

73 FLRA No. 30

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 15
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
JOINT MUNITIONS COMMAND
ROCK ISLAND, ILLINOIS
(Agency)

0-NG-3478

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

July 21, 2022

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

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).¹ This case involves a dispute that arose between the parties over proposals related to the Agency's implementation of several Executive Orders (the EOs). For the reasons that follow, we find that the proposals are outside the duty to bargain. Accordingly, we dismiss the Union's petition for review (petition).²

II. Background

During negotiations for a successor collective-bargaining agreement, the Agency notified the Union of its intent to implement the EOs.³ In response, the Union submitted proposals concerning implementation of the EOs.⁴ Subsequently, the Union requested a written declaration of nonnegotiability from the Agency over the proposals relevant here, which the Agency provided. Thereafter, the Union filed the instant petition.⁵

The Agency filed its statement of position (statement), and the Union filed a response to the statement (response). An Authority representative then conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority's Regulations.⁶ The Agency filed a reply to the response (reply).

Additionally, after the Agency declared the proposals nonnegotiable, it implemented the EOs. The Union then filed two grievances regarding the EOs' implementation, alleging that the Agency violated § 7116(a)(1), (2), (5), and (7) of the Statute⁷ by, among other things, unilaterally implementing the EOs.⁸

¹ 5 U.S.C. § 7105(a)(2)(E).

² After the Union filed its petition, the Authority's Office of Case Intake and Publication ordered the Union to correct certain procedural deficiencies in its filing. Feb. 5, 2020 Order at 2. In a timely response to the order, the Union filed an amended petition to correct deficiencies. Feb. 15, 2020 Amended Pet. at 1-52 (Am. Pet.). Unless otherwise noted, further references to the petition concern the amended version.

³ Promoting Accountability & Streamlining Removal Procedures Consistent With Merit System Principles, Exec. Order No. 13,839, 83 Fed. Reg. 25,343 (May 25, 2018) (EO 13839); 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 13837); 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 13836); Revocation of Executive Order Creating Labor-Management Forums, Exec. Order No. 13,812, 82 Fed. Reg. 46,367 (Sept. 29, 2017).

⁴ Reply Form, Attach. 2 (Union Proposals for Implementation) at 1 ("Union Proposals for Implementation of E.O. 13836, 13837, 13839, 13812").

⁵ The Union's petition initially included thirty proposals, but in its response to the Agency's statement of position (response) and at the post-petition conference (PPC), the Union withdrew proposals b, d, e, i, j, k, o, p, q, u, v, w, x, and aa from the petition. Resp. at 5-8 (withdrawing proposals b, d, e, i, and j); Record of PPC (Record) at 3, 5, 10, 15, 18, 21 (reaffirming Union withdrew proposals b, d, e, i, and j, and withdrawing proposals k, o, p, q, u, v, w, x, and aa); *see also* Reply Br. at 3, 5, 8, 12, 14, 16 (reaffirming Union withdrew proposals b, d, e, i, j, k, o, p, q, u, v, w, x, and aa); *see also* Mot. to Partially Withdraw at 2 (Agency withdrawing allegation of nonnegotiability as to proposals b, d, p, and q). After the Agency's reply withdrawing its allegation of nonnegotiability as to proposal y, Reply Br. at 14, the Authority issued an order directing the Union to show cause why the Authority should not dismiss proposal y because there does not appear to be a negotiability dispute. August 10, 2020 Order at 1-2. The Union responded to the order stating that it was withdrawing proposal y from the petition. Union's Resp. to Order at 1.

⁶ 5 C.F.R. § 2424.23.

⁷ 5 U.S.C. § 7116(a)(1), (2), (5), (7).

⁸ Reply Form, Attach. 3 (First Grievance); *Id.*, Attach. 7 (Second Grievance).

III. Preliminary Matters

- A. We consider the Agency's supplemental submission, and dismiss the petition as to proposals a, h, l, z, and ab, without prejudice.

