68 FLRA No. 161

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 12
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
(Agency)

0-NG-3131

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

September 30, 2015

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

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).[1] The case concerns the negotiability of three proposals relating to the Agency's existing transit-benefit program. The Agency filed a statement of position (statement), to which the Union filed a response (response). The Agency did not file a reply to the Union's response.

Regarding Proposal 1, we must decide whether the proposal affects management's right to determine its budget under § 7106(a)(1) of the Statute.[2] Because the Agency has an existing transit-benefit program, and Proposal 1 neither requires the Agency to allocate a specific amount of money in its budget to that program, nor requires a significant increase in costs, the Agency fails to demonstrate that Proposal 1 affects management's right to determine its budget.

Regarding Proposal 2, we must decide whether the proposal: (1) affects management's right to determine its internal security practices;[3] or (2) affects management's right to determine its budget. We find that Proposal 2 does not affect management's right to determine its internal security practices because the Agency fails to explain how the proposal affects its internal security. Further, we find that the Agency fails to show that Proposal 2 affects management's right to determine its budget because it does not establish that the proposal would require a significant increase in costs.

Regarding Proposal 6, we must decide whether the proposal: (1) is "covered by" a memorandum of understanding (MOU); or (2) affects management's right to determine its budget. Because the Agency failed to provide the Authority with a copy of the MOU, its argument that Proposal 6 is covered by the MOU is unsupported. The Agency also fails to support its claim that Proposal 6 affects management's right to determine its budget.

Regarding all of the Union's proposals, we must decide whether the Agency has no duty to bargain over them because they are "covered by" the parties' collective-bargaining agreement. Because the Agency only claims that the proposals are the subject of an article "initialed" by the parties during renegotiation of their term agreement,[4] but fails to establish that the article is part of an agreement that the parties executed, we find that the Agency fails to establish that the proposals are covered by an agreement between the parties.

II. Background

The Agency administers a transit-benefit program through the Washington Metropolitan Area Transit Authority (WMATA). The dispute arose between the parties when the Agency converted its transit-benefit program to an all-electronic system in which employee transit benefits (Smart Benefits) are automatically loaded onto employee WMATA transit cards (SmarTrip cards) at the beginning of each month. At the end of the month, WMATA automatically removes any unused amount. As a result of this conversion to an all-electronic system, transit benefits in the form of paper vouchers are no longer available.

Before the change to an all-electronic system, paper vouchers allowed employees to purchase different types of WMATA passes (e.g., daily, weekly, and monthly commuter train/bus passes), and transit passes from other commuter-transit companies (e.g., Virginia Railway Express and the Maryland Area Regional Commuter Train Service) (non-compatible passes). Under the new system, employees cannot directly purchase non-compatible passes using their SmarTrip card. They can only

[1] 5 U.S.C. § 7105(a)(2)(E).
[2] *Id.* § 7106(a)(1).
[3] *Id.*
[4] Statement at 5.

purchase the non-compatible passes with the assistance of Commuter Direct, a third-party vendor, who accepts the SmarTrip card as a payment method for non-compatible passes.

The Union submitted three proposals to the Agency while bargaining over the changes to the transit-benefit program. The Union sought to negotiate procedures that would allow employees to maintain the same travel arrangements they enjoyed prior to the conversion to the all-electronic system. The Agency declared the proposals nonnegotiable. During an Authority-conducted post-petition conference, the Union asked the Authority to determine the negotiability of Proposal 2 in its entirety.[5] The Union also asked the Authority to sever each part of Proposal 2, and "slightly" modified the wording of each of Proposal 2's three parts so their negotiability could be considered separately.[6] The Agency did not object. The parties agreed to refer to the three parts of Proposal 2 as Proposals 3, 4, and 5, and further agreed that the three proposals were alternatives among which the Agency could choose.[7] The parties also agreed to label the third proposal from the Union's original petition as Proposal 6.[8]

III. Proposal 1

A. Wording

> Management will assure that employees may continue to receive their transit benefits in all purchase formats (*viz*., by direct download, by mail via direct or indirect vendors, in person via direct or indirect vendors, etc) employees currently use in a reasonably convenient fashion. Management will provide employees who purchase weekly, biweekly, or monthly tickets/passes with transit benefits appropriate to purchasing such fare media in all purchase formats employees currently use.[9]

B. Meaning

The parties agree that Proposal 1 would require the Agency to continue to offer the same transit benefits that were available prior to the conversion.[10] Specifically, the Agency would be required to guarantee that all previously-available, non-compatible passes would continue to be available, and that employees could continue to purchase them using their previously-used method – for example, electronically, by mail, or in person.[11] The parties also agree that Proposal 1 does not prescribe how the Agency must achieve these results[12] and that the term "purchase format" does not mean paper vouchers.[13]

C. Analysis and Conclusions: The proposal does not affect management's right to determine its budget.

The Agency contends that Proposal 1 is nonnegotiable because it affects management's right to determine its budget under § 7106(a)(1) of the Statute.[14] The Authority applies a two-part test to determine whether a proposal affects management's right to determine its budget.[15] Under the first part of the test, if a proposal prescribes either the particular programs to be included in an agency's budget, or the amount to be allocated in the budget, then the Authority will find that the proposal affects the agency's right to determine its budget.[16] But the establishment of a program that is not included in the agency's budget does not, per se, affect an agency's budget-management right under the first part of the test.[17] Under the second part of the test, if an agency demonstrates that a proposal would result in an increase in costs that is significant and unavoidable and is not offset by compensating benefits, the Authority will find that the proposal affects the agency's right to determine its budget.[18] However, an assertion that a proposal would increase an agency's costs does not, by itself, establish that the proposal affects management's right to determine its budget.[19]

