71 FLRA No. 232

PATENT OFFICE
PROFESSIONAL ASSOCIATION
(Union)

and

UNITED STATES
PATENT AND TRADEMARK OFFICE
ALEXANDRIA, VIRGINIA
(Agency)

0-NG-3458

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DECISION AND ORDER
ON NEGOTIABILITY ISSUE

December 23, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

With this case, we remind the federal labor-relations community that executive orders issued pursuant to statutory authority are afforded the force and effect of law.[1]

This case involves ground-rules disputes between the parties over proposals concerning matters addressed in Executive Order (EO) 13836[2] and EO 13837.[3] 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 (Statute).[4] The petition for review (petition) involves seven proposals from a ground-rules memorandum of understanding (MOU) between the parties.

For the reasons that follow, we find that all seven proposals are outside the duty to bargain. Accordingly, we dismiss the petition.

II. Background

During term bargaining, the parties exchanged several proposals regarding ground rules for negotiation of a successor collective-bargaining agreement. At issue in the petition were ten proposals concerning official time, travel costs and per diem, and bargaining over permissive subjects. The Union requested a written declaration of nonnegotiability from the Agency over the proposals, and, when the Agency did not respond,[5] the Union filed the instant petition with the Authority.

Thereafter, an Authority representative conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority's Regulations,[6] at which the Agency advised that it did not challenge the negotiability of proposals 5, 8, and 10.[7] Accordingly, the Union agreed to withdraw proposals 5, 8, and 10.[8]

The Agency subsequently filed a statement of position (statement), the Union filed a response to the statement (response), and the Agency filed a reply to the response (reply).

III. Preliminary Matters

a. We deny the Union's severance request.

The Union asked the Authority to sever Proposal 6 into two parts so their negotiability could be considered separately.[9] The Agency did not object.[10] "'Severance means the division of a proposal . . . into separate parts having independent meaning, for the purpose of determining whether any of the separate parts is within the duty to bargain.'"[11] "'In effect, severance results in the creation of separate proposals[,] . . . [and] applies when some parts of [a] proposal . . . are determined to be

[1] *NFFE, Local 15*, 30 FLRA 1046, 1070 (1988) (*Local 15*).
[2] Exec. Order No. 13836, *Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining*, 83 Fed. Reg. 25,329 (May 25, 2018) (EO 13836).
[3] Exec. Order No. 13837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, 83 Fed. Reg. 25,335 (May 25, 2018) (EO 13837).
[4] 5 U.S.C. § 7105(a)(2)(E).
[5] Pursuant to 5 C.F.R. § 2424.21(b), the Union does not have a time limit for filing the negotiability appeal because the Agency failed to respond to the request for a written allegation of non-negotiability within ten days.
[6] 5 C.F.R. § 2424.23.
[7] Post-Pet. Conference Record (Record) at 1; *see also* Statement Br. at 2, 19.
[8] Record at 1.
[9] Pet. at 13; Record at 2-3.
[10] Record at 3.
[11] *NTEU*, 70 FLRA 701, 705 (2018) (*NTEU*), (quoting 5 C.F.R. § 2424.2(h)), *pet. for review denied. NTEU v. FLRA*, 943 F.3d 486 (2019).

outside the duty to bargain.'"[12] The Union's request for severance would sever Proposal 6 as follows:

> Proposal 6(a): The agency agrees that it will bargain in good faith over proposals that constitute permissive subjects of negotiation under 5 U.S.C. section 7106(b)(1).[13]
>
> Proposal 6(b): The agency agrees that it will not object to the [Federal Service Impasses Panel (FSIP)] subsequently exercising jurisdiction of such proposals should impasse be invoked.[14]

The Authority's Regulations allow for severance, but the exclusive representative must support its request with an explanation of how each severed portion of the proposal may stand alone and operate.[15] The Authority has denied a severance request when the severed components cannot operate, as originally intended, independently.[16] Here, although the Union does provide an explanation,[17] we find that Proposal 6(b) – the second sentence of the original proposal – cannot operate as originally intended without the context provided by Proposal 6(a) – the first sentence of the original proposal. Specifically, the phrase "such proposals" of 6(b) is without meaning if it is severed from the 6(a), because 6(a) provides the definition of "such proposals" – "proposals that constitute permissive subjects of negotiation under 5 U.S.C. [§] 7106(b)(1)."[18] Because Proposal 6 would not be able to operate as originally intended if it was severed, we deny the Union's severance request.

b. The EOs are accorded the force and effect of law.

At the heart of the Union's arguments in favor of negotiability are the assertions that the EOs[19] do not have the force and effect of law because the President does not have the authority to regulate labor relations within the federal government,[20] and the EOs conflict with the Statute.[21] However, these assertions are incorrect.[22] The EOs were issued pursuant to the President's statutory authority to regulate the Executive Branch.[23] The Authority has held that executive orders issued pursuant to statutory authority are to be accorded the force and effect of law.[24] Because the EOs were issued pursuant to a statutory authority, they have the force and effect of law.