The Agency requested leave under § 2429.26 of the Authority's Regulations⁹ to file, and did file, a motion to partially withdraw its allegation of nonnegotiability and certain arguments made in its statement.¹⁰ In its motion, the Agency states that because the EOs have been revoked,¹¹ it withdraws its allegation of nonnegotiability as to proposals a, h, l, z, and ab, and withdraws its arguments that proposals f, g, m, r, and s conflict with the EOs.¹²

Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of the Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" when appropriate.¹³ The Authority has held that a filing party must show why its supplemental submission should be considered.¹⁴ The Authority has granted leave to file other documents where the supplemental submission responds to issues that could not have been addressed previously.¹⁵

Because the revocation of the EOs occurred after the Agency filed its reply, the Agency could not have addressed the revocation's effect on its allegation of nonnegotiability and arguments previously. Therefore, we grant the Agency's motion to file a supplemental submission to partially withdraw its allegation of nonnegotiability and certain arguments made in its statement.¹⁶

Further, under § 7117 of the Statute and § 2424.2 of the Authority's Regulations, the Authority will consider a petition for review only where there is a negotiability dispute.¹⁷ The regulations define a "[n]egotiability

dispute" as a "disagreement between a[] [union] and an agency concerning the legality of a proposal or provision."¹⁸

As the Agency has withdrawn its allegation of nonnegotiability as to proposals a, h, l, z, and ab,¹⁹ and the Union does not object,²⁰ there is no disagreement between the Union and the Agency over the negotiability of these proposals. Therefore, we dismiss the petition as to proposals a, h, l, z, and ab, without prejudice to the right to refile, if the conditions governing review of negotiability issues are satisfied.²¹

Additionally, as the Agency has withdrawn its arguments that proposals f, g, m, r, and s conflict with the EOs, and the Union does not object, we do not consider those arguments. But we do consider the Agency's remaining arguments addressing the nonnegotiability of these proposals.

Accordingly, proposals c, f, g, m, n, r, s, t, and ac remain in dispute.

- B. Section 2424.30(a) of the Authority's Regulations does not require the dismissal of the petition.

At the PPC, the parties informed the Authority that the Union had filed the above-mentioned grievances alleging that the Agency committed several unfair labor practices (ULPs) under the Statute by implementing the EOs.²² As relevant here, the Authority's Office of Case Intake and Publication (CIP) issued an order on June 3, 2021 (June order), directing the Union to show cause why the petition should not be dismissed without prejudice under § 2424.30(a) of the Authority's Regulations²³ because it may be directly related to the pending grievances.²⁴ Based on the Union's response to the June order, CIP issued a second order on August 3, 2021 (August order), directing the Union to provide additional

⁹ 5 C.F.R. § 2429.26.

¹⁰ Mot. to Partially Withdraw at 2.

¹¹ Protecting the Federal Workforce, Exec. Order No. 14,003, 86 Fed. Reg. 7,231 (Jan. 22, 2021) (revoking EOs 13836, 13837, and 13839).

¹² Mot. to Partially Withdraw at 2. In its motion, the Agency also withdraws its allegation of nonnegotiability as to proposals b, d, p, q, and y, and its arguments that proposals e and j conflict with the EOs. *Id.* Because the Union previously withdrew these proposals from its petition, we find it unnecessary to consider the Agency's motion related to these proposals. *See supra* note 5.

¹³ 5 C.F.R. § 2429.26.

¹⁴ *U.S. Dep't of Transp., FAA*, 66 FLRA 441, 444 (2012) (citing *NTEU*, 65 FLRA 302, 305 (2010)).

¹⁵ *U.S. DHS, U.S. CBP*, 68 FLRA 524, 526 (2015) (*CBP*), *recons denied*, 69 FLRA 22 (2015).

¹⁶ *See id.*

¹⁷ 5 U.S.C. § 7117; 5 C.F.R. § 2424.2; *see, e.g., AFGE, Loc. 1164*, 65 FLRA 924, 927 (2011).

¹⁸ 5 C.F.R. § 2424.2(c) (also stating that a "negotiability dispute exists when a[] [union] disagrees with an agency contention that . . . a proposal is outside the duty to bargain").

¹⁹ Mot. to Partially Withdraw at 2.