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[5] Record of Post-Pet. Conference (Record) at 3.
[6] *Id.*
[7] *Id.*at 3-4.
[8] *Id.* at 5.
[9] Petition (Pet.) at 2-3.
[10] Record at 2.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] Statement at 8.
[15] *AFGE, AFL-CIO*, 2 FLRA 603, 608 (1980) (*Wright-Patterson*) (establishing a two-part test (Wright-Patterson test) to determine whether a proposal or provision affects management's right to determine its budget); *see also U.S. DHS, CBP*, 61 FLRA 113, 116 (2005).
[16] *NAGE, Local R14-52*, 48 FLRA 1198, 1204-06 (1993) (*NAGE*) (clarifying what constitutes a "program" under the first part of the Wright-Patterson test).
[17] *Id.* at 1204, 1209.
[18] *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 125 (2011) (*NFFE*) (finding proposal does not affect management's right to determine its budget where agency fails to demonstrate that proposal entails significant and unavoidable costs); *NFFE, Council of VA Locals*, 49 FLRA 923, 936-40 (1994) (*Council of VA Locals*) (applying Wright-Patterson test to proposal concerning a transit subsidy and finding that it does not affect management's right to determine its budget).
[19] *NFFE*, 66 FLRA at 125.

The Agency contends that Proposal 1 is nonnegotiable under the first part of the test because it requires the Agency to establish "expensive administrative programs for the administration of the [t]ransit-[s]ubsidy program."[20] However, the first part of the test is limited in scope to the formal process of prescribing programs appearing in the agency's budget, or the amount to be allocated in the budget.[21] It does not apply to a proposal that establishes an administrative procedure not recognized in the budget, or that simply requires expenditures by the agency,[22] as long as the proposal leaves the agency with discretion to determine how any necessary funding relating to the procedure will be addressed in its budget.[23]

Proposal 1 concerns the Agency's established transit-benefit program. Although Proposal 1 may require Agency expenditures to provide the previously available transit passes, it does not dictate how to achieve the results, and leaves it to the Agency's discretion to determine how to provide any necessary funding. Therefore, we find that the Agency does not demonstrate that Proposal 1 affects management's right to determine its budget under the first part of the budget test.

As to the second part of the budget test, the Agency identifies the administrative costs that have been eliminated by the establishment of the all-electronic system, and contends that Proposal 1 requires it to "resurrect an unnecessary and costly administrative procedure." [24] The Agency argues that "any increase in costs *may* disrupt the budget," and will not be offset by compensating benefits because the all-electronic system is more convenient to employees and results in increased employee productivity.[25] But the Agency does not specifically state what its increase in costs would be under Proposal 1. And the Agency's assertion that the proposal *may* increase its costs does not, by itself, establish that Proposal 1 affects management's right to determine its budget.[26]

The Agency's reliance on the administrative costs eliminated by the all-electronic system – to establish a significant increase in costs if it has to "resurrect" the previous administrative procedure – is misplaced. The Authority has found that an agency does not demonstrate "significant" costs where the agency fails to provide information placing its budget projection concerning the proposal's cost increases in perspective with the agency's budget as a whole, where, as here, the proposal affects the entire agency.[27] Consequently, because the Agency does not provide information placing any alleged potential-cost increase concerning the proposal in perspective with the entire Agency budget, the Agency does not provide a basis for establishing that any increase in costs is "significant."[28] Therefore, we find that the Agency does not demonstrate that Proposal 1 affects management's right to determine its budget under the second part of the budget test. Because we find that the Agency does not establish that Proposal 1 would result in a significant increase in costs, it is unnecessary to consider whether the increase in costs would be unavoidable and not offset by compensating benefits.[29]

Accordingly, we find that Proposal 1 is negotiable.

IV. Proposal 2

As set forth in Part II above, during the post-petition conference, the Union asked the Authority to determine the negotiability of Proposal 2 in its entirety.[30] Proposal 2 has three options and the parties agree that the proposal would permit the Agency to pursue any one – or more than one – of the three options.[31] The Union, however, also requested severance of Proposal 2, and so, for severance purposes, the three options of Proposal 2 were identified as Proposals 3, 4, and 5.[32] Because we find Proposal 2 negotiable in its entirety, it is unnecessary to resolve the Union's

[20] Statement at 9.
[21] *NAGE*, 48 FLRA at 1204.
[22] *Council of VA Locals*, 49 FLRA at 938; *NAGE*, 48 FLRA at 1204-06.
[23] *Council of VA Locals,* 49 FLRA at 938; *NAGE*, 48 FLRA at 1204-06.
[24] Statement at 8; *see also id.* at 9.
[25] *Id.* at 9 (emphasis added).
[26] *NFFE*, 66 FLRA at 125; *see also Council of VA Locals*, 49 FLRA at 939-40 (finding that agency failed to make a substantial demonstration that a proposal providing for a transit subsidy would result in a significant increase in costs).

[27] *E.g., U.S. DHS, CBP Agency, N.Y., N.Y.*, 61 FLRA 72, 76 (2005) (*CBP*) (finding that, while agency provided cost estimate of providing ammunition for employee firearms qualification practice, agency failed to show that award affected management's right to determine its budget because agency provided no other budgetary information that would allow the Authority to assess the significance of that cost in relation to the relevant budget as a whole); *AFGE, Local 1857*, 36 FLRA 894, 904-05 (1990) (*Local 1857*) (finding that proposal did not affect management's right to determine budget because agency failed to establish that proposal cost increase were "significant" where agency failed to provide any information placing its budget projections of proposal cost increase within the context of budget as a whole).
[28] *See Local 1857*, 36 FLRA at 902.
[29] *Council of VA Locals*, 49 FLRA at 942-43.
[30] Record at 3.
[31] *Id.*
[32] *Id.* at 3-5.

severance request.[33] Therefore, we address Proposals 3, 4, and 5 as separate options (Options 1, 2, and 3) under Proposal 2, rather than as separate proposals.

