluate that previous policy assessment here.

reporters in bargaining sessions.⁷¹ In addition, we reject the Agency's argument that Proposal 4 affects management's right to determine the methods and means of performing work under § 7106(b)(1) because the Agency has not attempted to satisfy the standard to show an effect on that right. Specifically, the Agency has not shown that: (1) there is a direct and integral relationship between the method or means that 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 Agency adopted the method or means.⁷² Moreover, based on *AFGE, Local 12*, we disagree with the Agency's contention that Proposal 4's reference to recording devices renders the proposal permissive rather than mandatory. For these reasons, we find that Proposal 4 is within the duty to bargain.⁷³

VIII. Order

We dismiss the petition for review as to Proposals 1, 2, and 3. The Agency shall, upon request, or as otherwise agreed to by the parties, negotiate with the Union over Proposal 4.⁷⁴

Member DuBester, dissenting in part:

While I agree with Parts III and VII of the majority's decision, I disagree with the majority's determination in Parts IV and V that Proposals 1 and 2 are nonnegotiable. I also disagree with Part VI of the decision, which finds that Proposal 3 is "covered by" Article 7 of the parties' agreement.¹

Proposal 1 requires that the "negotiating team for the Employer and the Union shall be authorized in writing by the Chair of the [Equal Employment Opportunity Commission (EEOC)] or designee and the President of the [Union] or designee, respectively."² The majority concludes that Proposal 1 offends the Agency's right to assign work because it would "require the Agency's chair to act or designate another employee to act."³ This conclusion misinterprets the Union's proposal and – more importantly – disregards basic statutory principles governing the parties' mutual obligation to bargain in good faith.

At the post-petition conference, the Union clarified that the term "designee" in the proposal "means that the Agency has the discretion to delegate [the] authority [to authorize the negotiating team in writing] to anyone in the Agency," and the "Agency agreed with the Union's explanation of the meaning and operation" of the proposal.⁴ In other words, if adopted, the proposal would not require the Agency's Chair to do anything, so long as the Agency had delegated this authority to another official.

The majority contends that this interpretation of the proposal avoids the Agency's argument regarding the parties' agreed-upon meaning of the proposal. To support this contention, the majority references the Agency's statement of position,⁵ in which it argued that the proposal would "preclude the Agency from exercising discretion to require an Agency official, other than the EEOC Chair, to identify the Agency's negotiation team and to authorize bargaining."⁶

But the Union clarified in its response to the Agency's statement of position that, although the proposal refers to the "EEOC [Chair] or designee," that wording is intended to be "discretionary" and refer to the Agency generally by requiring the "parties" to take

⁷¹ See, e.g., *AFGE, AFL-CIO, Int'l Council of U.S. Marshals Serv. Locals*, 11 FLRA 672, 677 (1983) ("[Proposals] requiring management to exercise its statutory rights under [§ 7106(a)(2)] in compliance with law are within the duty to bargain.").

⁷² E.g., *NAIL, Local 7*, 64 FLRA 1194, 1196 (2010).

⁷³ Using the numbering from the post-petition-conference report, Part III. above addresses "Proposal 5," and the Union has withdrawn "Proposal 6," Resp. at 13.

⁷⁴ In finding that Proposal 4 is within the duty to bargain, we make no judgment as to its merits. Further, we note that requiring negotiations over a proposal does not require agreement to the proposal. *NTEU*, 64 FLRA 395, 397 n.5 (2010).

¹ Majority at 7-8.

² Pet. at 3; see also Post-Pet. Conf. Record (Record) at 2.

³ Majority at 4 (concluding that the proposal improperly interferes with the Agency's right to assign work because it "requires a particular official to take action").

⁴ Record at 2.

⁵ Majority at 3.