²⁰ *See Nat'l Weather Serv. Emps. Org.*, 63 FLRA 450 (2009) (union had opportunity to file supplemental submission regarding proposals).

²¹ *AFGE, Council 53, Nat'l VA Council*, 71 FLRA 1124, 1125 (2020) (dismissing petition as to certain proposals where agency effectively withdrew allegation of nonnegotiability); *NFFE, Loc. 1998, IAMAW*, 71 FLRA 417, 417-18 (2019) (same).

²² Record at 2; *see* Resp. at 2; Statement at 1.

²³ 5 C.F.R. § 2424.30(a).

²⁴ June 3, 2021 Order to Show Cause at 1 (June Order).

evidence not included with its response to the June order to demonstrate why the petition should not be dismissed.²⁵

Section 2424.30(a) of the Authority's Regulations provides that the Authority will dismiss a negotiability appeal where the "exclusive representative files . . . a grievance alleging a [ULP] under the parties' negotiated grievance procedure, and the . . . grievance concerns issues directly related to the petition for review."²⁶ Such dismissals are "without prejudice to the right of the exclusive representative to refile the petition for review after the . . . grievance has been resolved administratively"²⁷

In response to the June and August orders, the Union asserted that both grievances have been resolved administratively because: (1) an arbitrator issued an award on the first grievance, and (2) the Union did not pursue the second grievance past the first step grievance procedure.²⁸ Because the Union has demonstrated that an arbitrator has issued an award resolving the ULP allegations in the first grievance,²⁹ we find that grievance administratively resolved.³⁰ And, as relevant here, the Authority has found that, when a union withdraws a ULP claim related to a petition, the Authority will consider the petition because the ULP claim "has been resolved administratively."³¹ Thus, because the Union demonstrated that it effectively withdrew the second grievance,³² we find that the second grievance also has been administratively resolved. Accordingly, we do not dismiss the Union's petition on this basis, and we address the proposals.

IV. The Proposals

A. Proposal c

1. Wording

Article 7 Section 7.1.c:
[Point of clarification] Any designated Union representative, both Agency and non-agency employees will be granted access to the facility as required to handle representational matters. The

Agency will not, in any way discriminate against Union representatives in granting full access to the workplace for the purpose of conducting union business.³³

2. Meaning

At the PPC, the parties explained that "[p]oint of clarification" indicates that the proposal will operate in conjunction with, and clarify other parts of, the parties' eventual renegotiated agreement.³⁴ Regarding the first sentence, the parties agreed that a "designated Union representative" includes any individual that the Union designated to serve in that capacity.³⁵ Where the sentence refers to "Agency and non-agency employees," the parties intend that phrase to mean individuals whom the Agency employs, as well as those whom it does not employ.³⁶ The parties explained that the "facility" refers to Rock Island Arsenal.³⁷ And they agreed that when the proposal requires that Union representatives "will be granted access to the facility," the Agency must provide Union representatives with the same access to the facility that third parties and Agency employees would have, subject to the same security-screening procedures.³⁸ The parties clarified that "representational matters" include all of those matters in which the Union would be entitled to act as the exclusive representative of the bargaining unit under the Statute.³⁹

Regarding the second sentence, by prohibiting the Agency from "discriminat[ing]" against Union representatives, the parties intend to forbid the Agency from treating those representatives less favorably than third parties or Agency employees with regard to "access to the workplace."⁴⁰ Further, the parties agreed that reference to "full access to the workplace" differs from the proposal's reference to "access to the facility."⁴¹ "[W]orkplace" access under the second sentence would entitle Union representatives to access the buildings at the facility where representational matters are conducted, after those representatives notify the security personnel (who screened them for access to the facility) of their

²⁵ August 3, 2021 Order to Show Cause at 1 (August Order).

²⁶ 5 C.F.R. § 2424.30(a).

²⁷ *Id.*

²⁸ Union's Resp. to June Order at 1-2; Union's Resp. to August Order at 1-3.

²⁹ Union's Resp. to August Order at 1-2; *see id.*, Ex. 4 (Award); *see also* June Order at 1-2.

³⁰ We note that the award resolving the first grievance did not resolve any questions concerning the negotiability of the proposals in the petition.