A. Option 1

1. Wording

Management will provide employees with the option of receiving Transit Link cards, TransBen checks, and transit-based debit cards if their transit provider or intermediary does not accept electronic benefits in all purchase formats employees currently use (*viz.*, by direct download, by mail via direct or indirect vendors, in person via direct or indirect vendors, etc). However, as fare media become available electronically in a particular purchase format employees currently use (*viz.*, by direct download, by mail via direct or indirect vendors, in person via direct or indirect vendors, etc), management may, with 90-day notice but without further negotiation, switch employees to that format, except where such a conversion would create a hardship, such as where the employee does not have a credit or debit card.[34]

2. Meaning

The Union explains that Transit Link cards, TransBen checks, and transit-based debit cards are alternative fare media to the SmarTrip card that employees may use to purchase transit benefits. They are accepted by transit providers that do not accept SmarTrip cards.[35] The proposal would require the Agency to transfer WMATA Smart Benefits directly onto these fare media, making them available to employees upon request.[36] Additionally, the Union explains that if fare media necessary for purchasing non-compatible passes – or non-compatible passes themselves – become available electronically, then the Agency could require employees to purchase the passes electronically.[37] The Agency agrees with the Union's explanation of the meaning, operation, and impact of Option 1.[38]

3. Analysis and Conclusions

a. The proposal does not affect management's right to determine its internal security practices.

The Agency contends that Option 1 affects management's right to determine its internal security practices under § 7106(a)(1) of the Statute. An agency's right to determine its internal security practices includes the authority to determine the policies and practices that are part of the agency's plan to secure or safeguard its personnel, property, and operations.[39] Where an agency shows a link or reasonable connection between its goal of safeguarding personnel or property, or preventing disruption of agency operations, and the disputed practice, the Authority will find that the practice constitutes the agency's exercise of its right to determine its internal security practices.[40]

Section 2424.24(a) of the Authority Regulations provides that an agency's statement of position to the Authority must, "among other things . . . supply all arguments and authorities in support of its position."[41] As explained in § 2424.24(c)(2), an agency must set forth its position on any relevant matters, including a "statement of the arguments and authorities supporting any bargaining obligation or negotiability claims."[42] The Authority has rejected arguments where an agency fails to explain why a proposal affects management's right to determine its internal security practices.[43]

The Agency asserts that Transit Link cards and TransBen checks are debit cards, and for "security reasons," it determined that it would not issue them to employees as part of the transit-benefit program.[44] But the Agency does not explain why the use of such debit cards under Option 1 affects its internal security practices. Consequently, the Agency fails to establish a link between safeguarding personnel, property, or operations and the use of such debit cards.[45] Additionally, the record indicates that employees already utilize a form of TransBen checks, undermining the Agency's claim that they pose a security concern for the Agency. Consistent with Authority Regulations and precedent, we find that the Agency's

[33] *AFGE, SSA, Gen. Comm.*, 68 FLRA 407, 409 (2015) (finding it unnecessary to address union's request to sever individual sections of proposal when finding proposal negotiable); *see also AFGE, Local 1164*, 65 FLRA 836, 840 n.3 (2011).
[34] Record at 3-4.
[35] Pet. at 3, 4; Record at 4.
[36] Pet. at 4; Record at 4.
[37] Record at 4.
[38] *Id.*

[39] *NFFE*, 66 FLRA at 128; *see also, e.g.*, *SSA*, 65 FLRA 523, 526 (2011).
[40] *NFFE*, 66 FLRA at 128.
[41] 5 C.F.R. § 2424.24(a).
[42] *Id.* § 2424.24(c)(2).
[43] *NFFE*, 66 FLRA at 128.
[44] Statement at 11.
[45] *NFFE*, 66 FLRA at 128.

internal-security-practice argument is unsupported, and we reject it as a bare assertion.[46]

b. The proposal does not affect management's right to determine its budget.

The Agency asserts that Option 1 is nonnegotiable because it affects management's right to determine its budget under § 7106(a)(1) of the Statute.[47] The Agency argues that Option 1 would cost the Agency a "significant amount of money" to enter into another third-party agreement with an outside contractor to provide fare media in addition to WMATA's SmarTrip cards.[48]

Although the Agency claims Option 1 would "cost the [Agency] a significant amount of money,"[49] it does not provide data to show what those costs would be. The Agency's assertions that the proposal would increase its costs do not, by themselves, establish that the proposal affects management's right to determine its budget.[50] Accordingly, as the Agency does not demonstrate that that the proposal would require a significant increase in costs, we find that the Agency does not demonstrate that Option 1 affects management's right to determine its budget.

Accordingly, we find that Option 1 is negotiable.

B. Option 2

1. Wording

> Management will establish, on its own or in collaboration with the union, on-site units which can convert Smart Benefits into fare media for all transit providers which will be available to employees for at least the time-frames Smart Benefit vouchers were available for distribution. Employees shall be allowed to translate Smart Benefits into fare media at these on-site units on-the-clock during duty time.[51]

2. Meaning

The Union defines an "on-site unit" as a machine, person, or other means of permitting employees to transfer Smart Benefits onto fare media that may be used to purchase non-compatible passes, and recognizes that this may not be possible to do without the assistance of a third-party vendor.[52] The Agency agrees with the Union's explanation of the meaning, operation, and impact of Option 2.[53]

3. Analysis and Conclusion: The proposal does not affect management's right to determine its budget.

The Agency asserts that Option 2 is nonnegotiable because it affects management's right to determine its budget under § 7106(a)(1) of the Statute.[54] The Agency asserts that Option 2 requires it, at "significant" cost and expense, to establish on-site units that can convert the Smart Benefits into fare media, and to reestablish at three locations the "costly administrative procedure" that the Agency used when it issued paper vouchers.[55] The Agency claims that there is no need for these on-site units, and that there are no offsetting compensating benefits that establishing them would produce.[56]

Although the Agency claims Option 2 would result in "significant costs,"[57] it does not provide data to show what those costs would be. The Agency's assertions that the proposal would increase its costs do not, by themselves, establish that the proposal affects management's right to determine its budget.[58] Accordingly, as the Agency does not demonstrate that that the proposal would require a significant increase in costs, and for the reasons discussed previously, we find that the Agency has not demonstrated that Option 2 affects management's right to determine its budget.

