

**72 FLRA No. 108**

NATIONAL TREASURY  
EMPLOYEES UNION  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
(Agency)

0-NG-3461

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DECISION AND ORDER ON NEGOTIABILITY  
ISSUES

December 13, 2021

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

**I. Statement of the Case**

In this case, we find that the Union's proposals are outside the duty to bargain because they are covered by the parties' agreement. 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).<sup>1</sup> The petition for review (petition) involves two proposals. For the reasons that follow, we find both proposals are outside the duty to bargain. Accordingly, we dismiss the Union's petition.

**II. Background**

During the term of the parties' agreement, the Agency announced a new initiative called the Contractor Management Module (the Module). The Module changes onboarding procedures for contractors. Additionally, the Module changed the duties of certain bargaining-unit employees (BUEs) who may utilize the Module when they are assigned to oversee new contracted employees. Consequently, the parties began negotiating the impact and implementation of the Module. On October 29, 2019, the Agency declared two of the Union's proposals to be nonnegotiable. Thereafter, the Union filed the

instant petition with the Authority on November 13, 2019. At issue in the petition are two proposals concerning the assignment of Module work to BUEs and the evaluations of BUEs who are assigned Module work.

The Agency filed a statement of position (statement) and the Union filed a response to the statement (response). Thereafter, an Authority representative conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority's Regulations.<sup>2</sup> The Agency then filed a reply to the Union's response (reply).

**III. Preliminary Matter: We will consider the revised wording of the Union's proposals.**

Prior to the PPC, the Union amended the wording of both proposals in its response to the Agency's statement.<sup>3</sup> The Union revised the proposals to address the Agency's claim that the proposals went beyond the scope of the proposed change.<sup>4</sup> The Union also argued at the PPC that the amended wording of the proposals—as they appear in the response—should supersede the wording that the Union provided in its petition.<sup>5</sup> Subsequently, the Agency objected to discussing the revised wording of the proposals at the PPC.<sup>6</sup> The Agency argued that the Authority should not consider the revised proposals because it never declared the amended proposals to be nonnegotiable and § 2424.22 of the Authority's Regulations requires the Union to set forth the "exact wording" of the proposals in its petition.<sup>7</sup>

The Agency asserts that there is no precedent to permit a union to revise the wording of its proposals after filing a petition.<sup>8</sup> That argument is not correct. The Authority has held that a union may amend its petition, including the wording of disputed proposals, before and during a PPC,<sup>9</sup> especially where, as here, there is no evidence that a party was prejudiced by the revised wording.<sup>10</sup> Here, the Agency was aware that the Union

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<sup>2</sup> 5 C.F.R. § 2424.23.

<sup>3</sup> Resp. at 4.

<sup>4</sup> *Id.* at 3-5.

<sup>5</sup> Record of PPC (Record) at 2.

<sup>6</sup> *Id.*

<sup>7</sup> Reply at 6-10; *see* 5 C.F.R. § 2424.22.

<sup>8</sup> Reply at 11-12.

<sup>9</sup> *AFGE, Loc. 1164*, 66 FLRA 112, 112 n.1 (2011) ("We note, in this regard, that a union may amend its petition, including the wording of disputed proposals, before and during a PPC.").

<sup>10</sup> *AFGE, Loc. 3928*, 66 FLRA 175, 176 (2011) (*Local 3928*) (Member Beck dissenting) ("In addition, there is no evidence that the [a]gency was prejudiced by the different wording because the record indicates that the [a]gency clearly understood the intent of the proposal and fully briefed to the Authority why the language in the petition was nonnegotiable.").

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<sup>1</sup> 5 U.S.C. § 7105(a)(2)(E).

amended the wording of the proposals prior to the PPC;<sup>11</sup> the Agency had the opportunity to consider the revised proposals both at the PPC and in its reply to the Union's response;<sup>12</sup> and the Union submitted the revised wording in direct response to the Agency's initial objections in its statement.<sup>13</sup> Therefore, we will only consider the revised proposals because they advance the resolution of the dispute.

#### IV. Proposal 3.b

##### A. Wording of Proposal 3.b

3.b. The phrase "other duties as assigned" will not be used to regularly assign work associated with the HRConnect Contractor Management Module initiative to impacted bargaining unit employees that is not reasonably related to his/her basic job description. This provision does not limit management's right to assign work, nor to modify an employee's position description in accordance with Article 26 of the 2019 NA.<sup>14</sup>

##### B. Meaning of Proposal 3.b

At the PPC, the Union stated that Proposal 3.b requires the Agency to change a BUE's position description before assigning Module work.<sup>15</sup> The Union explained that the proposal's prohibition from using "other duties as assigned" to assign Module work ensures that the Agency will maintain an accurate position description.<sup>16</sup> Consequently, the Union included the second sentence of Proposal 3.b because the proposal only requires the Agency to maintain accurate position descriptions and it does not limit management's right to assign work.<sup>17</sup> However, the Agency does not agree with the Union's claim that the *only* purpose of Proposal 3.b is to ensure the accuracy of a BUE's position description.<sup>18</sup> Rather, the Agency argues that Proposal 3.b is a specific prohibition on how the Agency may assign Module work by excluding the phrase "other duties as assigned" from a BUE's position description.<sup>19</sup>

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.<sup>20</sup> 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 purpose of construing what the proposal means and, based on that meaning, deciding whether the proposal is within the duty to bargain.<sup>21</sup>

Here, the plain wording of the proposal does not permit the Agency to assign Module work as "other duties as assigned."<sup>22</sup> While the proposal prevents the Agency from using a specific phrase to assign Module work, the central aim of the proposal is to encourage the Agency to maintain accurate position descriptions.<sup>23</sup> Therefore, we adopt the Union's statement of the meaning of the proposal to determine its negotiability.