³¹ 5 C.F.R. § 2424.30(a); *NAIL, Loc. 5*, 67 FLRA 85, 86 (2012); *NTEU*, 62 FLRA 267, 268-69 (2007), *aff'd & rev'd as to other*

matters sub nom., NTEU v. FLRA, 550 F.3d 1148 (D.C. Cir. 2008); *see also NTEU*, 59 FLRA 978, 978 (2004).

³² Union's Resp. to August Order at 3; *see id.*, Ex. 3; *see also* June Order at 2-3.

³³ Am. Pet. at 21, Proposals (Proposals) at 3.

³⁴ Record at 3; *see id.* at 2.

³⁵ *Id.* at 3-4.

³⁶ *Id.* at 4.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

intended destination within the facility buildings.⁴² In addition, the parties agreed that “union business” has the same meaning as “representational matters.”⁴³

Additionally, the parties agreed that the proposal would benefit bargaining-unit employees because it would allow those employees to receive advice and assistance from non-Agency-employee Union representatives.⁴⁴ However, the Agency noted that bargaining-unit employees were previously able to access non-Agency-employee sources of advice and assistance, where the Union had designated those sources to act as its agent.⁴⁵

3. Analysis and Conclusion: The Union fails to show that the proposal constitutes an exception to the affected management rights.

The Agency argues that proposal c is nonnegotiable because it affects management’s right to determine internal security practices under § 7106(a)(1) of the Statute.⁴⁶ The Union does not dispute, in either its petition or its response, the Agency’s argument.⁴⁷ The Authority’s regulations state that a “[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion.”⁴⁸ Consistent with these regulations, where, as here, a union does not respond to an agency’s claim that a provision affects the exercise of a management right, the Authority will find that the union concedes that the provision affects the claimed management right.⁴⁹ Thus, we find that the Union concedes that proposal c affects management’s right to determine its internal security practices.

Under § 2424.25(c)(1) of the Authority’s Regulations, a union must set forth its arguments and

supporting authorities for any assertion that its proposal constitutes an exception to a management right, including “[w]hether and why the proposal” constitutes a negotiable procedure under § 7106(b)(2), or an appropriate arrangement under § 7106(b)(3).⁵⁰ The Union asserts that proposal c is negotiable as an appropriate arrangement under § 7106(b)(3) of the Statute.⁵¹

In determining whether a proposal is an appropriate arrangement, the Authority first examines whether the proposal is intended as an arrangement for employees adversely affected by the exercise of a management right.⁵² To establish that a proposal is an arrangement, a union must identify the actual effects, or reasonably foreseeable effects, on employees that flow from the exercise of the management right and how those effects are adverse.⁵³ Proposals that address speculative or hypothetical concerns do not constitute arrangements.⁵⁴ That a proposal would provide benefits to employees, by itself, does not mean that the proposal constitutes an arrangement.⁵⁵

The Union asserts that the proposal is an appropriate arrangement for employees seeking representation in a grievance or other representational matter by an outside representative.⁵⁶ Although the Union describes the security process for representatives entering the Agency’s facility,⁵⁷ it neither identifies any actual adverse effects, or reasonably foreseeable adverse effects on employees flowing from any existing Agency limitations on access to its facility. In short, the Union’s assertions do not explain how the proposal is an arrangement.⁵⁸

Consequently, we conclude that the Union has not demonstrated that proposal c is an arrangement within the meaning of § 7106(b)(3) of the Statute.⁵⁹ As such, we need not address whether the proposal is appropriate.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 5 U.S.C. § 7106(a)(1); Statement at 5-8.

⁴⁷ Proposals at 3-4; Resp. at 5.

⁴⁸ 5 C.F.R. § 2424.32(c)(2); *id.* § 2424.32(a) (unions bear the “burden of raising and supporting arguments that the proposal . . . is within the duty to bargain, within the duty to bargain at the [A]gency’s election, or not contrary to law); *see also Nat’l Nurses United*, 70 FLRA 306, 307 (2017).