Accordingly, we find that Option 2 is negotiable.

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[46] *Id*.
[47] Statement at 11-12.
[48] *Id.* at 11.
[49] *Id.*
[50] *NFFE*, 66 FLRA at 125; *see also Council of VA Locals*, 49 FLRA at 939-40 (finding that agency failed to make a substantial demonstration that proposal providing for a transit subsidy would result in a significant increase in costs).
[51] *See* Statement at 4.
[52] Record at 4.
[53] *Id.*
[54] Statement at 11-12.
[55] *Id.* at 11.
[56] *Id.* at 11-12.
[57] *Id.* at 11.
[58] *NFFE*, 66 FLRA at 125; *see also Council of VA Locals*, 49 FLRA at 939-40 (finding that agency failed to make a substantial demonstration that proposal providing for a transit subsidy would result in a significant increase in costs).

C. Option 3

1. Wording

> Management will establish, on its own or in collaboration with the union, a relationship with Commuter Direct or other third-party vendor to provide a full range of such services at or close to the Frances Perkins Building and Postal Square Building at least once a week on variable days for at least the same number of hours during the workday over the course of the month that Smart Benefit vouchers were available for distribution, unless Commuter Direct or other third-party vendor opens up to provide the full range of such services at Union Station, and, if the Rosslyn Commuter Direct store closes or relocates, at the MSHA building.[59]

2. Meaning

The Union explains that "the full range of such services" means the ability to convert Smart Benefits into fare media that is accepted by all transit providers.[60] The proposal would require the Agency to work with Commuter Direct, a third-party vendor that currently accepts SmarTrip cards as payment for non-compatible passes, or a similar third-party vendor, to offer such services at or near three buildings where Agency employees work.[61] If these services become available at the Union Station WMATA station, then the proposal would no longer require the Agency to provide "the full range of such services" to its Washington, D.C. employees.[62] Additionally, an unsuccessful attempt by the Agency to arrange such services would not meet the proposal's mandatory requirements.[63] The Agency agrees with the Union's explanation of the meaning, operation, and impact of Option 3.[64]

3. Analysis and Conclusion: The proposal does not affect management's right to determine its budget.

The Agency asserts that Option 3 is nonnegotiable because it affects management's right to determine its budget under § 7106(a)(1) of the Statute.[65] The Agency contends that Option 3 requires the Agency to provide a full range of services at or near the Agency's two buildings in Washington, D.C. that would cost a "prohibitive amount of money" in relation to the number of employees who would use the services.[66]

Although the Agency claims Option 3 would "cost the [Agency] a prohibitive amount of money,"[67] it does not provide data to show what those costs would be. The Agency's assertion that the costs would be "prohibitive,"[68] does not, by itself, establish that the proposal affects management's right to determine its budget.[69] Accordingly, as the Agency does not demonstrate that that the proposal would require a significant increase in costs, we find that the Agency has not demonstrated that Option 3 affects management's right to determine its budget.

Accordingly, we find that Option 3 is negotiable.

V. Proposal 6

A. Wording

> Management will cover any service, processing, administrative, or similar fees Commuter Direct or other third-party vendors impose for using their services to process Smart Benefits greater than $1 per month.[70]

B. Meaning

The parties agree that Proposal 6 would require the Agency to refund employees for any service fees they incur by third-party vendors that are greater than one dollar per month, and that this proposal operates independently of the other proposals.[71]

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[59] *See* Statement at 4.
[60] Record at 5.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Statement at 5, 12.
[66] *Id.* at 12.
[67] *Id.*
[68] *Id.*
[69] *NFFE*, 66 FLRA at 125; *see also Council of VA Locals*, 49 FLRA at 939-41 (finding that agency failed to make a substantial demonstration that proposal providing for a transit subsidy would result in a significant increase in costs).
[70] Statement at 5.
[71] Record at 6.

C. Analysis and Conclusions

1. The proposal is not covered by an MOU.

The Agency argues that Proposal 6 is covered by an MOU between the parties. Section 2424.24(c)(2) of the Authority's Regulations requires the Agency to provide a "specific citation to any . . . section of a collective[-]bargaining agreement . . . and a copy of any such material that the Authority may not easily access."[72] Consistent with Authority precedent, an agency has the burden of providing a record to support its assertion that a proposal is nonnegotiable under the Statute.[73]

The Agency fails to support its "covered-by" claim. The Agency failed to provide the Authority with a copy of the MOU, nor does the record include a copy, or the language on which the Agency relies to support its claim. Thus, the Agency's argument is unsupported, and we reject it as a bare assertion.[74]

2. The proposal does not affect management's right to determine its budget.

The Agency asserts that Proposal 6 is nonnegotiable because it affects management's right to determine its budget under § 7106(a)(1) of the Statute.[75] The Agency asserts that Proposal 6 requires the Agency to pay "fees associated with commuting to work" beyond a $125.00 transit benefit agreed to by the parties.[76]

Although the Agency claims Proposal 6 would require expenditures beyond what the Agency already budgeted, the Agency does not provide data to show what those costs would be. Because the Agency does not demonstrate that that the proposal would require a significant increase in costs, we find that the Agency has not demonstrated that Proposal 6 affects management's right to determine its budget.

Accordingly, we find that Proposal 6 is negotiable.