[12] *Id.*
[13] Pet. at 12.
[14] *Id.*
[15] 5 C.F.R. § 2424.22(c). Member Abbott reiterates, as he has pointed out before, that severance is not called for in the Statute. And, as he as noted before, the proposing party controls the wording and scope of its proposal. Whether or not sections or sentences should be evaluated as a whole or independently is a decision for the proposing party to make when the proposal is made, not after. Thus, the language should be evaluated – whether it is negotiable or not negotiable – exactly as it is presented. Member Abbott hopes that the Authority's soon to be published negotiability regulations will not permit this procedure to continue. Instead, he hopes that the regulations will hold parties to the language that they proposed.
[16] *NTEU*, 70 FLRA at 705 (denying a severance request where the proposal's last sentence cannot operate, as originally intended, independent of the proposal's first sentence); *AFGE, Local 2058*, 68 FLRA 676, 680 (2015) (Member Pizzella dissenting in part) (granting the severance request because the severed components of the provision could operate independently).
[17] Pet. at 13.
[18] *Id.* at 12.
[19] EO 13836, 83 Fed. Reg. 25,329; EO 13837, 83 Fed. Reg. 25,335.
[20] Response at 2-14.
[21] *Id.* at 14-18.
[22] The Union cites *Karahalios v. NFFE, Local 1263*, 489 U.S. 527, 535 n.3 (1989) (*Karahalios*); *Kuhn v. National Ass'n of Letter Carriers, Branch 5*, 570 F.2d 757, 760 (8th Cir. 1978) (*Kuhn*); *Local 1498, AFGE v. AFGE, AFL/CIO*, 522 F.2d 486, 491 (3d Cir. 1975) (*Local 1498*), and *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456 (D.C. Cir. 1965) (*Manhattan-Bronx*), in support of its argument that the EOs were not issued pursuant to statutory authority. *Karahalios* did not make a finding about the statutory authority of EOs, but merely stated that "such orders were not legislative, [and] courts generally refused judicial enforcement." *Karahalios*, 489 U.S. 535 n.3. *Kuhn* did not discuss how EOs were handled under the Statute, but instead dealt with using an EO to establish subject matter jurisdiction. *Kuhn*, 570 F.2d at 760. Similarly, *Local 1498*, dealt with subject matter jurisdiction, finding that an EO did not constitute a "law of the United States within the meaning of [28 U.S.C.] § 1331." *Local 1498*, 522 F.2d at 491. Further, in citing *Manhattan-Bronx*, the Union fails to provide the context, which was a question of subject matter jurisdiction. *Manhattan-Bronx*, 350 F.2d at 456-57 ("That action does not seem to conflict with the Executive Order. But, even if it did, it does not follow that appellants have a right of such nature as to warrant intervention by an equity court."). As such, the cases cited by the Union are not persuasive in this situation.
[23] EO 13836, 83 Fed. Reg. at 25,329 ("By the authority vested in me as President by the Constitution and the laws of the United States of America"); EO 13837, 83 Fed. Reg. at 25,335 ("By the authority vested in me as President by the Constitution and the laws of the United States of America, including . . . section 7301 of title 5"). 5 U.S.C. § 7301 provides that "[t]he President may prescribe regulations for the conduct of employees in the executive branch."
[24] *Local 15*, 30 FLRA at 1070. *See also Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 n.5 (1974) (finding that an executive order regulating labor relations was issued pursuant to the statutory authorization in 5 U.S.C. § 7301).

The provisions of the EOs relied upon by the Agency here do not conflict with the Statute. The Union argues that the EOs conflict with the duty to bargain in good faith provided by § 7117 of the Statute.[25] While the EOs do dictate how executive branch agencies should bargain, they do not explicitly conflict with any provision of the Statute.[26] As relevant here, EO 13836 provides that "agencies should secure [collective-bargaining agreements] that: . . . do not cover matters that are not, *by law*, subject to bargaining," and that agencies "may not negotiate over the substance of the subjects set forth in [§] 7106(b)(1)."[27] This is consistent with § 7106(b)(1) of the Statute which provides "[n]othing in this section shall preclude any agency and any labor organization from negotiating – *at the election of the agency*, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work."[28]

EO 13837 requires agencies to ensure that "taxpayer-funded union time is used efficiently and authorized in amounts that are *reasonable, necessary, and in the public interest*."[29] EO 13837 also requires that employees only spend one-quarter of their paid time performing non-agency business, which includes taxpayer-funded union time, with any additional time spent counting towards the one-quarter cap for the next fiscal year.[30] The President's direction that federal "employees shall spend at least three-quarters of their paid time . . . performing agency business" or attending agency-required training[31] falls clearly within his statutory discretion to "prescribe regulations for the conduct of employees in the executive branch" under 5 U.S.C. § 7301.[32] This is also consistent with § 7131 of the Statute, which provides that official time shall be granted "in any amount *the agency and the exclusive representative* involved *agree* to be reasonable, necessary, and in the public interest."[33]

Finally, EO 13837 provides that "employees may not be permitted reimbursement for expenses incurred performing non-agency business, unless required by law or regulation," and "employees may not use taxpayer-funded union time[34] to prepare or pursue grievances brought against the agency . . . except where such use is otherwise authorized by law or regulation."[35] The Statute does not contain any language that contradicts either of these provisions.[36] As such, the EOs

[25] Response at 14-18.

[26] *Compare* EO 13836, 83 Fed. Reg. at 25,331-32 *with* 5 U.S.C. § 7106(b)(1). *Compare* EO 13837, 83 Fed. Reg. at 25,335-37 *with* 5 U.S.C. § 7131.

[27] EO 13836, 83 Fed. Reg. at 25,331-32 (emphasis added).

[28] 5 U.S.C. § 7106(b)(1) (emphasis added). The dissent claims that our reliance on the plain language of the Statute is not a rationale. Dissent at 17. We disagree. *See Bostock v. Clayton Cty., Ga.*, 140 S.Ct 1731, 1737 (2020) (stating that "when the *express* terms of a statute give us one answer and extratextual considerations suggest another, it's no contest[; o]nly the written word is the law") (emphasis added). We also note that courts typically read executive orders and statutes harmoniously where it is reasonably possible to do so. *See Rattigan v. Holder*, 689 F.3d 764, 770 (D.C. Cir. 2012) (imputing "knowingly false" standard to Title VII "reporting and referral" claims so as to harmonize with Executive Order); *Harris v. United States*, 19 F.3d 1090, 1095 (5th Cir. 1994) (holding that Executive Order was not implicitly overruled by later statutes and explaining that because the Executive Order and the statutes can "operate concurrently" both should stand).

[29] EO 13837, 83 Fed. Reg. at 25,335 (emphasis added).

[30] *Id.* at 25,337.

[31] *Id.*

[32] 5 U.S.C. § 7301.

[33] *Id.* § 7131(d) (emphasis added). Again, the dissent accuses us of disregarding the purpose of the Statute in reaching this conclusion. Dissent at 17. We again, fail to see how a conclusion based on the plain language of the Statute can contradict the purpose of the Statute. *See Hall v. United States*, 566 U.S. 506, 519 (2012) (relying on the plain language, context, and structure of a statute to determine the meaning of the terms in question); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (finding that "the legislative purpose is expressed by the ordinary meaning of the words used [by Congress]") (citing *Richards v. U.S.*, 369 U.S. 1, 9 (1962)). The dissent's contrary view relies on an overly broad reading of this part of the Statute – that the Statute means to give the agency head or his or her designee complete freedom to decide what is "reasonable, necessary, and in the public interest," unfettered by any direction from his or her superior (the President) or any government-wide rule as to what is "reasonable, necessary, and in the public interest." *See* 5 U.S.C. 7131(d). But the President's authority under Article II of the Constitution includes the power to "control[] those who execute the laws," *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting James Madison, 1 Annals of Cong. 463 (1789)), and his power under 5 U.S.C. § 7301 includes the right to set rules for how federal employees conduct the public's business – whether at the bargaining table or elsewhere. The Statute did not cut the heart out of these constitutional and statutory provisions by creating a zone of collective bargaining where agency representatives may operate free from lawful constraints from their superiors, the dissent's argument notwithstanding.