⁴⁹ *See AFGE, Loc. 2058*, 68 FLRA 676, 682-83 (2015) (*Local 2058*) (Member Pizzella dissenting in part); *AFGE, Loc. 1938*, 66 FLRA 1038, 1040 (2012) (*Local 1938*).

⁵⁰ 5 C.F.R. § 2424.25(c)(1)(ii), (iii).

⁵¹ Resp. at 5.

⁵² *Local 2058*, 68 FLRA at 679 (citing *AFGE, Nat’l Border Patrol Council*, 51 FLRA 1308, 1317 (1996)).

⁵³ *Id.* (citing *NTEU*, 55 FLRA 1174, 1187 (1999) (*NTEU*)); *Marine Eng’rs’ Beneficial Ass’n Dist. No. 1-PCD*, 60 FLRA 828, 831 (2005) (*Marine*) (citing *NTEU*, 55 FLRA at 1187).

⁵⁴ *Local 2058*, 68 FLRA at 679-80 (citations omitted); *Marine*, 60 FLRA at 831.

⁵⁵ *U.S. DOD, Fort Bragg Dependents Schs., Fort Bragg, N.C.*, 49 FLRA 333, 344 (1994) (*Fort Bragg*) (citing *AFGE, Council of Prison Locs., Loc. 3974*, 48 FLRA 225, 230-31 (1993); *NTEU*, 45 FLRA 1256, 1258-59 (1992)).

⁵⁶ Resp. at 5.

⁵⁷ *Id.*

⁵⁸ *Fort Bragg*, 49 FLRA at 344-45 (finding that mere assertion by union that proposal would benefit employees because it would afford employees access to representation assistance does not demonstrate that proposal would ameliorate any adverse effects flowing from the exercise of a management right).

⁵⁹ *Fraternal Ord. of Police, DC Lodge 1, NDW Lab. Comm.*, 72 FLRA 377, 379 (2021) (Member Abbott concurring); *Fort Bragg*, 49 FLRA at 344-45; *see* 5 C.F.R. § 2424.32(a).

Because the proposal affects management’s right to determine its internal security practices, and the Union has not established that the proposal is negotiable as an exception to that right under § 7106(b)(3), we find that proposal c is outside the duty to bargain.⁶⁰

B. Proposals f, g, m, n, r, s, t, ac

1. Wording

a. Proposal f

Article 7 Section 7.4.a: When an employee will be acting as a Union official during duty time, the employee will, at a minimum, send an email with as much notice as possible, to his/her supervisor notifying when he/she are leaving the work site. The employee will also send an email to the supervisor when he/she returns to the worksite. The employee and supervisor may develop additional methods of communication to facilitate approval. The employee will consider the mission requirements when determining when to leave the worksite to minimize mission impact during the anticipated absence. However, if mission requirements dictate, the supervisor may require the employee or representative to return to the office. In the event there is a mission requirement, the supervisor will defer the use of taxpayer-funded union time. Normally, deferrals will be no longer than immediate mission requirements. Any conflict on deferral or the use of time/approval will be addressed by the senior Union representative and designated management representative. If mutual agreement is not reached to resolve when time may be used, the Union may file a grievance to address.⁶¹

b. Proposal g

b. When an employee is seeking Union assistance during duty time, the employee will, at a minimum, send an email with as much notice as possible, to his/her supervisor notifying when he/she are leaving the work site. The

employee will also send an email to the supervisor when he/she returns to the worksite. The employee will consider the mission requirements when determining when to leave the worksite to minimize mission impact during the anticipated absence.⁶²

c. Proposal m

5. If mission requirements dictate, the use of official time may be deferred. Normally, deferrals will be no longer than immediate mission requirements. In the event a steward’s representational issues become disproportionate, discussions will be initiated by the senior Union representative or the designated management representative to attempt to resolve the issue. If mutual agreement is not reached to resolve the amount of representational duties being performed either party may file a Union/Management Dispute.⁶³

d. Proposal n

Section 7.8. Union Management Meetings

The following policies and procedures shall apply to meetings between the Parties:

Article 7 Section 7.8.a 1 8. Where the Agency finds official time to be an ineffective and inefficient use of taxpayer funds, the following labor-management functions will be scheduled outside of the labor representative’s duty hours to allow for the full participation of employee labor representatives:

- 1. Joint Labor-Management training.
- 2. Formal meetings between Management Officials and bargaining unit employees on matters related to any personnel policy or practices,

⁶⁰ Because we find that proposal c is outside the duty to bargain for the foregoing reasons, it is unnecessary to address the Union’s request for severance. Proposals at 4; Record at 4.