⁶ Agency's Statement of Position (SOP) at 6.

action.⁷ Thus, according to the Union, the proposal is not intended to “dictate any duties to the Agency personnel” but rather to “ask the Agency to inform [the Union] of whom they have delegated specific authority to[.]” regarding the Agency’s bargaining team.⁸

The Authority has held that where the parties disagree over the meaning of a proposal, it looks first to the proposal’s wording and the *union’s* statement of intent.⁹ If the union’s explanation of the proposal’s meaning comports with the wording, then that explanation is adopted for the purpose of construing what the proposal means and, based on that meaning, deciding whether the proposal is within the duty to bargain.¹⁰ Applying these principles, I would find that the proposal allows the Agency to delegate its responsibility for authorizing its negotiating team to anyone it deems appropriate within the Agency, and therefore does not affect the Agency’s right to assign work.

But more fundamentally, the proposal imposes no obligations upon the Agency beyond those already required by the Statute. The Authority has consistently found that “proposals that require an agency to exercise its management’s rights in accordance with applicable laws do not interfere with such rights and are within the duty to bargain.”¹¹ And under § 7114(b)(2) of the Statute, “the duty of an agency to negotiate in good faith includes the obligation ‘to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment.’”¹²

Proposal 1 does nothing more than give effect to this statutory obligation by requiring the Agency to provide the Union written notice that its negotiating team is authorized to bargain on its behalf. And “the mere fact that a proposal or provision entails some kind of agency action does not necessarily implicate an agency’s right to assign work.”¹³ Indeed, a conclusion to the contrary “would completely nullify the obligation to bargain.”¹⁴ Accordingly, I would conclude that the proposal does not affect the Agency’s right to assign work, and would find that it falls within the parties’ duty to bargain.

I also disagree with the majority’s conclusion in Part V of the decision that Proposal 2 is outside the duty

to bargain. Proposal 2 provides that the parties “may identify” the individuals on their bargaining teams who are authorized to perform certain functions during the bargaining process. The majority’s conclusion that this proposal is outside the duty to bargain “because it is effectively meaningless”¹⁵ is flawed for several reasons.

First, it is important to note that the majority’s conclusion is based upon an argument that was not even raised by the Agency. The Agency has consistently asserted in its filings with the Authority that the proposal “interferes with management[.]’s right to assign work” because it “excessively limits the Agency’s discretion to determine the specific duties assigned to the management bargaining team.”¹⁶ But it has never argued that the proposal is outside the duty to bargain because it is “meaningless,” thus depriving the Union the opportunity to address this claim. The majority should not dismiss the Union’s petition on these grounds for this reason alone.

And even if the Agency had raised this argument, it provides no basis for finding that the proposal is outside the duty to bargain. The majority’s conclusion relies upon a decision by the U.S. Court of Appeals for the District of Columbia in which the court questioned whether a proposal “that purports to have no meaning whatsoever” could be within the duty to bargain.¹⁷ But the majority’s reliance on this decision is misplaced.

The court’s question was premised upon the Authority’s assertion to the court that the proposal at issue “would have no meaning” if it were included in a collective-bargaining agreement.¹⁸ Looking beyond whether the Authority should be deciding for the parties whether a proposal has meaning to them, it is simply not true that Proposal 2 has “no meaning.” Indeed, as the majority acknowledges, the parties agree that the proposal would “create[] a process that the parties can

⁷ Resp. at 3-4; *see also id.* at 6.

⁸ *Id.* at 2.

⁹ *NAGE, Local R-109*, 66 FLRA 278, 278 (2011).

¹⁰ *Id.* (citing *NAGE, Local RI-100*, 61 FLRA 480, 480 (2006)).

¹¹ *NLRB Union*, 62 FLRA 397, 402 (2008).

¹² *AFGE, Local 3656*, 4 FLRA 702, 703 (1980) (quoting 5 U.S.C. § 7114(b)(2)).

¹³ *NTEU*, 64 FLRA 443, 447 (2010) (Member Beck dissenting).

¹⁴ *POPA*, 41 FLRA 795, 822-23 (1991).

¹⁵ Majority at 6.

¹⁶ Reply Form at 7; *see also* SOP Br. at 6 (arguing that the proposal “impermissibly affects management’s right to assign work” because it “effectively dictates” the organization and duties of the Agency’s bargaining team) (internal citation omitted). The Union modified the proposal at the post-petition conference to clarify that it was discretionary. However, as the majority’s decision finds, the Union was entitled to modify the proposal in this manner, and the Agency clarified that the “modified language does not change the intended function or impact of this proposal.” SOP Br. at 7. The Agency did not make any additional arguments that uniquely concern the proposal’s wording as modified at the conference.