[34] EO 13837 defines "taxpayer-funded union time" as "official time granted to an employee pursuant to [5 U.S.C. § 7131]." EO 13837, 83 Fed. Reg. at 25,336.

[35] *Id.* at 25,337. Again, we note that this mandatory directive falls within the President's authority under 5 U.S.C. § 7301.

[36] *See generally* 5 U.S.C. § 7101. Member Abbott notes that this is not the first time a president has dictated the responsibilities of executive branch agencies when it comes to gray areas of statutory requirements. *See* Exec. Order No. 13672, *Further Amendments to Executive Order 11478, Equal Emp't Opportunity in the Fed. Gov't, & Executive Order 11246, Equal Emp't Opportunity*, 79 Fed. Reg. 42,971, 42,971 (July 21, 2014) (effectively expanding Title VII protections by prohibiting discrimination on the basis of sexual orientation and gender identity); Exec. Order No. 13496, *Notification of Emp.*

are consistent with the Statute. Therefore, they are accorded the force and effect of law and affect the negotiability of proposals.[37]

IV. Proposals 1 and 4

A. Wording of Proposal 1

(2)(e) POPA negotiators whose duty station is other than the U.S.P.T.O. campus in Alexandria, VA shall be entitled to reimbursement of travel and per diem expenses incurred during bargaining for a new agreement (including any subsequent [Federal Mediation and Conciliation Service (FMCS)] and FSIP proceedings).[38]

B. Meaning of Proposal 1

In its petition, the Union stated that the proposal would "entitle any union negotiators whose duty stations are other than at the [Agency] headquarters in Alexandria, VA to travel and per diem for negotiations at the [Agency] headquarters in accordance with [General Service Administration (GSA)] travel regulations for negotiations sessions . . . *notwithstanding* Section 4(a) of [EO] 13837."[39] At the PPC, the Union clarified that the proposal means that reimbursement of travel and per diem expenses would be to the extent allowed by the GSA's regulations.[40] The Agency agreed with the Union's explanation of the meaning and operation of the proposal as stated in the petition and clarified in the PPC.[41]

C. Wording of Proposal 4

(6)(a) The Agency will pay for any travel costs including transportation, lodging costs, travel time and per diem for any negotiating team members who are not within 50 miles of the Alexandria office.[42]

D. Meaning of Proposal 4

In its petition, the Union stated that the proposal would "entitle any union negotiators whose duty stations are other than at the [Agency] headquarters in Alexandria, VA to travel and per diem for negotiations at the [Agency] headquarters in accordance with GSA travel regulations for negotiations sessions . . . *notwithstanding* Section 4(a) of [EO] 13837."[43] At the PPC, the Union explained that this proposal is similar to Proposal 1, but reiterated due to its location in the ground rules.[44] The Union further explained that duty station is the same duty station as in Proposal 1.[45] The Agency agreed with the Union's explanation of the meaning and operation of the proposal.[46]

E. Analysis and Conclusion

The Agency argues that the proposals are non-negotiable because they are contrary to EO 13837, Section 4(a)(iv).[47] Section 4(a)(iv) provides that "[e]mployees may not be permitted reimbursement for expenses incurred performing non-agency business, unless required by law or regulation."[48] The Agency argues there is no law or regulation that requires the reimbursement of expenses for negotiating a new collective-bargaining agreement, and therefore, reimbursement for travel expenses and per diem is contrary to the EO.[49]

Rights Under Fed. Labor Laws,74 Fed. Reg. 6,107, 6,107 (Jan. 30, 2009) (requiring all government contractors to post notices informing employees of their labor rights according to the National Labor Relations Act in order to retain the contract).

[37] Because we find that the EOs have the force and effect of law, we need not address the Union's arguments that the EOs are not government-wide regulations within the meaning of § 7117 of the Statute. Response at 18-24. *See U.S. DHS, U.S. CBP, Detroit Sector, Detroit, Mich.*, 70 FLRA 572, 574 n.18 (2018) (Member DuBester dissenting) (finding it unnecessary to address the remaining arguments when an award has been set aside); *see also NFFE, Local 1450, IAMAW*, 70 FLRA 975, 977 (2018); *U.S. Dep't of the Air Force, Grissom Air Reserve Base, Miami, Ind.*, 67 FLRA 342, 343 (2014) (Member Pizzella concurring). Nonetheless, even if we were to consider this argument, we would find the Union's argument that the EOs do not constitute government-wide regulations to be without merit. *See U.S. Dep't of Treasury, IRS v. FLRA*, 996 F.2d 1246, 1251–52 (D.C. Cir. 1993) (noting that Section 7117(a)(1) "is cast in absolute terms – there is no obligation to bargain over any proposal inconsistent with a government-wide regulation"). Contrary to the Union's argument, EO 13837's official time provisions prescribe a uniform rule for employee conduct, applicable across the entire government, and thus counts as a "government-wide rule." And if the Executive's right to issue government-wide rules were limited to subjects unregulated by the Statute, then § 7117(a)(1)'s express exception from the scope of bargaining for "government-wide rule[s] or regulation[s]" would have no effect at all. 5 U.S.C § 7117(a)(1).

[38] Pet. at 5.

[39] Pet. at 5 (emphasis added).

[40] Record at 1.

[41] *Id.* at 1-2.

[42] Pet. at 9.

[43] *Id.* at 9-10 (emphasis added).

[44] Record at 2.

[45] *Id.*

[46] *Id.*

[47] Statement Br. at 22.

[48] EO 13837, 83 Fed. Reg. at 25,337.

[49] Statement Br. at 23.