##### C. Analysis and Conclusion

The Agency argues that Proposal 3.b (1) is covered by Article 26, Section 3(A) of the parties' agreement,<sup>24</sup> (2) is beyond the scope of the proposed change,<sup>25</sup> (3) interferes with management's right to assign work and direct employees,<sup>26</sup> and (4) is not an appropriate arrangement under § 7106(b)(3) of the Statute.<sup>27</sup> Under § 2424.2(d) of the Authority's Regulations, if a proposal raises both a bargaining-obligation dispute and a negotiability dispute, then the Authority may resolve the bargaining-obligation dispute.<sup>28</sup> Furthermore, the Authority may resolve only the bargaining-obligation dispute if doing so establishes that the proposal is outside the duty to bargain.<sup>29</sup> For the reasons below, resolving the Agency's covered-by objection fully disposes of Proposal 3.b, so we need not address the Agency's remaining arguments.<sup>30</sup>

The covered-by doctrine has two prongs, but here we discuss only the first prong. Under the first

<sup>11</sup> Record at 2-3; Reply at 6-10.

<sup>12</sup> Record at 2-3; Reply at 3-6; *see also Local 3928*, 66 FLRA at 176.

<sup>13</sup> Resp. at 3-5.

<sup>14</sup> *Id.* at 4.

<sup>15</sup> Record at 2-3.

<sup>16</sup> *Id.* at 3.

<sup>17</sup> *Id.*

<sup>18</sup> Reply at 33-34.

<sup>19</sup> *Id.*

<sup>20</sup> *AFGE, Nat'l Council of EEOC Locs. No. 216*, 71 FLRA 603, 606 (2020) (*Locals No. 216*) (then-Member DuBester dissenting in part).

<sup>21</sup> *Id.*; *NAGE, Loc. R-109*, 66 FLRA 278, 278 (2011); *NAGE, Loc. R1-100*, 61 FLRA 480, 480-81 (2006).

<sup>22</sup> Resp. at 4.

<sup>23</sup> *Id.*

<sup>24</sup> Statement at 10-13.

<sup>25</sup> Reply at 30-31.

<sup>26</sup> *Id.* at 32-34.

<sup>27</sup> *Id.* at 35-43.

<sup>28</sup> 5 C.F.R. § 2424.2(d).

<sup>29</sup> *Locals No. 216*, 71 FLRA at 606-07.

<sup>30</sup> *See, e.g., NATCA*, 66 FLRA 213, 217-18 & n.6 (2011) (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).

prong, the Authority examines whether the subject matter of the change to conditions of employment is expressly contained in the agreement.<sup>31</sup> The Authority does not require an exact congruence of language.<sup>32</sup> Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute.<sup>33</sup>

Article 26, Section 3(A) states that “[t]he position description for each position will accurately reflect the actual duties, responsibilities, and the managerial relationships pertaining to the employee filling that position.”<sup>34</sup> Therefore, because the Agency already has a duty to maintain accurate position descriptions, the Agency argues that the subject matter of Proposal 3.b is covered by Article 26, Section 3(A).<sup>35</sup> Here, the subject matter of Article 26, Section 3(A) demonstrates that the parties previously bargained over the accuracy of a BUE’s position description.<sup>36</sup> Specifically, Article 26, Section 3(A) requires the Agency to change a BUE’s position description to reflect the actual duties of that BUE.<sup>37</sup> Thus, the Agency has already negotiated how it will address situations where a BUE is assigned new duties—such as duties related to the Module—and we find that Proposal 3.b and Article 26, Section 3(A) concern the same subject matter.<sup>38</sup>

In response, the Union asserts that “a proposal may restate existing obligations without affecting its negotiability.”<sup>39</sup> The Union argues that Proposal 3.b is within the duty to bargain because it merely restates the Agency’s existing contractual obligations under Article 26, Section 3(A).<sup>40</sup> However, in the cases cited by the Union, the Authority stated only that a proposal could restate existing *statutory* obligations without imperiling its *negotiability*.<sup>41</sup> Therefore, contrary to the Union’s

assertions, a proposal is outside the duty to bargain if it restates an existing *contractual* obligation that is expressly covered by the subject matter of an existing, negotiated contractual provision.<sup>42</sup> Moreover, the Union does not explain how Proposal 3.b addresses a subject matter that is not already covered by Article 26, Section 3(A) of the parties’ agreement.<sup>43</sup> Consequently, we reject the Union’s argument and find that the parties have already negotiated how the Agency will address the accuracy of a BUE’s position description.<sup>44</sup> Therefore, Proposal 3.b is covered by the same subject matter as Article 26, Section 3(A) of the parties’ agreement and the Agency has no duty to bargain over Proposal 3.b.