The dissent's expansive view of management's right to determine its budget[77] is inconsistent with a balanced interpretation of the Statute, and well-established Authority and judicial precedent. Adopted more than three decades ago, the Authority's two-part budget-right test, known as the *Wright-Patterson* test,[78] "reflects an effort to strike a balance between the obligation to engage in collective bargaining over conditions of employment and the preservation of an agency's right to determine its budget, both of which are among the expressed purposes of the Statute."[79] To maintain this balance, the Authority requires an agency to demonstrate that a proposal "prescribe[s] the particular programs or operations the agency would include in its budget," or "an increase in costs [that] is significant and unavoidable and . . . not offset by compensating benefits."[80]

The dissent would dispense with both parts of this test. Regarding prescribing "a particular program," the dissent finds it sufficient that the proposals "will 'compel [the Agency] to resurrect an unnecessary . . . administrative procedure.'"[81] This clearly falls short of prescribing a particular program to include in the Agency's budget.

Regarding a "significant or unavoidable" increase in costs, the dissent finds it sufficient that the proposals would be "costly."[82] However, Authority precedent requires more rigor regarding costs, from agencies that rely on the budget right. As discussed previously, agencies must provide information placing in perspective any alleged potential cost increases with the agency's budget.[83] As the Supreme Court held, rejecting an agency's request that it find "that a proposal calling for a 13.5% salary increase [for teachers at an Army-owned school] would necessarily result in a 'significant and unavoidable' increase in the agency's overall costs," "[w]e cannot do that without knowing even so rudimentary a fact as the percentage of the agency's budget attributable to teachers' salaries. Under the Authority's precedents, petitioner had the burden of proof on this point, but it placed nothing in the record to document its total costs or even its current total teachers' salaries."[84] Consequently, we reject the dissent's invitation to abandon well-established Authority – and Supreme Court – precedent.

[72] 5 C.F.R. § 2424.24(c)(2).
[73] *NFFE*, 66 FLRA at 126.
[74] *E.g.*, *Prof'l Airways Sys. Specialists*, 64 FLRA 474, 480 n.13 (2010) (rejecting as bare assertion agency's unsupported claim that proposal is covered by the parties' agreement); *see also*, *e.g.*, *NFFE*, 66 FLRA at 128, 131 (rejecting agency argument as a bare assertion where agency fails to explain why proposal affects management's right to determine internal security).
[75] Statement at 5, 11-12.
[76] *Id.* at 12.

[77] Dissent at 18-21.
[78] *See Wright-Patterson*, 2 FLRA at 607-08.
[79] *NAGE*, 48 FLRA at 1202.
[80] *Wright-Patterson*, 2 FLRA at 608.
[81] Dissent at 20 (citing the Agency's SOP at 8).
[82] *Id.*
[83] *E.g.*, *CBP*, 61 FLRA at 76; *Local 1857*, 36 FLRA at 904-05.
[84] *Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 653 (1990).

VI. The proposals are not covered by an agreement between the parties.

The Agency contends that all of the proposals are nonnegotiable because they are covered by an agreement between the parties.[85] Under the Authority's "covered-by" doctrine, a party is not required to bargain over conditions of employment that already have been resolved by bargaining.[86] A threshold requirement for the application of the covered-by doctrine is the existence of an *executed* agreement between the parties.[87] The doctrine applies to any collectively-bargained agreement between the parties, including not only term agreements,[88] but also other agreements such as MOUs.[89]

The Agency argues,[90] and the Union does not dispute,[91] that during negotiations over a new term collective-bargaining agreement, the parties reached an agreement on – and "initialed" – Article 4, entitled "Transit Subsidies." However, the Agency does not claim that Article 4 is part of an entire agreement that the parties executed. Consistent with the Authority's precedent holding that "the agreement, not a portion thereof" is considered executed for purposes of agency-head approval under § 7114(c),[92] the act of initialing Article 4 did not execute it as an agreement governing the parties for "covered by" purposes. Accordingly, the Agency fails to establish that the proposals are covered by an agreement by the parties.

Finally, we note that this case involves the *negotiability* – as opposed to the perceived rationality, propriety, or wisdom – of the Union's bargaining proposals. A negotiability dispute is defined by the Authority's Regulations as a disagreement between a union and an agency "concerning the legality of a proposal or provision."[93] So, although the dissent argues at length that the proposals are "silly,"[94] the merits of the Union's proposals are not at issue in this proceeding. The only question before us is whether Proposals 1, 2, and 6 are outside the duty to bargain.[95]

VII. Order

The Agency shall, upon request or as otherwise agreed to by the parties, negotiate with the Union over Proposals 1, 2, and 6.

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[85] Statement at 5-6.
[86] *NFFE*, 66 FLRA at 126.
[87] *See NTEU*, 64 FLRA 156, 158 (2009).
[88] *E.g.*, *NFFE*, 66 FLRA at 124, 126.
[89] *E.g.*, *NAGE*, *Local R1-109*, 64 FLRA 132, 134 (2009).
[90] Statement at 5.
[91] Response at 1.
[92] *See POPA*, 41 FLRA 795, 802 (1991) (internal quotation marks omitted) (citing *U.S. Dep't of the Army, Watervliet Arsenal, Watervliet, N.Y.*, 34 FLRA 98, 105 (1989); *Dep't of the Interior, Nat'l Park Serv., Colonial Nat'l Historical Park, Yorktown, Va.*, 20 FLRA 537, 541 (1985)).
[93] 5 C.F.R. § 2424.2(c).
[94] Dissent at 18.
[95] *See* 5 C.F.R. § 2424.2(c).

Member Pizzella, dissenting:

The famed economist Milton Freidman once noted that "very few people spend other people's money as carefully as they spend their own."[1]

For over twenty-two years,[2] the Federal government has authorized executive branch agencies to provide federal employees transit-benefit subsidies to encourage employees to make the widest use of public transportation, to off-set the cost of commuting, and simply because transit subsidies have become a commonly-accepted employee benefit with many private-sector companies.[3] In other words, it is good for the environment and is a useful retention tool.