¹⁷ *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779, 787 (D.C. Cir. 2013).

¹⁸ *Id.*

use to identify who on the bargaining team has the authority to perform the duties . . . listed in the proposal.”¹⁹ It is puzzling that the majority would find “no meaning” to a proposal that is clearly designed to assist the parties in conducting negotiations in an effective and efficient manner.

And to the extent that the majority finds that the proposal is outside the duty to bargain because it does not *require* the Agency to abide by its procedures, this conclusion is entirely unfounded. The Authority has never held that a proposal is outside the duty to bargain because it does not require an agency to take a particular action. To the contrary, the Authority has concluded that proposals similar to Proposal 2 are within the duty to bargain *precisely because* they preserve the agency’s discretion with respect to actions described in the proposal.²⁰ I would therefore find that this proposal is within the duty to bargain.

Finally, I disagree with Part VI of the decision, which finds that Proposal 3 is “covered by Article 7” of the parties’ agreement,²¹ and consequently is outside the Agency’s duty to bargain. Proposal 3 would require the Agency to pay the travel costs for the Union’s negotiators in accordance with Section 7.05 of the parties’ agreement during proceedings before the Federal Mediation and Conciliation Service (FMCS) or the Federal Service Impasses Panel (FSIP or the Panel). Section 7.05(c) of the parties’ agreement provides that the Agency shall pay the travel and per diem costs of one Union negotiator for national negotiation sessions, and Section 7.05(e) provides that, where agreement on proposals cannot be reached, “either Party may inform the other Party in writing that it is initiating the statutory procedures” governing negotiating impasses.²²

The majority finds that, because Proposal 3 “references and incorporates Section 7.05 of the existing agreement” and the Union “asserts that the proposal ‘exten[ds]’ the reach of Section 7.05 . . . [the proposal] concerns a matter that is expressly contained in the agreement.”²³ But Section 7.05 of the agreement is silent regarding whether the Agency will pay travel costs associated with mediation or impasse proceedings once a party has provided notice that such proceedings have been initiated. Indeed, by its plain wording, Section 7.05 only obligates the Agency to pay travel costs for negotiation sessions scheduled by the parties. It neither obligates the Agency to pay for travel associated with proceedings directed by either an FMCS mediator or the Panel, nor even references this subject matter.

Moreover, the Union’s explanation that the proposal is “an extension of the existing [bargaining agreement] to include proceedings before the FMCS and FSIP”²⁴ does not, as asserted by the majority, “show that Proposal 3 concerns a matter that is expressly contained in the agreement.”²⁵ To the contrary, the Union’s assertion is consistent with a finding that the parties have not previously addressed the payment of travel costs related to these proceedings.

Accordingly, I disagree with the majority’s conclusion that Proposal 3 is “covered by” the parties’ agreement, and I would address the Agency’s remaining arguments regarding this proposal.

¹⁹ Majority at 5 (quoting Record at 2).

²⁰ See *Laurel Bay Teachers Ass’n, OEA/NEA*, 49 FLRA 679, 681 (1994) (proposal providing that the agency “may” permit a monthly union meeting is negotiable because it preserves the agency’s discretion over the matter and therefore “in no way limits management’s ability to assign duties”); see also *Ass’n of Civilian Technicians, Evergreen & Rainer Chapters*, 57 FLRA 475, 478 (2001) (proposal prescribing selective factors used in determining candidate qualifications is within duty to bargain because it does “not prohibit the [a]gency from using other crediting plans” and “preserves management’s discretion” to establish a crediting plan); *POPA*, 56 FLRA 69, 92-93 (2000) (proposal providing that the agency “may permit” examiners to use paper files is within duty to bargain because it “neither requires the [a]gency to continue to maintain paper files nor requires the [a]gency to permit examiners to use those files”).

²¹ Majority at 7-8.

²² Resp., Attach. 2 at 10.

²³ Majority at 8.

²⁴ Resp. at 7.

²⁵ Majority at 8.