⁶¹ Proposals at 6-7, as amended by Record at 5.

⁶² Proposals at 8.

⁶³ *Id.* at 15, as amended by Record at 12.

or other general condition of employment.

3. Investigative interviews.
4. Labor-Management Forums or equivalent, including pre-decisional discussions about possible changes to personnel policies, practices and working conditions.
5. Grievance meetings.
6. Oral replies to proposed disciplinary or adverse actions based on misconduct or performance.⁶⁴

e. Proposal r

The Employer agrees that disciplinary actions shall be based upon just cause and be consistent and equitable within the bargaining unit.⁶⁵

f. Proposals

a. Oral Counseling Sessions: A supervisor should, when considering discipline, recognize a period of good conduct by the employee as a mitigating factor in disciplinary proposals. Where the time between a counseling session and another minor infraction exceeds 2 years, the weight of a prior counseling session should be minimal, if considered at all.

b. Written Counseling Sessions: A supervisor should recognize a period of good conduct by the employee as a mitigating factor in disciplinary proposals. Where the time between a written counseling and another infraction exceeds 2 years, the weight of a written counseling should be minimal, if used at all. Formal Written Counseling, where there has been no recurrence of the infraction, shall be removed on the expiration date.⁶⁶

g. Proposal t

Article 14, Section 5.b. Such discipline should be consistent throughout the Bargaining Unit, in that like penalties should be imposed for like offenses. (Does not conflict with EO).⁶⁷

h. Proposal ac

Section 34.3 Timeframe to Remove Entries

Time limits for derogatory information will be as defined below:

c[.] Entries related to attendance problems, exclusive of leave restrictions, which have no expiration dates, will be removed after one (1) year if there has been no recurrence.

d[.] Entries related to performance, other than the official performance plan and appraisal, will be removed upon the expiration of the annual rating period to which they pertain.

e[.] Entries that have an expiration date will not be used to support future actions after the expiration date.⁶⁸

2. Meaning of proposals f, g, m, n, r, s, t, and ac

a. Proposal f

At the PPC, the parties agreed that proposal f, as a whole, sets forth methods to govern labor-management communications regarding the scheduling and use of official time.⁶⁹ Regarding the third sentence, the Agency disagreed with the Union's assertion that the phrase "to facilitate approval"⁷⁰ means that employees who act as Union officials on duty time *must* obtain supervisory approval in order to use official time.⁷¹ The Agency also disagreed with the Union's assertion that the terms "when determining when to leave the worksite" and "minimize mission impact"⁷² would allow a supervisor the discretion to defer or deny a request if an employee does

⁶⁴ Proposals at 17, as amended by Record at 13-14.

⁶⁵ Pet. at 40, Proposals at 22.

⁶⁶ Proposals at 23.

⁶⁷ Record at 17.

⁶⁸ Proposals at 33.

⁶⁹ Record at 8.

⁷⁰ *Id.* at 6.

⁷¹ *Id.* (Agency asserted that proposal would allow an employee to merely notify a supervisor of the employee's official-time usage, without seeking or obtaining approval).

⁷² *Id.*

not give adequate weight to mission requirements before requesting official time.⁷³