Within the metropolitan Washington, D.C. area, many private-sector employers and federal agencies take advantage of the SmartBenefits® Autoload program. It is "a *versatile* and *valuable benefit* for both employers and employees [that is an] IRS-compliant, web-based program that lets employers assign the dollar value of employees' monthly commuting benefit directly to *reusable*, *rechargeable* plastic SmarTrip® cards, which can be used for *parking*, *rail*, *van pool* and *bus* travel throughout the D.C. metropolitan region . . . [and is] as flexible as your needs, and available online 24/7."[4]

As noted by the majority, the Department of Labor (DOL) "converted its transit-benefit program to an all-electronic system [so that] transit benefits (Smart Benefits) are automatically loaded onto employee [SmarTrip] cards at the beginning of each month."[5] Before the change, employees could opt to receive paper vouchers which they could use to purchase daily, weekly, or monthly Washington Metropolitan Area Transit Authority (WMATA) passes or to purchase transit passes "from other [regional, non-WMATA affiliated] commuter-transit companies" such as rail systems that provide mass transit options for employees from Virginia and Maryland.[6]

After the change, however, all DOL employees were required to participate in the SmartBenefits program in order to receive a monthly-transit subsidy. Employees were given the option to convert their subsidy to non-WMATA affiliated commuter-transit companies but were required to "purchase the non-compatible passes with the assistance of CommuterDirect[®],"[7] an independent contractor of WMATA which converts "employer-sponsored transit debit card[s] to [non-WMATA regional transit systems] passes."[8]

DOL implemented the change to SmartBenefits after a DOL Inspector General (IG) report found that some employees were abusing the transit-subsidy program.[9] Specifically, the IG report found that 13.8% of surveyed DOL employees were receiving both paper fare cards and SmartBenefits and that 14.5% were using multiple SmarTrip cards.[10] As a result the IG report recommended the "suspen[sion]" of all forms of transit subsidies except for SmartBenefits in order to facilitate enhanced controls over the transit-subsidy program.[11]

The transition from multiple forms of transit-subsidy reimbursement, including paper fare cards and vouchers, to SmartBenefits was quite successful and, in the end, allowed no less than *nineteen* DOL employees who were paid salaries as high as general schedule (GS)-12 to perform other more productive work for DOL because they were no longer burdened with the inefficient administration and distribution of paper fare cards and vouchers.[12]

But, despite the demonstrated efficiencies and work hours saved after SmartBenefits was implemented, AFGE, Local 12 (Local 12) now demands that DOL customize its entire transit-subsidy program in order to satisfy the personal preferences of a minority of employees[13] who do not want to give up paper fare cards and vouchers.

Let's take a closer look at what exactly Local 12 is demanding from DOL:

- Provide transit-subsidy benefits *in whatever form* — by "direct download, by mail via direct or indirect vendors, in person via direct or indirect vendors" — and how frequently — "weekly,

[1] *Milton Friedman Quotes*, Quotation Collection (Aug. 25, 2015), www.quotationcollection.com/author/Milton-Friedman/quotes.

[2] Federal Employees Clean Air Incentives Act, Pub. L. No. 103-172, 107 Stat. 1995 (1993).

[3] *SmartBenefits*, Washington Metropolitan Area Transit Authority (Aug. 25, 2015), http://www.wmata.com/business/employer_fare_program/.

[4] *Id*. (emphasis added).

[5] Majority at 2.

[6] *Id*.

[7] *Id*. at 2-3.

[8] Commuter Direct (Sept. 29, 2015), http://www.CommuterDirect.com.

[9] U.S. Dep't of Labor, Office of Inspector General – Office of Audit, *Transit Subsidy Program*, Report No. 02-09-202-13-001 at 10 (March 31, 2009) (IG report).

[10] *Id*.

[11] *Id*. at 12.

[12] Statement at 7-8.

[13] *See* IG report at 21.

biweekly, or monthly" — *the employee believes* is "reasonably convenient."[14]

- Provide transit-subsidy benefits *in any form* of fare media acceptable to *any transit provider* that *any employee opts* to use and *to never require* any employee to convert to electronic download if the employee does not use a credit or debit card.[15]

- *Contract with* (translated: pay for) *every transit provider* that any employee opts to use to establish an "*on-site unit*[]," at all three Washington, D.C. DOL office buildings, for the sole purpose of "convert[ing] SmartBenefits into fare media" that is used by each transit provider.[16] And, so as not to cause the least bit of inconvenience for any employee opting for their own customized transit-subsidy program, the employee must be permitted to convert their "SmartBenefits into fare media at the on-site units . . . *during duty time*,"[17] of course.

- *Contract with* (translated: pay for) Commuter Direct (which converts SmartBenefits into other fare media) to provide an *in-house service* center at both the Francis Perkins and Postal Square office buildings (unless DOL convinces Commuter Direct to "open[] up . . . full . . . services at Union Station" and the Rosslyn office building "*if*" Commuter Direct "closes or relocates" its store at Rosslyn[18]) as if DOL can simply dictate to a regional transportation authority run by several state and city jurisdictions.

- "[*C*]*over any* service, processing, administrative, or similar *fees* [that] Commuter Direct or [any] other third-party vendors impose for using their services," services which *the employee elected* for his or her own convenience and because *the employee chose not to use* the SmartBenefits provided by DOL.[19]

Local 12 and the employees (who are inexplicably obsessed with paper fare cards) seem to view the transit-subsidy benefit much as they would a Burger King any-way-you-like-it menu. But, the federal government is not Burger King and neither federal employees, nor federal unions, have standing to dictate to any federal agency how, when, and in what manner it will distribute optional, federal subsidies that are allocated only when federal budget allotments permit.

