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**National Treasury Employees Union and
United States Customs Service,
Washington, DC**

59 FLRA 217

Federal Labor Relations Authority

59 FLRA No. 35

0-NG-2637

September 25, 2003

Related Index Numbers

**72.511 Refusal to Bargain in Good Faith,
Continuous Duty to Negotiate, Subjects Not
Covered by Agreement**

Judge / Administrative Officer

**Dale Cabaniss, Carol Waller Pope and Tony
Armendariz**

Ruling

The agency was not required to bargain the union's proposals. However, it could choose to on its own accord.

Meaning

The "covered by" doctrine was established as a defense to an alleged unlawful refusal to bargain in good faith charge. A party may refuse to bargain a matter that is expressly addressed in the collective bargaining agreement. Also, a party may refuse to bargain a matter that is not expressly addressed in the CBA if it is "nonetheless inseparably bound up with" the CBA.

Case Summary

The union filed a negotiability appeal regarding two proposals, requiring the agency to bargain its initiated changes and engage in mid-term bargaining. The FLRA decided the proposals were negotiable at the agency's election.

The union's negotiability appeal involved the "covered by" doctrine. Matters that are expressly contained in the collective bargaining agreement do not have to be bargained. Also, if the CBA does not

expressly encompass the matter but the subject is nonetheless 'inseparably bound up with ... a subject expressly covered by the contract," bargaining is not required.

In determining whether an issue is covered by a CBA, a fine line must be traversed between statutes favoring resolution of disputes through bargaining and disruptions from endless negotiations.

The agency found both proposals outside the duty to bargain. It claimed the proposals constitute a permissive subject of bargaining, which is a statutory right. Therefore, bargaining is not mandatory.

Both proposals required the agency to waive part of the covered by doctrine, which would limit its defense to a failure to bargain in good faith charge. The FLRA ruled that because the proposals concern permissive subjects of bargaining, they are negotiable only at the agency's option.

Member **Carol Waller Pope** dissented. She found the proposals were mandatory and required bargaining.

Full Text

**Decision and Order on Negotiability
Issues**

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), and concerns the negotiability of two proposals, The proposals would require the Agency to engage in mid-term bargaining, either over Agency-initiated changes (Proposal 1) or over Union requests for mid-term bargaining (Proposal 2), unless the subject matter of bargaining is specifically addressed in the parties' National Agreement or an existing Memorandum of Understanding.

We find, for the reasons that follow, that the proposals are negotiable at the election of the Agency.

II. Proposals

Proposal 1

Article 37, Section I.A

Unless it is clear that a matter at issue was specifically addressed by the parties in this Agreement or an existing Memorandum of Understanding, the subject is appropriate for mid-term bargaining.

Proposal 2

Article 37, Section I.C

The Employer recognizes that the Union in accordance with law and the terms of this Agreement has the right to ... (2) initiate bargaining on its own and engage in mid-term bargaining over matters not specifically addressed in this Agreement or an existing Memorandum of Understanding.

III. Background

This negotiability dispute involves the "covered by" doctrine originally set forth in *Social Security Administration*, 47 FLRA 1004 (1993) (*SSA*). In *SSA*, the Authority stated that it would resolve claims that a party is not obligated to bargain over a matter on the ground that a contract provision covers the matter in dispute by first determining whether the matter is "expressly contained" in the collective bargaining agreement. *SSA*, 47 FLRA at 1018. If the provision does not expressly encompass the matter, the Authority stated that it would next determine whether the subject is nonetheless "inseparably bound up with ... a subject expressly covered by the contract." *Id.* (citing *C & S Industries, Inc.*, 158 NLRB 454, 459 (1966), cited with approval in *Dep't of the Navy, Marine Corps Logistics Base v. FLRA*, 962 F.2d 48, 60 (D.C. Cir. 1992) ("*Marine Corps*"). The Authority further stated that it would examine all record evidence to determine whether the parties reasonably should have contemplated that the agreement would foreclose further bargaining in such instances. *Id.* at 1019.

The Authority noted that its doctrine was based on precedent developed by the National Labor Relations Board. *Id.* (citing *Triangle PWC, Inc.*, 231

NLRB 492, 493 (1977) (union demand to bargain on pension levels constituted a "mid" or "in" term attempt to negotiate on a matter covered by the contract, where "[t]he subject was broached but ... the [u]nion did not pursue the matter, choosing instead to pursue other contract terms").