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.⁷⁴ If the union's explanation comports with the proposal's plain wording, then the Authority adopts that meaning in determining whether the proposal is within the duty to bargain.⁷⁵ Here, the plain wording of the proposal, which is entitled "Requesting and Documenting Official Time,"⁷⁶ allows an employee-supervisor pair to develop methods of communication to assist in the approval process; the proposal does not suggest that notification is the only requirement for approval of official time.⁷⁷ The plain wording also requires an employee to *consider* the mission requirements when determining to leave the worksite, but allows a supervisor to essentially reverse the employee's determination to leave the worksite by requiring them to return to the office.⁷⁸ Therefore, we adopt the Union's statement of the meaning of the proposal to determine its negotiability.⁷⁹

b. Proposal g

At the PPC, the parties agreed that proposal g is similar to the first, second, and fourth sentences of proposal f, except that proposal g concerns official-time usage for bargaining-unit "employees" not acting as Union officials.⁸⁰

c. Proposal m

The parties agreed that the phrase "[i]f mission requirements dictate," the concept of "deferr[ing]" official time, and the second sentence of the proposal operate in the same manner as they did in proposal f.⁸¹ Further, the parties explained that the employee's first-line supervisor would normally be the individual deferring an employee's official time.⁸² And the parties agreed that the proposal contemplates a

situation in which "a steward's representational issues become disproportionate" and raise concerns for management, and that the proposal would permit either party to file a certain type of grievance if management's concerns were not resolved informally.⁸³

d. Proposal n

The parties agreed that proposal n would be triggered when the Agency denies a labor representative request to perform one of the listed activities on official time.⁸⁴ In such a case, the Agency must comply with the scheduling requirements under proposal n when scheduling one of the listed functions, to allow Union participation to the fullest extent practicable.⁸⁵

e. Proposal r

The Agency disagreed with the Union's assertion that "just cause" means discipline that has a justifiable basis and is not arbitrary or capricious.⁸⁶ The Agency also disagreed that "consistent and equitable" means discipline must comply with EO 13,839 and that the penalty is equitable (1) given the severity of the disciplinary offense and (2) when considered alongside penalties given to other bargaining-unit employees who commit like offenses.⁸⁷ Here, the plain wording of the proposal requires that discipline be based on just cause and be consistent and equitable throughout the bargaining unit.⁸⁸ Because the Union's explanation comports with the plain wording of the proposal, we adopt the Union's explanation.⁸⁹

f. Proposals

The parties agreed that the proposal applies to all discipline, but the Agency disagreed with the Union's assertion that "mitigating factor" and "should be minimal, if considered at all" give a supervisor discretion to determine how much weight, if any, to give a "period of good conduct."⁹⁰ Here, the proposal's wording allows a supervisor to weigh a period of good conduct as

⁷³ *Id.*

⁷⁴ *AFGE, Council 119*, 72 FLRA 63, 64 (2021) (*Council 119*) (Member Abbott dissenting in part) (citing *AFGE, Nat'l Council of EEOC Locs No. 216*, 71 FLRA 603, 606 (2020) (*EEOC Locals*) (then-Member DuBester dissenting in part)).

⁷⁵ *Id.* (citing *NAGE, Loc. R-109*, 66 FLRA 278, 278-79 (2011); *NAGE, Loc. R1-100*, 61 FLRA 480, 480-81 (2006) (Member Armendariz concurring)).

⁷⁶ Union Proposals for Implementation at 3. In its proposals to the Agency, the Union titled proposal f, along with several withdrawn proposals, as "Requesting and Documenting Official Time."

⁷⁷ Proposals at 6.

⁷⁸ *Id.* at 6-7, as amended by Record at 5.

⁷⁹ *EEOC Locals*, 71 FLRA at 606-07.

⁸⁰ Record at 8.

⁸¹ *Id.* at 12.

⁸² *Id.*

⁸³ *Id.* at 12-13.

⁸⁴ *Id.* at 14.

⁸⁵ *Id.* In its reply, the Agency disputed the PPC record, which stated that the parties agreed that proposal n would allow the Agency to adjust a labor representative's duty hours on a particular day to coincide with the labor-management function instead of rescheduling the function to match the representative's duty hours. Reply Br. at 1-2; *see* Record at 14. For the reasons discussed *infra* Section IV.B.3, we need not resolve the Agency's disagreement with the Record.

⁸⁶ Record at 15.

⁸⁷ *Id.*

⁸⁸ Pet. at 40, Proposals at 22.

⁸⁹ *EEOC Locals*, 71 FLRA at 606-07.