Local 12 vainly tries to justify its proposals by arguing that "[when] DOL discontinued providing paper vouchers[,] th[e] change *forced* [employees] *to establish accounts* with CommuterDirect . . . some [employees] would no longer be able to utilize forms of transit they had previously relied upon."[20]

Other than establishing that a few employees *prefer* to receive their monthly-transit subsidy in paper form, Local 12 fails to establish what is so daunting about receiving the monthly subsidy (which is an *optional* benefit, by the way, not an entitlement) by automatic download to a plastic card. First, employees may use their "SmartBenefits . . . to purchase [any non-WMATA affiliated commuter-transit companies of the employee's choosing]," and, "[a]s a CommuterDirect.com account holder [the employee] can set up *a renewable order* to *automatically* receive the tickets and passes you need for your commute."[21] Second, one must presume that these employees already receive their federal salary by electronic download since Congress mandated direct deposit beginning in 1996.[22]

In other words, rather than taking ten minutes to help its paper-obsessed employees to establish a simple CommuterDirect.com account which would *automatically* convert their SmartBenefits to alternate transit passes *for them*, Local 12 proposes that DOL use taxpayer funding to reestablish an inefficient program, reassign nineteen employees to monitor the inefficient program, and contract with an independent contractor of WMATA to establish *three on-site service centers*. Local 12 first made these proposals to DOL in September 2011, filed an unfair labor practice charge in November 2011 when DOL asserted it should not have to negotiate over these proposals, and then spent countless hours pursuing this negotiability appeal after filing its petition with the Authority in January 2013.[23]

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[14] Majority at 3 (citing Petition at 2-3).
[15] *Id*. at 6 (citing Record of Post-Pet. Conference at 3-4).
[16] *Id*. at 8 (emphasis added) (citing Statement at 3).
[17] *Id*. (emphasis added).
[18] *Id*. at 10 (emphasis added) (citing Statement at 3).
[19] *Id*. at 11 (emphasis added) (citing Statement at 5).
[20] Statement at 1.
[21] http://www.commuterdirect.com (emphasis added).
[22] 31 U.S.C. § 3332.
[23] *See* Petition & Attachs.

Taxpayers, and I believe Congress as well, would be astonished to learn of these silly proposals. As for me, I find the entire notion − that a federal union would propose that a federal agency use taxpayer-funded budget allocations to satisfy *the personal preferences* of a few employees − to run counter to the concept of good-faith-collective bargaining as that concept was envisioned in the Federal Service Labor-Management Relations Statute (the Statute).[24] In its opening "[f]indings and purpose," the Statute recites that collective bargaining is "designed to meet the special requirements and needs *of the* [*g*]*overnment*,"[25] not the personal preferences and obsessions of its employees. The opening section further mandates that the obligation to collectively bargain "should be interpreted in a manner consistent with the requirement of an effective and efficient [g]overnment."[26]

Whether Local 12 introduced these proposals for some reason (yet to be explained) other than the personal preference of a few employees or simply because it was able to do so, each of the three proposals, including the "options," clearly interfere with the Agency's right to determine its own budget under § 7106(a)(1) of the Statute.[27]

DOL established that it would experience a "significant" increase in costs[28] if it is compelled to "reestablish [the] very costly administrative procedures" which it eliminated by switching to SmartBenefits.[29] More specifically, DOL asserts, and the Union does not dispute, that it was able to eliminate fifty-one (51) monthly hours of work that formerly were performed by nineteen employees who were paid salaries as high as GS-12.[30] But that is not enough for the majority.

According to the majority, DOL "does not demonstrate that the proposal[s] would require a significant increase in costs."[31]

I do not agree that in all cases a precise itemization of costs is required and, in some cases, an exact estimate is not even possible. But those impracticalities should not preclude an agency from being able to argue that a specific proposal interferes with its right to determine its budget.

[24] 5 U.S.C. §§ 7101-7135.
[25] *Id*. at § 7101(b) (emphasis added).
[26] *Id*.
[27] 5 U.S.C. § 7106(a)(1).
[28] Statement at 9.
[29] *Id*.
[30] *Id*. at 7.
[31] Majority at 11.

I may not be a math expert, but I seem to recall a basic algebraic concept of equality and balance which posits that the value of one side of an equation may not be increased without also increasing the other side of the equation. DOL provided extensive data that demonstrated the savings that were realized by moving to the SmartBenefits program. By requiring DOL to reestablish the precise number of work hours and positions, which were devoted to run an old and inefficient transit-subsidy program, it is axiomatic that there would be an increase in costs that corresponds to the savings that were realized when it implemented SmartBenefits.

Therefore, I do not agree that DOL "does not demonstrate that the proposal[s] would require a significant increase in costs."[32]

But, as discussed below, the proposals do not stop there. Local 12 goes on to demand that DOL establish contracts with independent contractors and agencies, over which DOL has no control, to set up on-site service centers for just a handful of employees. Because those contracts have never been negotiated, it is not possible for DOL to establish precise costs for contracts which have not yet been negotiated. However, anyone who has administered any sort of significant agency program will not dispute the notion that establishing contracts with outside entities to provide services to DOL employees will cost something.

Therefore, the majority's vague conclusion that the data provided by DOL is not sufficient to establish that the proposals affects management's right to determine its budget fails the labor-management relations community in several significant respects.

First, the decision fails to inform future parties exactly what the majority, waiting to second guess an agency's assessment, would require to establish a proposal "would result in a significant increase in costs."[33] In some respects, my colleagues' analysis reminds me of the approach they adopted to determine whether an arbitrator's award impermissibly interferes with a management right. According to the majority, an award cannot interfere with a management right unless it "abrogates" that right even though the majority has never defined for the labor-management relations community what abrogation would look like and "*has never found* any provision, proposal, or award to abrogate a management right."[34]

[32] *Id.* at 11.
[33] *Id.*
[34] *AFGE, Local 4052*, 68 FLRA 38, 46 (2014) (Dissenting Opinion of Member Pizzella) (internal citations omitted).