<sup>31</sup> *Locals No. 216*, 71 FLRA at 607; *NTEU*, 70 FLRA 941, 942 (2018) (then-Member DuBester dissenting).

<sup>32</sup> *Fed. BOP v. FLRA*, 654 F.3d 91, 94-95 (D.C. Cir. 2011) (*BOP*).

<sup>33</sup> *Locals No. 216*, 71 FLRA at 607.

<sup>34</sup> Pet., Attach. 2 at 1.

<sup>35</sup> Statement at 10-12; see also Reply at 25-26 (“reaffirm[ing]” the covered-by arguments in its Statement as applying to the revised version of Proposal 3.b).

<sup>36</sup> Pet., Attach. 2 at 1.

<sup>37</sup> *Id.*

<sup>38</sup> *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 674 (D.C. Cir. 2017) (“[W]hether the parties intended a particular outcome does not resolve the ‘covered-by’ analysis.”).

<sup>39</sup> Resp. at 17.

<sup>40</sup> *Id.* at 17-19.

<sup>41</sup> See *Pro. Airways Sys. Specialists*, 64 FLRA 492, 495 n.8 (2010) (Member Beck dissenting) (“That a proposal may simply restate existing obligations does not affect its negotiability. Further, parties frequently include in their collective bargaining agreements provisions that mirror, or are intended to be

interpreted in the same manner as, provisions of law and regulation.”); *Pro. Airways Sys. Specialists*, 64 FLRA 474, 478 n.11 (2010) (Member Beck concurring and dissenting) (same); *NAGE, Loc. R1-109*, 64 FLRA 132, 134 n.3 (2009) (Member Beck dissenting) (same).

<sup>42</sup> See *Locals No. 216*, 71 FLRA at 607 (“Considering the wording of Section 7.05 above, we find that the parties have bargained over when the [a]gency will pay for travel and per diem in connection with negotiations, and how the parties will bring their negotiation impasses to the [Federal Mediation and Conciliation Service] or [Federal Service Impasses Panel] for assistance.”); *NTEU*, 70 FLRA at 943 (“We agree with the [a]gency’s contention that the subject of the proposal and the subject of Section 1.D.1. are the same: how to address employees’ individual inventory concerns.”).

<sup>43</sup> See Resp. at 17-19; see also 5 C.F.R. § 2424.32(a) (stating that the union bears the burden of “raising and supporting arguments that the proposal or provision is within the duty to bargain, within the duty to bargain at the agency’s election, or not contrary to law”).

<sup>44</sup> See *Locals No. 216*, 71 FLRA at 607; *NTEU*, 70 FLRA at 943.

## V. Proposal 4.b

### A. Wording of Proposal 4.b

4.b. Evaluative Review. All impacted bargaining-unit employees' performance evaluations will be conducted in accordance with all applicable provisions of Article 12 of the 2019 NA. Pursuant to Article 12, Section 4K, management will take into account mitigating factors such as availability of resources, lack of training, mix of work, collateral duties, or frequent authorized interruptions of normal work duties. Work associated with the HRConnect Contractor Management Module initiative based on words to the effect "other duties as assigned" shall not be used for performance appraisals.<sup>45</sup>

### B. Meaning of Proposal 4.b

The Union states that Proposal 4.b prevents the Agency from appraising BUEs on Module work unless the Agency modifies the BUE's position description to include Module work.<sup>46</sup> Although BUE's position descriptions presently include the phrase "other duties as assigned," the Union argues that a BUE's position description should be specific enough to put employees and prospective applicants on notice of the duties that will be rated in performance evaluations.<sup>47</sup> Therefore, the Union argues that Proposal 4.b only limits the Agency's ability to evaluate a BUE's performance of Module work based on that employee's position description.<sup>48</sup> At the PPC, the Agency stated that it disagreed with the Union's explanation of the proposal's operation because BUEs already perform module work with their current position descriptions.<sup>49</sup>

As stated earlier, where the parties disagree over a proposal's meaning, or to resolve other meaning issues, the Authority looks first to the proposal's plain wording and the union's statement of intent.<sup>50</sup> Here, the majority of Proposal 4.b requires the Agency to comply with certain provisions of the parties' agreement.<sup>51</sup> Additionally, Proposal 4.b prevents the Agency from appraising a BUE's performance of Module work when the Agency assigns Module work under the phrase "other

duties as assigned."<sup>52</sup> Therefore, Proposal 4.b certainly prevents the Agency from evaluating a BUE's performance of Module work unless the Agency amends the BUE's position description to include Module work.<sup>53</sup> Therefore, we adopt the Union's statement of the meaning of the proposal to determine its negotiability.