The Authority will find a proposal outside the duty to bargain when it is contrary to law.[50] Any analysis must start with the plain language of the EO.[51] As relevant here, Section 4(a)(iv) provides that "[e]mployees may not be permitted reimbursement for expenses incurred performing non-agency business, unless required by law or regulation."[52] EO 13837 defines "agency business" as "work performed by Federal employees . . . on behalf of an agency, but does not include work performed on taxpayer-funded union time."[53] Therefore, EO 13837 prohibits the reimbursement for expenses incurred while on taxpayer-funded union time, *unless* it is required by law or regulation. The Agency asserts that there is no law or regulation that provides for reimbursement of expenses incurred while on taxpayer-funded union time.[54] We are not aware of, and the Union does not provide,[55] any law or regulation that requires the reimbursement of expenses incurred while on taxpayer-funded union time. Therefore, the proposal – requiring the Agency to reimburse expenses of Union negotiators incurred while negotiating the new collective-bargaining agreement – is contrary to EO 13837, and therefore, outside the duty to bargain.[56]

V. Proposals 2, 3, and 7

A. Wording of Proposal 2

(3)(i) No official time authorized by this MOU shall count against any quantitative cap on the employee's use of official time established by section 4 of [EO] 13837.[57]

B. Meaning of Proposal 2

In its petition, the Union stated the proposal would "*override or supersede*" Section 4(a)(ii)(3) of EO 13837.[58] The Union further explained that the proposal would prevent the reduction of the amount of official time that an employee may utilize in subsequent fiscal years, even if he or she exceeds the one-quarter of paid official time for negotiating a successor agreement provided by EO 13837.[59] At the PPC, the Union explained that the proposal would apply to any bargaining-unit employee involved in the negotiation process.[60] The Agency agreed with the Union's explanation of the meaning and operation of the proposal.[61]

C. Wording of Proposal 3[62]

(3)(j) Official time authorized by 5 U.S.C. section 7131 used by a POPA negotiator while engaged in bargaining over these ground rules or the new collective-bargaining agreement (including any subsequent FMCS and FSIP proceedings) shall not count against any quantitative cap on the employee's use of official time established by section 4 of [EO] 13837 in either the current or successive fiscal years.[63]

D. Meaning of Proposal 3

In its petition, the Union stated the proposal would "*override or supersede*" Section 4(a)(ii)(3) of EO 13837.[64] The Union further explained that the proposal would prevent the reduction of the amount of official time that an employee may utilize in subsequent fiscal years, even if he or she exceeds the one-quarter of paid

[50] *See NTEU*, 71 FLRA 307, 310 (2019) (Member DuBester concurring) (*NTEU II*) (finding a proposal non-negotiable because it was contrary to 5 U.S.C. § 6121(4) and applicable Office of Personnel Management guidance); *AFGE, Local 2058*, 68 FLRA 676, 685-86 (2015) (*Local 2058*) (Member Pizzella dissenting in part) (finding a proposal non-negotiable because it would require the Agency to violate 5 U.S.C. § 7115(b)(1)); *NTEU*, 68 FLRA 334, 336-37 (2015) (*NTEU I*) (finding a proposal non-negotiable because it conflicted with 5 C.F.R. § 300.201(c)); *AFGE, Local 2185*, 31 FLRA 45, 51 (1988) (*Local 2158*) (finding a proposal outside the duty to bargain because it was inconsistent with Executive Order 12564).

[51] *NTEU II*, 71 FLRA at 308.

[52] EO 13837, 83 Fed. Reg. at 25,337.

[53] *Id.* at 25,335.

[54] Statement Br. at 23.

[55] Response Br. at 1-18 (arguing that EO 13836 and EO 13837 do not have the force and effect of law because they were not issued with statutory authority and conflict with the Statute).

[56] Our dissenting colleague cites to Authority precedent that occurred prior to the enactment of the EOs to support his assertion that proposals 1 and 4 are negotiable. Dissent at 4 n.27. These cases do not consider the effect of the EOs. Because the dissent fails to accord the EOs the force and effect of law – which we do – his assertion incorrectly concludes that the proposals are within the duty to negotiate.

[57] Pet. at 6.

[58] *Id.*

[59] *Id.*

[60] Record at 2.

[61] *Id.*

[62] At the PPC, the Union clarified the proposal to remove subsection (c) from the reference to 5 U.S.C. § 7131, so that Proposal 3 would read, in relevant part, as: "Official time authorized by 5 U.S.C. section 7131 used by a POPA negotiator." Record at 2. In the absence of any objection from the Agency, we consider the proposal clarified. *See AFGE AFL-CIO, Local 2361*, 57 FLRA 766, 766 n.3 (2002) (citing *Ass'n of Civilian Technicians, Heartland Chapter*, 56 FLRA 236, 236 n.1 (2000)).

[63] Record at 3; Pet. at 7-8.

[64] Pet. at 8.

official time for negotiating a successor agreement provided by EO 13837.[65] At the PPC, the Union explained that the proposal would apply only to the designated union negotiators involved in the process, and that POPA means the Union.[66] The Agency agreed with the Union's explanation of the meaning and operation of the proposal.[67]

E. Wording of Proposal 7[68]

(10)(b) The agency agrees to grant a reasonable amount of official time to POPA representatives who assist in prosecuting any negotiability appeal that may arise during negotiations or as a result of agency head review. Such official time shall not count against any quantitative cap on the employee's use of official time established by section 4 of [EO] 13837 in either the current or successive fiscal years.[69]

F. Meaning of Proposal 7

In its petition, the Union stated the proposal would "override or supersede" Section 4(a)(ii) of EO 13837.[70] At the PPC, the Union explained that the first sentence of the proposal forces the Agency to provide Union representatives a reasonable amount of official time to work on any negotiability appeals that arise out of negotiations or during the agency-head review process.[71] The Union further explained that the second sentence of the proposal would exclude the official time mentioned in the first sentence from the quantitative cap on official time that is included in Section 4 of EO 13837.[72] The Agency agreed with the Union's explanation of the meaning and operation of the proposal.[73]

G. Analysis and Conclusion

The Agency argues that the proposals are non-negotiable because they are contrary to EO 13837, Section 4(a)(ii).[74] Section 4(a)(ii) provides that employees may only spend more than one-quarter of their paid time on "taxpayer-funded union time," if it is for purposes covered by 5 U.S.C. § 7131(a) or (c), with excess time being carried over to count against subsequent years' caps.[75] Therefore, the Agency claims that the proposals directly conflict with the requirements of the EO.[76]

The Authority will find a proposal outside the duty to bargain when it is contrary to law.[77] As relevant here, Section 4(a)(ii)(2), (3) provide that:

> [e]mployees who have spent one-quarter of their paid time in any fiscal year on non-agency business may continue to use taxpayer-funded union time in that fiscal year for purposes covered by sections 7131(a) and 7131(c) of title 5 . . . [however] [a]ny time in excess of one-quarter . . . shall count toward the limitation . . . in subsequent fiscal years."[78]

As the Union concedes,[79] EO 13837 requires official time to not exceed one-quarter of an employee's paid time, unless it meets an exception, in which case, the employee's official time for the next fiscal year will be reduced.[80] Therefore, the proposal – which would require the Agency to not count the "taxpayer-funded union time" spent by an employee negotiating ground rules, negotiating the new agreement, or prosecuting a negotiability appeal against the one-quarter cap – is contrary to EO 13837, and therefore, outside the duty to bargain.[81]