As I noted just fourteen days ago in *NTEU, Chapter 83*,[35] the Authority must "provide leadership"[36] and "take such action and make such recommendations . . . [the Authority] considers necessary"[37] to ensure that our decisions are "consistent with applicable laws, rules, or regulations"[38] and "with the requirement of an effective and efficient [g]overnment."[39] It is clear to me that Congress viewed the management rights (listed in § 7106(a)) as one of the fundamental cornerstones of the collective-bargaining framework that it established by the Statute. Therefore, I cannot conclude that Congress intended for the Authority to develop standards that make it nearly impossible for an agency to demonstrate a sufficiently egregious impact (as here, the right to determine its budget) or to avoid the responsibility to clearly define the burden that must be met. Federal unions and federal agencies deserve better and ought not to have to guess at what they must do in order to meet a standard established by Authority precedent.

Second, the majority's indiscernibly vague analysis continues a recent assault on the right of federal agencies to determine their own budgets. Just today, in *U.S. Department of HHS, National Institute of Environmental Health Services*, the majority told the National Institute of Environmental Health Sciences that it could not reallocate funds from discretionary bonuses in order to meet its statutorily-mandated mission when that reallocation was necessitated by reduced funding levels which resulted from sequestration.[40]

In these cases, the Authority abandons (and not by my "invitation"[41]) earlier precedent wherein the Authority held that a proposal directly interferes with an agency's right to determine its budget when "the proposal *requires the inclusion of a particular program* or amount in its budget *or* that the proposal will result *in significant* and unavoidable *increases in cost*."[42] Here, the Agency more than sufficiently demonstrates that the proposals at issue will "compel [DOL] to resurrect an unnecessary and costly administrative procedure."[43] In other words, the proposals *require* DOL to *include* a *particular program* based, not on the strategic and planned priorities of DOL but, on the personal preferences for paper fare cards.

Specifically, Proposal 1 compels DOL to accommodate employees who wish to revert back to the previous transit-benefits system.[44] Options 1 and 3 compel DOL to enter into a third-party agreement with outside contractors in order to issue employees TransBen checks and provide various other benefit distribution services.[45] Option 2 compels DOL to establish contracts with various transit providers to provide *on-site units* at *three different office locations*.[46]

The majority's narrow definition of "budget" defies common sense. Under that narrow perspective, an agency may not protect its right to determine its own budget unless it provides a detailed accounting of the exact cost and financial impact of any and all union proposals, no matter how obvious, significant, or unavoidable are those impacts.

DOL established that the proposals not only "result in significant and unavoidable increases in cost" but also "require the inclusion of a particular program"[47] and therefore directly interfere with its right to budget under 5 U.S.C. § 7106(a)(1).

Furthermore, I do not agree with the majority's rationale for rejecting DOL's covered-by argument.

On this point, DOL argues that the parties reached some sort of agreement on the matter of transit benefits in the parties' "newly negotiated CBA" and that Article 4 was "initialed on May 27, 2011."[48] The majority rejects that argument because "the act of initialing Article 4 did not execute it as an agreement"[49] and "the agreement, not a portion thereof" must be executed in order to argue that a matter is covered-by a previously negotiated provision.[50]

The majority attempts to draw a line that is not so clear.

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[35] 68 FLRA 945, 958-59 (2015) (Dissenting Opinion of Member Pizzella).
[36] 5 U.S.C. § 7105(a)(1).
[37] *Id*. at § 7122 (a).
[38] *Id*.
[39] *Id.* at § 7101(b).
[40] 68 FLRA 1049, 1053-56 (2015) (Dissenting Opinion of Member Pizzella).
[41] Majority at 13.
[42] *Fort Stewart (Georgia) Ass'n of Educators*, 28 FLRA 547, 551 (1987) (*Fort Stewart*) (emphasis added) (citing *AFGE, AFL-CIO*, 2 FLRA 604, 607-08 (1980)).
[43] Statement at 8.
[44] *Id*. at 6.
[45] *Id*. at 11-12.
[46] *Id*.
[47] *Fort Stewart*, 28 FLRA at 551.
[48] Statement at 5-6.
[49] Majority at 13.
[50] *Id*. (internal quotation marks omitted).

The date an agreement is executed may well differ from the date an agreement becomes effective.[51] The *execution* of an agreement typically predates agency head review, under 5 U.S.C. § 7114(c). Typically, the executed agreement becomes *effective* thirty-one days after execution.[52] Under the unique timing of these negotiations, DOL was required to file its statement of position on July 12, 2013. Then, Local 12 acknowledged, on July 29, 2013, that Article 4 became part "of the newly negotiated CBA,"[53] and the entire CBA "became *effective* on August 29, 2013."[54]

Thank you.

[51] *U.S. DOD*, *Ill. National Guard*, *Springfield, Ill.*, 68 FLRA 199, 201 (2015); *Fort Bragg Ass'n. of Teachers*, 44 FLRA 852, 857-58 (1992) (date of execution that triggers time limits for agency head review is date on which no further action is necessary to finalize completed agreement); *U.S. HHS, SSA, Balt., Md*, 47 FLRA 1004, 1017-18 (1993) (for respite from unwanted change and stability and repose comes the execution of an agreement); *POPA*, 41 FLRA 795, 802-03 (1991)(date of execution relates to date on which no further action is necessary to finalize a complete agreement).

[52] 5 U.S.C. § 7114(c).

[53] Statement at 6.

[54] 2012 Collective Bargaining Agreement, Article 51, Section 1, http://afgelocal12.org/?zone=/unionactive/private_view_article.cfm&HomeID=368944&page=201320Contract, (emphasis added).