### C. Analysis and Conclusion

The Agency argues that Proposal 4.b (1) is covered by Article 12, Section 4 of the parties' agreement,<sup>54</sup> (2) is beyond the scope of the proposed change,<sup>55</sup> (3) interferes with management's right to assign work and direct employees,<sup>56</sup> and (4) is not a procedure under § 7106(b)(2) of the Statute.<sup>57</sup> The Authority may resolve a bargaining-obligation dispute if a proposal raises both a bargaining-obligation dispute and a negotiability dispute.<sup>58</sup> Additionally, resolving the Agency's covered-by objection fully disposes of Proposal 4.b, so we need not address the Agency's remaining negotiability objections.<sup>59</sup>

As stated above, the covered-by doctrine has two prongs. Under the first prong, the Authority examines whether the subject matter of the change to conditions of employment is expressly contained in the agreement.<sup>60</sup> The Authority does not require an exact congruence of language.<sup>61</sup> Instead, the Authority finds the requisite similarity if a reasonable reader would conclude that the contract provision settles the matter in dispute.<sup>62</sup>

The Agency cites to numerous provisions in Article 12, Section 4—which details how the Agency evaluates the performance of BUEs—to support its claim that Proposal 4.b is covered by the parties' agreement.<sup>63</sup> First, the Agency cites to Article 12, Section 4(C), which states that the Agency "will measure actual work performance in relation to the performance requirements of the positions to which employees are assigned and will be based on a reasonable and representative sample of the employee's work."<sup>64</sup> Based on Article 12, Section 4(C), the Agency argues that the parties' agreement already

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Statement at 14-18; *see also* Reply at 25-26 ("reaffirm[ing]" the covered-by arguments in its Statement as applying to the revised version of Proposal 4.b).

<sup>55</sup> Reply at 30-31; Resp. at 6.

<sup>56</sup> Reply at 32.

<sup>57</sup> *Id.* at 44-45.

<sup>58</sup> 5 C.F.R. § 2424.2(d).

<sup>59</sup> *See, e.g., NATCA*, 66 FLRA at 217-18 & n.6.

<sup>60</sup> *Locals No. 216*, 71 FLRA at 607; *NTEU*, 70 FLRA at 942.

<sup>61</sup> *BOP*, 654 F.3d at 94-95.

<sup>62</sup> *Locals No. 216*, 71 FLRA at 607.

<sup>63</sup> Statement at 14.

<sup>64</sup> *Id.*

<sup>45</sup> Resp. at 4-5.

<sup>46</sup> Record at 2-3.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Locals No. 216*, 71 FLRA at 606.

<sup>51</sup> Resp. at 4.

states that BUEs will only be evaluated based on the performance requirements of their position descriptions.<sup>65</sup>

Second, the Agency notes that Article 12, Section 4(J)(1) states that collateral duties will not be used as a negative factor in an employee's performance evaluation.<sup>66</sup> Moreover, because the phrase "other duties as assigned" encompasses collateral duties, the Agency argues that BUEs will not be negatively evaluated on Module work if it is assigned as "other duties."<sup>67</sup> Third, the Agency cites to Article 12, Section 4(K) of the parties' agreement.<sup>68</sup> Article 12, Section 4(K) states that "[i]n the application of standards to individual employees, the Employer will take into account mitigating factors such as availability of resources, lack of training, mix of work, collateral duties or frequent authorized interruptions of normal work duties."<sup>69</sup> Therefore, the Agency argues that the parties' agreement already considers the completion of collateral duties—like Module work—as a mitigating factor in performance evaluations.<sup>70</sup>

Here, the Agency cites to numerous provisions in the parties' agreement to demonstrate that Proposal 4.b concerns the same subject matter as Article 12, Section 4. While the phrase "other duties as assigned" does not appear in Article 12, Section 4 of the parties' agreement,<sup>71</sup> the Union does not dispute the Agency's claim that the assignment of "other duties" is

synonymous with the assignment of collateral duties.<sup>72</sup> Consequently, because Article 12, Section 4 pertains to the assignment of "other duties" as collateral duties, Proposal 4.b and Article 12, Section 4 both concern the assignment of Module work as "other duties."<sup>73</sup> Furthermore, similar to Proposal 4.b, Article 12, Section 4 of the parties' agreement already states that BUEs will not be negatively assessed on their performance of collateral duties.<sup>74</sup> Thus, we find that Proposal 4.b and Article 12, Section 4 concern the same subject matter under the first prong of the covered-by doctrine.<sup>75</sup>

The Union argues that Proposal 4.b is not outside the duty to bargain because it merely restates an already existing bargaining obligation and does not alter or change Article 12, Section 4 of the parties' agreement.<sup>76</sup> However, we reiterate that a proposal is outside the duty to bargain if it restates an existing contractual obligation that is expressly covered by the subject matter of an existing, negotiated contractual provision.<sup>77</sup> Consequently, because the Union fails to explain how Proposal 4.b does not address a subject matter that the parties have already negotiated in their collective-bargaining agreement, Proposal 4.b is outside the duty to bargain.<sup>78</sup>

## VI. Order

We dismiss the Union's petition.