⁹⁰ Record at 17.

one mitigating factor in the Agency's decision to discipline an employee, and suggests that where the time between a counseling session and another minor infraction exceeds two years, the deciding supervisor may attribute minimal weight in considering discipline. Because the Union's explanation comports with the plain wording of the proposal, we adopt the Union's statement of the proposal's meaning.⁹¹

g. Proposal t

Similar to proposal r, the parties disagreed over the meaning of "consistent" and whether it requires the Agency to give the same penalty to all bargaining-unit employees with similarly labelled disciplinary offenses, regardless of the details of each employee's offense.⁹² Here, the plain wording of the proposal seeks to clarify that discipline should be imposed consistently throughout the bargaining unit by providing that an employee's discipline should be similar to the discipline imposed on other employees who have committed similar offenses. Because the Union's explanation comports with the plain wording of the proposal, we adopt that explanation.⁹³

h. Proposal ac

The parties agreed that the proposal is intended to limit the Agency's future use of "derogatory information" when the information is not the basis of discipline and is not used by its expiration date.⁹⁴

3. Analysis and Conclusions:
Proposals f, g, m, n, r, s, t, and
ac affect management's rights
under § 7106 of the Statute.

The Agency argues that proposals f, g, m, n, r, s, t, and ac are nonnegotiable because they affect management's right to assign work under

§ 7106(a)(2)(B)⁹⁵ or management's right to remove employees or take other disciplinary actions under § 7106(a)(2)(A) of the Statute.⁹⁶ The Union does not dispute, in either its petition or its response, the Agency's arguments. Nor does the Union make any argument that these proposals fall within an exception to management rights.⁹⁷ Thus, consistent with § 2424.32(c)(2), discussed above, we find that the Union concedes that these proposals affect the cited management rights,⁹⁸ and fails to show that the proposals are negotiable pursuant to an exception to management's rights.⁹⁹ Therefore, we dismiss the petition as to proposals f, g, m, n, r, s, t, and ac.¹⁰⁰

V. Decision

We dismiss the petition.

⁹¹ *EEOC Locals*, 71 FLRA at 606-07.

⁹² Record at 17 (Union stated that proposal t means that the Agency must use appropriate comparators during discipline and that discipline must be equally applied to all bargaining-unit employees); *id.* at 18 (Union stated that proposal t also means that the Agency may vary the disciplinary penalties of bargaining-unit employees based on the details in the specifications); *id.* (Agency asserted that "like penalties should be imposed for like offenses" means only that the penalty is consistent with regard to the severity of the disciplinary offense and "consistent" does not mean that the supervisor considers the treatment of other bargaining-unit employees when disciplining an employee).

⁹³ *EEOC Locals*, 71 FLRA at 606-07.

⁹⁴ Record at 22.

⁹⁵ 5 U.S.C. § 7106(a)(2)(B); Statement at 12 (proposals f & g), 17 (proposal m), 18 (proposal n).

⁹⁶ 5 U.S.C. § 7106(a)(2)(A) Statement at 20 (proposal r), 21 (proposal s), 22 (proposal t), 27 (proposal ac).

⁹⁷ Proposals at 15-16 (proposal m), 16-18 (proposal n), 23-24 (proposal s), 24-25 (proposal t), 33-34 (proposal ac); Pet. at 40-41, Proposals at 22-23 (proposal r); Resp. at 6 (proposals f & g), 9 (proposal m), 10 (proposal n), 11-12 (proposal r), 12-13 (proposal s), 13 (proposal t), 16-17 (proposal ac).

⁹⁸ See *Local 2058*, 68 FLRA at 682-83; *Local 1938*, 66 FLRA at 1040.

⁹⁹ *Council 119*, 72 FLRA at 64-65; see also *Local 2058*, 68 FLRA at 682-83 (Authority does not consider whether a proposal constitutes an exception to management's rights under § 7106(b) if the union does not make that argument).

¹⁰⁰ Because we find that Proposals f, g, and ac are outside the duty to bargain for the foregoing reasons, it is unnecessary to address the Union's requests for severance. Proposals at 7 (proposal f), 9 (proposal g), 34 (Proposal ac); see also Record at 8 (Proposals f & g), 22 (proposal ac).