[65] *Id.*
[66] Record at 2.
[67] *Id.*
[68] In its petition, the Union requested severance of Proposal 7. Pet. at 14. However, at the PPC, the Union withdrew its request for severance. Record at 3.
[69] Pet. at 13.
[70] *Id.*
[71] Record at 3.
[72] *Id.*
[73] *Id.*
[74] Statement Br. at 23-24.
[75] EO 13837, 83 Fed. Reg. at 25,337.
[76] Statement Br. at 24.
[77] *See NTEU II*, 71 FLRA at 310; *Local 2058*, 68 FLRA at 685-86; *NTEU I*, 68 FLRA at 336-37; *Local 2158*, 31 FLRA at 51.
[78] EO 13837, 83 Fed. Reg. at 25,337.
[79] *See* Pet. at 6 (stating the proposal would "*override or supersede*" Section 4(a)(ii)(3) of EO 13837); *id.* at 8 (stating the proposal would "*override or supersede*" Section 4(a)(ii)(3) of EO 13837); *id.* at 13 (stating the proposal would "*override or supersede*" Section 4(a)(ii) of EO 13837).
[80] *See* EO 13837, 83 Fed. Reg. at 25,337.
[81] We agree with the dissent that there is a duty to bargain over official time. Dissent at 19. However, that duty to bargain is limited by § 7117, which provides that "the duty to bargain in good faith" only applies, "*to the extent [a proposal is] not inconsistent with any Federal law or any Government-wide rule or regulation*." 5 U.S.C. § 7117(a)(1). The dissent fails to acknowledge that the EOs have the effect of law. Therefore, the finding that proposals 2, 3, and 7 are nonnegotiable because they are contrary to EO 13837 is consistent with the Statute.

VI. Proposal 6

A. Wording[82]

(8)(c) The agency agrees that it will bargain in good faith over proposals that constitute permissive subjects of negotiation under 5 U.S.C. section 7106(b)(1). The agency agrees that it will not object to the FSIP subsequently exercising jurisdiction of such proposals should impasse be invoked.[83]

B. Meaning

At the PPC, the Union explained that the proposal would "compel the Agency to bargain over permissive subjects . . . *notwithstanding* section 6 of [EO] 13836."[84] The Union also explained that the proposal would "require the Agency to use FSIP if the negotiations reach an impasse."[85] The Agency agreed with the Union's explanation of the meaning and operation of the proposal.[86]

C. Analysis and Conclusion

The Agency argues that the proposal is non-negotiable because it is contrary to Section 6 of EO 13836, which prohibits agencies from negotiating over permissive subjects.[87] The Authority will find a proposal outside the duty to bargain when it is contrary to law.[88] As relevant here, Section 6 provides that agencies "may not negotiate over the substance of the subjects set forth in [5 U.S.C. §] 7106(b)(1)."[89] As the Union concedes,[90] EO 13836 prevents the Agency from negotiating over permissive subjects, as defined by 5 U.S.C. § 7106(b)(1).[91] Therefore, the proposal – which would require the Agency to violate the EO and negotiate on permissive subjects – is contrary to EO 13836, and therefore, outside the duty to bargain.[92]

VII. Proposal 9

A. Wording

(13)(b) POPA representatives shall be entitled to official time to prepare or pursue grievances (including arbitration of grievances) that may arise out of any alleged violation of these ground rules or claims of unfair bargaining that arise during negotiations.[93]

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[82] As noted above, the Union's request for severance of Proposal 6 into two parts is denied. Therefore, we will only address the original Proposal 6. Pet. at 13.

[83] *Id.* at 12.

[84] Record at 3.

[85] *Id.*

[86] *Id.*

[87] Statement Br. at 25. The Agency also argues that Proposal 6 is contrary to 5 U.S.C. § 7106(b)(1) because it "eliminates the Agency's statutory right to decline to negotiate permissive subjects on a topic-by-topic basis." *Id.* We do not reach this argument because we find that the proposal is contrary to EO 13836, and thus, non-negotiable. *See AFGE, Nat'l Council of EEOC Locals No. 216*, 71 FLRA 603, 607 (2020) (Member DuBester dissenting in part) (finding it unnecessary to address the remaining arguments as to the negotiability of a proposal when a prior objection fully disposes of the proposal).

[88] *See NTEU II*, 71 FLRA at 310; *Local 2058*, 68 FLRA at 685-86; *Local 2158*, 31 FLRA at 51.

[89] EO 13836, 83 Fed. Reg. at 25,332.

[90] *See* Record at 3 (stating the proposal would "compel the Agency to bargain over permissive subjects . . . *notwithstanding* section 6 of [EO] 13836.").

[91] *See* EO 13836, 83 Fed. Reg. at 25,332.

[92] The dissent asserts that this conclusion is inconsistent with the Statute. Dissent at 5. We disagree. *Supra* nn.28 & 33. Notwithstanding EO 13836, we note that a proposal committing to negotiate over permissive subjects is itself a permissive topic. *SSA, Balt., Md.*, 55 FLRA 1063, 1069 (1999) ("The Authority has found that a contract proposal requiring a party to engage in bargaining over [§] 7106(b)(1) matters constitutes a proposal negotiable at the election of the agency under [§] 7106(b)(1)"). And the Agency has clearly elected not to bargain over this permissive topic. Statement Br. at 26; Agency Reply at 3. More importantly, the second sentence of Proposal 6 renders it non-negotiable. A party violates the Statute by insisting to impasse on a permissive topic of bargaining. *AFGE, Local 3937, AFL-CIO*, 64 FLRA 17, 21 (2009) ("It is well established that insisting to impasse on a permissive subject of bargaining violates the Statute." (citing *U.S. Food & Drug Admin. Ne. & Mid-Atlantic Regions*, 53 FLRA 1269, 1273-74 (1998); *Sport Air Traffic Controllers Org.*, 52 FLRA 339, 347 (1996); *USDA Food Safety & Inspection Serv.*, 22 FLRA 586, 587-88 (1986); *FDIC, Headquarters*, 18 FLRA 768, 771-72 (1985))). Therefore, Proposal 6's requirement that the Agency consent to FSIP asserting jurisdiction over impasses on permissive subjects means that the proposal is outside the duty to bargain. In addition, we note that the parties cannot create FSIP jurisdiction by their consent. *DOD Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, Puerto Rico*, 71 FLRA 127, 134 (2019) (Member DuBester dissenting), *pet. for rev. denied in relevant part, Antilles Consol. Educ. Ass'n v. FLRA*, 977 F.3d 10, 18 (D.C. Cir. 2020).