<sup>65</sup> *Id.* at 14-15.

<sup>66</sup> *Id.* at 15. Article 12 Section 4(J)(1) of the parties' agreement states the following:

[t]he Employer has determined that only time spent performing work related to an employee's critical job elements and standards will be considered in performance appraisals. Authorized time spent performing collateral duties and Union representational functions will not be considered as a negative factor when evaluating any critical job elements. For example, if a Union representative has spent thirty percent (30%) of a work period on official time, annual leave, LWOP or performing Union duties, this fact will be considered in the application of expected performance standards. Additionally, if an employee is performing collateral duties or Union representational functions that result in frequent interruptions of normal work, such factors will be taken into account when evaluating the employee.

*Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Resp. at 4.

<sup>72</sup> See Statement at 4 (Module work is "considered collateral duties to the employee's regular work or performed under 'other duties as assigned' in the employee's position description."); *id.* at 14 ("Only time spent performing work related to the employee's standards and critical job elements will be considered; time spent performing duties outside of the employee's standards and critical job elements will not be considered negatively in an employee's performance appraisal."); Resp. at 18-19.

<sup>73</sup> See Resp. at 18-19.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> See *Locals No. 216*, 71 FLRA at 607; *NTEU*, 70 FLRA at 943. In the alternative, the Agency also argues that Proposal 4.b concerns the same subject matter as the parties' agreement because it changes the standards by which the Agency may evaluate the performance of collateral duties. Statement at 16-17. However, this argument is unfounded and without merit. As the Agency has demonstrated in its statement, both Proposal 4.b and Article 12, Section 4 of the parties' agreement state that the Agency may not use collateral duties—such as Module work—as negative factors in a BUE's performance evaluation. *Id.* at 14-15. Therefore, we reject this argument.

<sup>76</sup> Resp. at 18-19.

<sup>77</sup> See *Locals No. 216*, 71 FLRA at 607; *NTEU*, 70 FLRA at 943.

<sup>78</sup> See *Locals No. 216*, 71 FLRA at 607; *NTEU*, 70 FLRA at 943.

**Member Abbott, concurring:**

I agree that both proposals are outside the duty to bargain because they are covered by the parties' agreement.<sup>1</sup> However, I write separately to address several concerns that I have with both the Authority's covered-by doctrine and the new standards advanced by the dissent.

The dissent does not simply reframe a new approach to the Authority's covered-by doctrine. Instead, it calls on us to expel the Authority's longstanding precedent on the covered-by doctrine altogether in favor of one of the two standards used by the National Labor Relations Board (NLRB or the Board) to resolve private-sector disputes, both of which are far more onerous than our current standard.<sup>2</sup> According to the dissent, the Authority should adopt the Board's negotiability standards because "parties should not only have the opportunity, but should be encouraged, to resolve these disagreements through the bargaining process rather than their negotiated grievance procedure."<sup>3</sup>

I agree with the Chairman that parties should be encouraged to resolve disputes at the bargaining table. But that does not mean the parties should be encouraged or expected to bargain again and again over matters that previously were discussed, or are naturally related to those matters that were discussed, at the bargaining table around which the parties negotiated their term collective-bargaining agreement (CBA). The pertinent question then is whether the parties should be expected or required to return to bargain again over those matters. And this should not just apply to the provisions that made their way into the CBA. Parties have many reasons why they would discuss and include some provisions, but not others, in the CBA. Ultimately, each party makes the choice as the provisions that need to be, or actually inserted into, the CBA. But if the parties discuss a matter at the bargaining table, and then choose not to insert a provision concerning that matter into the CBA, that choice ought to be respected and should preclude later bargaining during the agreement's term in the same matter that an included provision precludes later bargaining.

The foundation upon which the Chairman bases his radical call is flawed in several respects. In the cases cited by the Chairman, the Board does not criticize the covered-by doctrine. Rather, the Board criticizes the "contract-coverage" doctrine and asserts that "[c]hanging to a 'contract-coverage' standard would very likely

complicate the collective-bargaining process and increase the likelihood of labor disputes."<sup>4</sup> Furthermore, the Chairman also fails to consider and account for the significant differences between private sector labor-relations and federal collective bargaining under the Federal Service Labor-Management Relations Statute (Statute), a line that has all too frequently been ignored.<sup>5</sup>

We have no more reason to apply a standard that has been used by the NLRB than the NLRB has to apply our standards. Unlike the Chairman's bewilderment at this notion, the Authority throughout its history has recognized that the foundations which underlie collective bargaining in the private and public sectors are quite distinct.<sup>6</sup> In private-sector collective bargaining, the parties' bargaining rights are completely encapsulated in their CBA.<sup>7</sup> By contrast, federal collective-bargaining does not cover the entire employment relationship because of the limitations imposed by Congress in the Statute.<sup>8</sup> The Statute explicitly limits bargaining to "conditions of employment" and it carves out specific matters that may not be covered by a CBA, including any management rights defined by § 7106(a).<sup>9</sup> Because the coverage of the National Labor Relations Act is far more encompassing, the failure to reach agreement can result in strikes. Under our Statute, such work stoppages are explicitly prohibited. Our Statute is also concerned with whether bargaining processes are efficient and effective so as not to needlessly burden the American taxpayer who foots the bill for all required bargaining, but also for bargaining that is repetitive or unnecessary. Refusing to acknowledge that these differences are relevant or even matter, the dissent fails to explain why the Authority should follow private-sector precedent created by the Board.

<sup>4</sup> See *Provena Hosps.*, 350 NLRB 808, 813-14 (2007) ("A 'contract-coverage' standard, in contrast, creates an incentive for employers to seek contractual language that might be construed as authorizing unilateral action on subjects of no present concern, requires unions to be wary of agreeing to such provisions, and invites future disputes about the scope of the contractual provision.")

<sup>5</sup> See *U.S. DHS, U.S. CBP, El Paso, Tex.*, 72 FLRA 7, 9 n.30 (2020) (*El Paso II*) (then-Member DuBester dissenting in part) ("Member Abbott notes that there are limits to the deference accorded arbitrators in federal sector arbitrations."); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 665 (2020) (*FCI Miami*) (Concurring Opinion of Member Abbott) ("Federal courts and administrative bodies, state courts, and the Authority have consistently questioned how far *Steelworkers'* deference translates more generally into the public sector.")

<sup>6</sup> *FCI Miami*, 71 FLRA at 664.

<sup>7</sup> *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960).

<sup>8</sup> *FCI Miami*, 71 FLRA at 664.

<sup>9</sup> *Id.*

<sup>1</sup> Majority at 4-9.

<sup>2</sup> Dissent at 14-15.

<sup>3</sup> *Id.* at 14.

Additionally, I am concerned that the dissent's new standards—both the contract-coverage doctrine and the “clear and unmistakable waiver” standard<sup>10</sup>—will become the Authority's new “abrogation” quagmire—a situation where Federal agencies were forced to bargain regardless of the language previously agreed to in earlier negotiations, or the limitations imposed on bargaining by the Statute. Prior to *U.S. DOJ, Federal BOP*,<sup>11</sup> the Authority used the abrogation standard and determined that an arbitrator's application of a contractual provision would not be found to be contrary to law unless it entirely “abrogates” a management right.<sup>12</sup> The abrogation standard was criticized by other Members of the Authority and federal courts, alike, because it was draconian and no provision—not even one—was ever found to abrogate a management right.<sup>13</sup> Just as the Chairman embraced that unworkable standard, adopting the NLRB's standard will be similarly improbable that an Agency will ever be able to prove that a union clearly and unmistakably waived a right to bargain. Neither approach can be reconciled with the Statute's management rights,<sup>14</sup> or limiting bargaining to matters that meet the definition of a condition of employment.<sup>15</sup>

Clearly, a reexamination is warranted. But a radical change, such as that proposed by the dissent, is not. Rather, the change that is necessary requires just one small step. In addition to those matters that are expressly contained in or inseparably bound with a subject expressly covered by the agreement,<sup>16</sup> our preclusion should expand to those matters that were discussed by the parties during negotiations but were, for whatever reason, not included as a provision in the final agreement. Therefore, as I discussed above, that choice should be

respected and have the same preclusionary effect as provisions that were included.

Therefore, I call upon my colleague to adopt this approach as the Authority's new covered-by standard.

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<sup>10</sup> Dissent at 14-15.

<sup>11</sup> 70 FLRA 398, 405 (2018) (*DOJ*) (then-Member DuBester dissenting).

<sup>12</sup> *U.S. EPA*, 65 FLRA 113, 118 (2010).

<sup>13</sup> *AFGE, Loc. 1164*, 67 FLRA 316, 321 (2014) (Concurring Opinion of Member Pizzella) (“My research reaffirms that since . . . 2011, the Authority still has yet to find that any proposal, any provision, or any application of contract provisions by any arbitrator abrogates any management right.”); *NTEU*, 65 FLRA 509, 521 (2011) (Dissenting Opinion of Member Beck) (“My research reveals *no case* in the past 20 years in which the Authority has found that a contract provision abrogates any management right; it just doesn't happen.”).

<sup>14</sup> See *DOJ*, 70 FLRA at 405-06.

<sup>15</sup> *El Paso II*, 72 FLRA at 10 (“Therefore, we find the term ‘working conditions’ must be separately analyzed and we define ‘working conditions’ as the circumstances or state of affairs attendant to one's performance of a job. Therefore, to determine whether the [a]gency had a duty to bargain, we must ask whether the change to a personnel policy, practice, or matter affects the circumstances or state of affairs attendant to one's performance of a job.”).

<sup>16</sup> *NTEU*, 70 FLRA 941, 942 (2018) (then-Member DuBester dissenting).

**Chairman DuBester, dissenting:**

As I have stated previously, I believe that “the Authority’s use of the covered-by standards warrants a fresh look.”<sup>1</sup> The circumstances of this case demonstrate why.