[93] Pet. at 16.

B. Meaning

In its petition, the Union stated the intent of the proposal is to "allow union representatives to use official time to prepare and prosecute grievances about the [A]gency's conduct that may arise out of the course of these negotiations, notwithstanding the prohibition against the use of official time for grievance processing contained in Section 4(v) of [EO] 13837."[94] At the PPC, the Union clarified that the proposal would compel the Agency to provide the Union official time to pursue grievances and arbitration that may arise out of violations of the parties' ground rules or unfair bargaining during negotiations.[95] The Agency agreed with the Union's explanation of the meaning and operation of the proposal.[96]

C. Analysis and Conclusion

The Agency argues that the proposal is non-negotiable because it is contrary to EO 13837, Section 4(a)(v).[97] Section 4(a)(v) provides that "employees may not use official time 'to prepare or pursue grievances (including arbitration of grievances) brought against an agency' with certain specific exceptions for grievances brought on one's own behalf, appearing as a witness in a grievance proceeding, or asserting a claim related to whistleblower retaliation."[98] Therefore, the Agency claims that the proposal directly conflicts with the limitations expressed in the EO.[99]

The Authority will find a proposal outside the duty to bargain when it is contrary to law.[100] As relevant here, Section 4(a)(v) provides that "[e]mployees may not use taxpayer-funded union time to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to [5 U.S.C. §] 7121, except where such use is otherwise authorized by law or regulation."[101] As the Union concedes,[102] EO 13837 prevents the use of official time to prepare or pursue grievances against the agency.[103] Therefore, the proposal – which would require the Agency to authorize the use of official time to prepare or pursue grievances that may arise out of a violation of the ground rules or claims of unfair bargaining – is contrary to EO 13837, and therefore, outside the duty to bargain.[104]

VIII. Order

We dismiss the Union's petition.

[94] *Id.* at 17.
[95] Record at 3.
[96] *Id.*
[97] Statement Br. at 24.
[98] *Id.* (quoting EO 13837, 83 Fed. Reg. at 25,337).
[99] *Id.* at 25.
[100] *See NTEU II*, 71 FLRA at 310; *Local 2058*, 68 FLRA at 685-86; *Local 2158*, 31 FLRA at 51.
[101] EO 13837, 83 Fed. Reg. at 25,337.
[102] *See* Pet. at 17 (stating the proposal would govern "notwithstanding the prohibition against the use of official time for grievance processing contained in Section 4(v) of [EO] 13837").
[103] *See* EO 13837, 83 Fed. Reg. at 25,337.
[104] *Id.*

Member DuBester, dissenting:

In *AFGE, AFL-CIO v. Trump*,[1] the U.S. District Court for the District of Columbia concluded that numerous provisions of Executive Orders 13,836[2] and 13,837[3] (EOs) – including each of the provisions upon which the majority relies for its decision today – are inconsistent with the language and purpose of the Federal Service Labor-Management Relations Statute (Statute). And on this basis, the court held that those provisions are invalid and cannot be enforced. On appeal, the U.S. Circuit Court of Appeals for the District of Columbia (D.C. Circuit) vacated this decision, but solely on grounds that the unions were required to pursue their claims through "the scheme established by the Statute."[4]

Reaching this conclusion, the D.C. Circuit reasoned that the matters raised by the unions' claims "lie at the core of the FLRA's 'specialized expertise in the field of federal labor relations.'"[5] And noting the "'special function'" served by the Authority "'of applying the general provisions of the [Statute] to the complexities' of federal labor relations,"[6] the court expressed confidence that the Authority's "expertise can be 'brought to bear'" on the unions' claims,[7] including the question of whether "the Statute bars agencies from implementing the executive orders."[8]

Today's decision – in which the majority concludes that all seven of the Union's proposals are outside the duty to bargain because they conflict with various provisions of the EOs – fails to meet the court's charge.

There is certainly no question that the Union's proposals conflict with the EOs. However, as the district court correctly noted in reviewing the unions' claims, the EOs cannot be enforced in a manner that conflicts with the language and purpose of the Statute.[9] Indeed, in the petition before us, the Union emphasized that the conflicts between the Statute and the EOs' provisions upon which the agency has relied to exclude the proposals from bargaining "are at the heart of this negotiability appeal."[10]

But rather than bringing the Authority's statutory expertise to bear, the majority's decision is practically devoid of statutory analysis. For instance, while the majority concludes that the provisions in EO 13,837 related to expense reimbursements and official time use for grievances are consistent with the Statute, it rests this conclusion solely upon its finding that "[t]he Statute does not contain any language that contradicts . . . these provisions."[11]

Similarly, to support its conclusion that the provision in EO 13,836 prohibiting agencies from negotiating permissive subjects does not conflict with the Statute, the majority simply asserts – with no supporting analysis or rationale – that this prohibition "is consistent with" § 7106(b)(1) of the Statute.[12] And, employing the same perfunctory logic, it concludes – without further analysis – that provisions in EO 13,837 limiting the percentage of time employees may spend performing activities on official time are "consistent with § 7131 of the Statute."[13]

Remarkably, the majority fails to address the litany of substantive arguments set forth by the Union regarding why these EO provisions conflict with the language and purpose of the Statute. And even more remarkably, the majority avoids engaging in *any* substantive Statutory analysis because, in its view, any conflicts between the Statute and the EOs are simply irrelevant.

Towards this end, the majority finds that the EOs have the force and effect of law because the President issued them pursuant to his authority to "'prescribe regulations for the conduct of employees in the executive branch.'"[14] And it concludes that because the duty to bargain does not extend to matters that are

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[1] 318 F.Supp.3d 370 (D.D.C. 2018) (*AFGE I*), reversed and vacated, *AFGE, AFL-CIO v. Trump*, 929 F.3d 748 (D.C. Cir. 2019) (*AFGE II*).

[2] Developing Efficient, Effective, and Cost-Reducing Approaches To Federal Sector Collective Bargaining, Exec. Order No. 13,836, 83 Fed. Reg. 25,329 (May 25, 2018) (EO 13,836).

[3] Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use, Exec. Order No. 13,837, 83 Fed. Reg. 25,335 (May 25, 2018) (EO 13,837).

[4] *AFGE II*, 929 F.3d at 754.