Here, the Agency implemented a new module for the accomplishment of its work, and changed bargaining-unit employees’ duties in the process. There is no dispute that the Agency had a duty to engage in impact-and-implementation bargaining regarding the change, and the parties engaged in such bargaining. As part of that bargaining, the Union proposed, in effect, to make it *clear* that unit employees will not be assigned work on the new module or appraised for such work unless their position descriptions are updated to reflect that work.

The pertinent provisions of the parties’ existing collective-bargaining agreement state, generically, that: the Agency will measure work performance in relation to the performance requirements of employees’ assigned positions; only time spent performing work related to critical elements will be considered in performance appraisals; collateral duties will not be considered as a negative factor in evaluating critical job elements; performance of collateral duties that result in frequent interruptions of normal work will be taken into account in evaluations; and collateral duties and frequent authorized interruptions of normal work duties will be taken into account as mitigating factors in applying performance standards.

Those provisions place certain limitations on the Agency’s ability to appraise employees’ performance. But they do *not* address the new module or explain how its adoption will affect employees, including how they will be assigned module work or how their performance of such work will be evaluated. And, even more generally, the contract provisions do *not* address how the Agency will implement changes in work processes or how it will go about assigning new duties to employees when it makes such changes.

As I recently stated in the context of union-initiated midterm bargaining, Congress “has unambiguously concluded,”<sup>2</sup> in § 7101(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute),<sup>3</sup> that “collective bargaining in the public

sector ‘safeguards the public interest,’ ‘contributes to the effective conduct of public business,’ and ‘facilitates and encourages the amicable settlements of disputes.’”<sup>4</sup> Collective bargaining under the Statute is “‘a continuing process’ involving, among other things, ‘resolution of new problems not covered by existing agreements.’”<sup>5</sup> And midterm bargaining promotes the Statute’s objectives because it “‘contributes to stability in federal labor-management relations and effective government’”<sup>6</sup> and “‘lead[s] to more focused negotiations.’”<sup>7</sup> It also “‘further[s] the Statute’s goal of enabling employees, ‘through labor organizations of their own choosing’ to more timely participate in ‘decisions which affect them’ and in cooperatively resolving disputes.’”<sup>8</sup> And negotiating over matters that arise midterm “is preferable to addressing them through the more adversarial grievance/arbitration process.”<sup>9</sup>

The same principles apply to the type of midterm bargaining at issue here – namely, bargaining that occurs in response to management-initiated changes to conditions of employment. And they support finding a duty to bargain over the Union’s proposals, through which the Union is merely attempting to clarify how the parties’ existing agreement will apply to the implementation of the new module and the attendant changes in unit employees’ duties.

Without such clarification, it is entirely foreseeable that disagreements will arise regarding whether or how the agreement applies to this new situation. In my view, the parties should not only have the opportunity, but should be encouraged, to resolve these disagreements through the bargaining process rather than their negotiated grievance procedure. And even where grievances arise concerning the application of a clarified agreement, the parties will still have benefitted from this bargaining by narrowing the disputes to be resolved at arbitration and providing the arbitrator greater clarity regarding the parties’ agreement.

Avoiding or narrowing such disputes by requiring the parties to clarify these matters in the course of their already-occurring impact-and-implementation bargaining promotes all of the statutory goals discussed above. For this reason alone, I believe the Authority should reexamine its “covered-by” doctrine.

<sup>1</sup> *SSA, Balt., Md.*, 66 FLRA 569, 576 (2012) (*SSA Balt.*) (Dissenting Opinion of then-Member DuBester); *accord NTEU, Chapter 160*, 67 FLRA 482, 487 (2014) (Dissenting Opinion of then-Member DuBester).

<sup>2</sup> *U.S. OPM*, 71 FLRA 977, 982 (2020) (*OPM*) (Dissenting Opinion of then-Member DuBester).

<sup>3</sup> 5 U.S.C. § 7101(a)(1).

<sup>4</sup> *OPM*, 71 FLRA at 982 (citing *U.S. Dep’t of the Interior, Wash., D.C.*, 56 FLRA 45, 51 (2000) (*Interior*) (Member Cabaniss concurring, in part, and dissenting, in part)).

<sup>5</sup> *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 46 (1957)).

<sup>6</sup> *Id.* (quoting *Interior*, 56 FLRA at 52).

<sup>7</sup> *Id.* (citing *Interior*, 56 FLRA at 52).

<sup>8</sup> *Id.* at 983 (quoting *Interior*, 56 FLRA at 54).

<sup>9</sup> *Id.* (quoting *Interior*, 56 FLRA at 51).



Until very recently, the National Labor Relations Board (the Board) applied a “clear and unmistakable waiver” standard to resolve complaints that an employer had unilaterally implemented changes in terms and conditions of employment in violation of the National Labor Relations Act.<sup>10</sup> As I have previously explained, in opting to apply that standard rather than a covered-by standard, the Board had “critically observed that the covered-by standard ‘creates an incentive for employers to seek contractual language that might be construed as authorizing unilateral action on subjects of no present concern, requires unions to be wary of agreeing to such provisions, and invites future disputes about the scope of the contractual provision.’”<sup>11</sup> As I further noted, the vast majority of the federal courts of appeals that have addressed the issue have applied the clear-and-unmistakable waiver standard.<sup>12</sup> And, under that standard, there is no question that the Union’s proposals would fall within the parties’ duty to bargain.