[5] *Id.* at 760 (quoting *AFGE, AFL-CIO, Council of Locals No. 214 v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir. 1986) (*AFGE Council of Locals*)).

[6] *Id.* (quoting *NFFE, Local 1309 v. Dep't of Interior*, 526 U.S. 86, 99 (1999)).

[7] *Id.* at 761 (quoting *Jarkesy v. SEC*, 803 F.3d 9, 29 (D.C. Cir. 2015)).

[8] *Id.*

[9] *AFGE I*, 318 F.Supp.3d at 417 ("Thus, the notion that the President does not have the statutory authority to issue an executive order that conflicts with a federal statute need not detain the Court for long. Quite simply, this is now clear beyond cavil, for the D.C. Circuit has held that executive orders that conflict with the purposes of a federal statute are *ultra vires*.") (citing *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1339 (D.C. Cir. 1996)).

[10] Resp., Attach., Br. at 15.

[11] Majority at 5.

[12] *Id.* at 4.

[13] *Id.* at 5.

[14] *Id.* (quoting 5 U.S.C. § 7301).

"'inconsistent with any Federal law or any Government-wide rule or regulation,'"[15] the Union's proposals are nonnegotiable solely because they are contrary to the EOs.

But it is this *exact* reasoning that the district court rejected – correctly, in my view – as "verbal jujitsu."[16] As the court explained, "even if the President can issue executive orders that carry the force of law in the field of federal labor-management relations, he does not have a 'blank check . . . to fill in at his will.'"[17] Rather, the EOs are enforceable only to the extent that they do not conflict with the Statute.[18]

Applying this principle to the rationale adopted by the majority, the court recognized that "Congress enacted the [Statute] to protect and preserve collective bargaining rights, not to destroy them."[19] Accordingly, the court correctly concluded that § 7117 of the Statute cannot be rationally interpreted to allow a President "to pick off any of the mandatory or permissive topics of negotiation that Congress took care to delineate in the [Statute], and put it into the management rights (non-negotiable) bundle."[20] Indeed, as the court found, "it is hard to even *imagine* a rational statutory exception that is *intentionally* designed to swallow the rule."[21]

Essentially ignoring these principles, the majority finds that Proposals 2, 3 and 7 – which would afford official time to union representatives notwithstanding the caps set forth in EO 13,837 – are outside the duty to bargain because they conflict with Section 4(a)(ii) of this EO.[22] The majority also finds that Proposal 9 – which would entitle union representatives to official time to prepare or pursue grievances – is outside the duty to bargain because this proposed use of official time is prohibited by Section 4(a)(v) of EO 13,837.[23]

Again, there is no dispute that these proposals are inconsistent with the cited provisions of EO 13,837. The Union readily concedes this in its filings. But the pertinent question is whether enforcement of these provisions conflicts with the Statute.

As noted, the majority concludes that Section 4(a)(v) is consistent with the Statute because the Statute "does not contain any language that contradicts" this provision.[24] And the majority concludes that Section 4(a)(ii) is consistent with the Statute because § 7131 of the Statute "provides that official time shall be granted 'in any amount *the agency and the exclusive representative* involved *agree* to be reasonable, necessary, and in the public interest.'"[25]

But the plain language and statutory purpose of § 7131(d) requires the exact opposite conclusion regarding both EO provisions. More precisely, these EO provisions are inconsistent with the Statute specifically *because* § 7131(d) expressly delegates to the parties the role of determining, through collective bargaining, the amount of official time the union may use for representational purposes.

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[15] *Id.* at 12 n.81 (quoting 5 U.S.C. § 7117(a)(1)); *see also id.* at 7 n.37.
[16] *AFGE I*, 318 F.Supp.3d at 434.
[17] *Id.* at 417 (quoting *AFL-CIO v. Kahn*, 618 F.2d 784, 793 (D.C. Cir. 1999)).
[18] *See, e.g.*, *Marks v. CIA*, 590 F.2d 997, 1003 (D.C. Cir. 1978) ("[A]n executive order cannot supersede a statute.").
[19] *AFGE I*, 318 F.Supp.3d at 434.
[20] *Id.* (further concluding that "there is no rational explanation for [the] suggestion that Congress would have intended for the President to have the power to act in this fashion *at all* in regard to the matters that the [Statute] specifically characterizes as negotiable").
[21] *Id.*
[22] Section 4(a)(ii)(1) of EO 13,837 states: "Except as provided in subparagraph (2) of this subsection, employees shall spend at least three-quarters of their paid time, measured each fiscal year, performing agency business or attending necessary training (as required by their agency) in order to ensure that they develop and maintain the skills necessary to perform their agency duties efficiently and effectively." 83 Fed. Reg. at 25,337. Section 4(a)(ii)(2) states: "Employees who have spent one-quarter of their paid time in any fiscal year on non-agency business may continue to use taxpayer-funded union time in that fiscal year for purposes covered by sections 7131(a) or 7131(c) of [the Statute]." *Id.* Section 4(a)(ii)(3) states: "Any time in excess of one-quarter of an employee's paid time used to perform non-agency business in a fiscal year shall count toward the limitation set forth in subparagraph (1) of this subsection in subsequent fiscal years." *Id.*
[23] Section 4(a)(v) of EO 13,837 states: "Employees may not use taxpayer-funded union time to prepare or pursue grievances (including arbitration of grievances) brought against an agency under procedures negotiated pursuant to section 7121 of [the Statute], except where such use is otherwise authorized by law or regulation." *Id.*
[24] Majority at 5.
[25] *Id.* (quoting 5 U.S.C. § 7131(d)).

The Authority has long recognized this principle – which should be obvious from the plain language of § 7131(d) – in decisions holding that the "parties may negotiate all matters concerning the use of official time under § 7131(d)."[26] And it is reinforced by the Statute's legislative history, which confirms that § 7131(d) "makes all . . . matters concerning official time for unit employees engaged in labor-management relations activity," other than the official time specifically provided by § 7131(a) and (c), "subject to negotiation."[27]

Indeed, in reversing a previous Authority decision involving the negotiability of a proposal concerning a union's use of official time, the D.C. Circuit reiterated that, by enacting § 7131(d), Congress "provided that the *agency and the union together* should determine the amount of official time 'reasonable, necessary, and in the public interest.'"[28] And the court cautioned the Authority that it "cannot assume that Congress' explicit provision for official time [under § 7131(d)] was not meant to be a meaningful guarantee."[29]

Plainly stated, the explicit limitations placed on official time use by EO 13,837 cannot be reconciled with § 7131(d) for the simple reason that they render non-negotiable matters that Congress expressly intended the parties to negotiate, and agree to, through the collective bargaining process. And to the extent that the EO justifies its restrictions on official time use by the need to ensure "an effective and efficient government,"[30] it must be noted that the D.C. Circuit has rejected this premise as a rationale for limiting the negotiability of official time proposals under the Statute.[31] Thus, it is clear that the majority's application of EO 13,837 to remove Proposals 2, 3, 7 and 9 from the bargaining table is inconsistent with both the language and purpose of the Statute.