But even under the Board’s recently adopted analogue to the Authority’s covered-by doctrine – the “contract coverage” doctrine – I believe the Agency would be required to bargain over the proposals at issue.<sup>13</sup> The contract-coverage doctrine distinguishes between contract provisions that allow an employer to take unilateral employer action and those that prohibit the employer from taking some action.<sup>14</sup>

Similar to the Board, the D.C. Circuit “has interpreted the ‘contract coverage’ standard in unilateral-change cases to present the question whether a union has already ‘exercise[d] its right to bargain’ by memorializing in a contract the employer’s *right to act unilaterally*, thereby removing the covered action from

the range of further mandatory bargaining.”<sup>15</sup> Consistent with this principle, it has explained that, “[a]lthough the contract coverage standard does not require that the parties’ Agreement ‘specifically mention’ the . . . action at issue, . . . , *nor does it mean* an employer can unilaterally change the terms and conditions of employment without bargaining because they fall within a broad subject area that the parties’ Agreement had addressed in other respects[.]”<sup>16</sup>

Here, the cited provisions of the parties’ existing agreement do not allow the Agency to take any action; they prohibit it from doing certain things. And, even if the implementation of the module could be considered to “fall within a broad subject area” that the parties’ agreement already addresses, that would not obviate the duty to bargain under the Board’s contract-coverage doctrine.<sup>17</sup>

For all of these reasons, it is clear to me that the Authority should re-examine its current covered-by doctrine. And against this background, I disagree that the doctrine should be applied to prevent bargaining over the proposals at issue.

<sup>10</sup> See *MV Transp., Inc.*, 368 NLRB No. 66, slip op. at 25 (2019) (Dissenting Opinion of then-Member McFerran) (“Breaking with [seventy] years of precedent[.] . . . the majority today abandons ‘one of the oldest and most familiar of Board doctrines’: the clear-and-unmistakable-waiver standard[.]” (quoting *Provena Hosps.*, 350 NLRB 808, 810 (2007) (*Provena*))).

<sup>11</sup> *SSA Balt.*, 66 FLRA at 576 (quoting *Provena*, 350 NLRB at 813-14).

<sup>12</sup> See *id.*; see also *MV Transp., Inc.*, 368 NLRB No. 66, slip op. at 26 & n.12 (Dissenting Opinion of then-Member McFerran) (discussing court cases).

<sup>13</sup> See, e.g., *MV Transp., Inc.*, 368 NLRB No. 66, slip op. at 1.

<sup>14</sup> See *ABF Freight Sys.*, 369 NLRB No. 107, slip op. at 3 (2020) (“Although a collective-bargaining agreement need not specifically address the employer decision at issue to be ‘covered by’ the contract, here, looking at the plain language of the [contract], all we find is a contractual prohibition, which the Respondent may well have breached. Accordingly, we cannot say that the installations came within the compass or scope of any contract language that granted the Respondent the right” to take the unilateral action at issue.).

<sup>15</sup> *Pac. Mar. Ass’n v. NLRB*, 967 F.3d 878, 890 (D.C. Cir. 2020) (*Pac. Mar.*) (emphasis added) (citations omitted); see also *id.* at 891 (further explaining that “[t]o conclude that a [collective-bargaining agreement] covers the challenged unilateral conduct, the conduct must fall ‘within the compass or scope of contract language granting the employer the right to act unilaterally’”).

<sup>16</sup> *Id.* at 891 (emphasis added) (citations omitted); see also *Int’l Brotherhood of Elec. Workers, Loc. Union 43 v. NLRB*, 9 F.4th 63, 72-77 (2d Cir. 2021) (U.S. Court of Appeals for the Second Circuit adopted Board’s contract-coverage doctrine but reversed Board’s finding of no unilateral-change violation, concluding that contract provisions regarding hours of work and overtime did not permit employer to unilaterally implement six-day workweek).

<sup>17</sup> *Pac. Mar.*, 967 F.3d at 890. My colleague spills much ink pointing out that private-sector bargaining differs from federal-sector bargaining in various ways. See Concurrence at 10-11. That is certainly true. See, e.g., *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 71 FLRA 660, 673 (2020) (Dissenting Opinion of then-Member DuBester) (discussing the “significant limitations on federal sector bargaining that are not found in the private sector”), *pet. for review dismissed sub nom. AFGE, Loc. 3690 v. FLRA*, 3 F.4th 384 (D.C. Cir. 2021). But my colleague fails to explain how the differences he discusses are in any way relevant to application of the covered-by and contract-coverage doctrines. Moreover, to the extent that my colleague’s concern is rooted in ensuring efficient and effective processes, I would simply note, as stated above, that this interest is ably served by allowing parties to resolve their differences through bargaining.