The same conclusion applies to the majority's application of EO 13,837 to exclude Proposals 1 and 4 from the scope of bargaining. Both proposals would provide for the payment of travel and per diem expenses for union negotiators in accordance with applicable travel regulations.

Citing the "plain language"[32] of Section 4(a)(iv) of EO 13,837,[33] which forbids such reimbursements, the majority concludes that the proposals are outside the duty to bargain because no law or regulation "requires the reimbursement of expenses incurred" by employees while on official time.[34]

But once again, the majority misses the point. The question is not whether reimbursement of these expenses is required by extant law or regulation, but whether this is a matter that the Statute delegates to the parties to address and resolve as part of the collective bargaining process. And, once again, the answer is yes.[35]

Indeed, as the district court aptly noted, bargaining over "material support" for union representatives is "viewed as a vital term in collective

[26] *United Power Trades Org.*, 64 FLRA 440, 442 (2010); *see also U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1119 (1994) (*Air Force*) (concluding that § 7131(d) requires the parties to a collective bargaining relationship "to negotiate over proposals involving the amount of official time available for use by union representatives during any particular time period," and that, "if a matter is encompassed within the definition of section 7131(d), it will constitute a mandatory subject of bargaining"); *AFGE, Nat'l INS Council*, 45 FLRA 391, 400-01 (1992) (citations omitted) (explaining that official time for representing employees in various types of proceedings is negotiable under § 7131).

[27] *Air Force*, 49 FLRA at 1119 (quoting H.R. Rep. No. 1403, 95th Cong., 2d Sess. 59 (1978), reprinted in Comm. on Post Office & Civil Serv., House of Representatives, 96th Cong., 1st Sess., Legislative History of the Fed. Serv. Labor-Mgmt. Relations Statute, Title VII of the Civil Serv. Reform Act of 1978, (Comm. Print No. 96-7), at 705 (1979)).

[28] *AFGE Council of Locals*, 798 F.2d at 1530 (quoting 5 U.S.C. § 7131(d) (emphasis added)).

[29] *Id.*

[30] EO 13,837, § 1, 83 Fed. Reg. at 25,335.

[31] *AFGE Council of Locals*, 798 F.2d at 1530 ("The FLRA's generalized concern to protect the ability of agencies to carry out their mission cannot displace a specific congressional provision providing for the negotiability of official time proposals."); *see also id.* ("The FLRA's suggestion that its interpretation is necessary to protect the ability of agencies to function effectively also ignores the express language of section 7131(d).").

[32] Majority at 7.

[33] Section 4(a)(iv) of EO 13,837 states: "Employees may not be permitted reimbursement for expenses incurred performing non-agency business, unless required by law or regulation." 83 Fed. Reg. at 25,337.

[34] Majority at 7.

[35] *NTEU*, 31 FLRA 856, 858-59 (1988) (union proposal that members of its negotiating team who are on official time shall receive full travel and per diem allowances in accordance with applicable regulations "concerns conditions of employment" and is therefore "within the duty to bargain"); *NTEU*, 42 FLRA 964, 972 (1991) (concluding that proposal to reimburse travel and per diem costs incurred by union representatives is "within the duty to bargain"). Oddly, the majority distinguishes these decisions because they "occurred prior to the enactment of the EOs" and therefore "do not consider the effect of the EOs." Majority at 9 n.56. To the extent that any response to this assertion is even warranted, I would simply reiterate that the precedent is cited for the principle that the Statute delegates these matters to the parties to address and resolve as part of the collective bargaining process.

bargaining negotiations for many reasons, including the fact that the potential of securing support contributes to the parity between management and labor that the [Statute] implicitly requires."[36] And as the court correctly observed, the EO provisions limiting this support "exacerbate[] management's advantages over labor and hamper[] unions' ability to engage effectively in future collective bargaining, contrary to the clearly articulated goals of the [Statute]."[37]

Finally, I disagree with the majority's conclusion that Proposal 6 – which would require the Agency to bargain over permissive subjects – is rendered non-negotiable by EO 13,836. The majority rests its conclusion upon Section 6 of the EO, which directs that the "heads of agencies subject to [the Statute] may not negotiate over the substance of the subjects set forth in section 7106(b)(1) of [the Statute], and shall instruct subordinate officials that they may not negotiate over those same subjects."[38] And, as noted, the majority summarily concludes that this EO provision is consistent with § 7106(b).

But, as the district court aptly observed in finding that this provision conflicted with the Statute, the scope of bargaining under the Statute is "actually quite 'narrow' to begin with," and so it "stands to reason that almost *any* attempt to shrink the otherwise generally accepted and traditional scope of bargaining rights under [the Statute] can quickly render such an effort suspect from the standpoint of the boundaries that Congress has constructed."[39] And more specifically, in a separate decision addressing a similar prohibition on permissive bargaining contained in an agency's human resources system, the D.C. Circuit cited the prohibition as a "critical" distinction in concluding that the system impermissibly restricted the scope of bargaining under the Statute.[40]

In sum, the majority fails to conduct any reasoned analysis regarding whether enforcement of the EO provisions is consistent with the Statute. This is reason alone to reject its conclusions. But looking beyond this troubling aspect, it is readily apparent that application of these provisions to dismiss the Union's petition cannot be reconciled with the Statute's language and purpose.

Accordingly, I dissent.

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[36] *AFGE I*, 318 F.Supp.3d at 427 (citing *Bureau of Alcohol, Tobacco & Firearms*, 464 U.S. 89, 104 (1983); *Dep't of the Navy, Naval Constr. Battalion Ctr., Port Hueneme, Cal.*, 14 FLRA 360, 372 (1984)).
[37] *Id.* at 428.
[38] EO 13,836, 83 Fed. Reg. at 25,332.
[39] *AFGE I*, 318 F.Supp.3d at 430 (quoting *NTEU v. Chertoff*, 452 F.3d 839, 860 (D.C. Cir. 2006) (*Chertoff*)) (emphasis in original).
[40] *Chertoff*, 452 F.3d at 862.