The Authority also stated that it "strongly agree[d]" with the court's decision in *Marine Corps* that "'implicit in [the] statutory purpose is the need to provide the parties to such an agreement with stability and repose with respect to matters reduced to writing in the agreement.'" *Id.* at 1017, quoting *Marine Corps*, 962 F.2d at 59. In this regard, the Authority further stated the following with respect to the statutory purposes served by the doctrine:

In sum, in examining whether a matter is contained in or covered by an agreement, we must be sensitive both to the policies embodied in the Statute favoring the resolution of disputes through bargaining and to the disruption that can result from endless negotiations over the same general subject matter. Thus, the stability and repose that we seek must provide a respite from unwanted change to both parties: upon execution of an agreement, an agency should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining; similarly, a union should be secure in the knowledge that the agency may not rely on that agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining.

SSA, 47 FLRA at 1017.

In *United States Customs Serv., Customs Mgmt. Ctr., Miami, Fla.*, 56 FLRA 809, 814 (2000) (*Customs Mgmt.*), the Authority clarified that the "covered by" doctrine has two prongs. The Authority stated that, to the extent that some decisions issued subsequent to *SSA* suggested that the "third" or "intent" part of the doctrine was a separate, independent element of the *SSA* doctrine, it is not. *Id.* In this regard, the Authority held:

If the agreement provision does not expressly

encompass the matter, the Authority moves to the next part of the analysis to determine whether the matter sought to be bargained is an aspect of matters already negotiated. That analysis, of whether the matter sought to be bargained is in fact an aspect of matters already negotiated, will as deemed necessary consider the parties' bargaining history or intent as a requisite component of the examination of all the record evidence. *See SSA*, 47 FLRA at 1019. As examination of bargaining history and intent is clearly an aspect of the "covered by" doctrine established by private sector and Authority precedent, we reject the ... argument that such evidence cannot be considered. However, this part of the *SSA* doctrine, the "intent" portion of the examination of the record evidence[,] is not a separate, independent criterion. Rather, it is an integral component of that part of the "covered by" analysis to determine whether the matter sought to be bargained is inseparably bound up with and thus is plainly an aspect of a subject covered by the contract.

Id. at 814 (footnote omitted).

Accordingly, the "covered by" doctrine operates as a defense to an alleged unlawful refusal to bargain, by an agency under § 7116(a)(5) or by a union under § 7116(b)(5) of the Statute. The "covered by" doctrine has two prongs. Under the first prong, if a party seeks to bargain over a matter that is expressly addressed by the terms of the parties' collective bargaining agreement, the other party may properly refuse to bargain over the matter. Under the second prong, if a matter is not expressly addressed by the terms of the parties' collective bargaining agreement but is nonetheless inseparably bound up with and, thus, an aspect of a subject covered by the terms of the agreement, the party may also properly refuse to bargain over the matter.

IV. Positions of the Parties

A. Agency

The Agency contends that both proposals are outside the duty to bargain because they would limit the Agency's right to use part of the "covered by" doctrine. Specifically, the Agency maintains that the

proposals would prevent it from raising the second prong of the "covered by" doctrine as a defense to a charge that it improperly failed to bargain over proposals submitted by the Union, either in response to an Agency change in conditions of employment or in response to Union-initiated midterm bargaining proposals. Thus, according to the Agency, it "would not be able to argue that its action was inseparably bound up in the contract language[]" and it would not be permitted "to refer to the bargaining history regarding the action it intended to take." Agency Statement of Position, Attachment. The Agency acknowledges that it could choose to agree to a limitation on its ability to apply the "covered by" doctrine, but maintains that it cannot be required to bargain to agree to such a limitation. In short, the Agency asserts that the proposals constitute a permissive subject of bargaining, not a mandatory one.

The Agency asserts that the proposals are similar to proposals in *Dep't of Defense Dependent Schools*, 12 FLRA 52 (1983) (*DODDS*) and *AFGE, Local 2*, 4 FLRA 450 (1980). In each case, according to the Agency, a party's proposal sought to limit a statutory right of the other party, and in each case the Authority found that the proposal was a permissive subject of bargaining, not a mandatory one. Specifically, the Agency asserts that in *DODDS*, the Authority found that a party has the statutory right to insist on bargaining at the level of exclusive recognition, and that a proposal requiring a party to agree to bargain at a lower level was a permissive subject of bargaining. Similarly, the Agency contends that in *AFGE Local 2*, the Authority found that an agency has a statutory right to refuse to bargain over promotion procedures for bridge supervisory positions, and that an agency could choose to bargain over such a proposal but could not be required to do so.

B. Union

The Union asserts that the proposals do not limit either party's statutory rights and, therefore, cannot be considered a permissive subject of bargaining as alleged by the Agency. The Union states that it is

"mindful" of the Authority's decision in *Soc. Sec. Admin.*, 55 FLRA 374, 377 (1999) (*SSA II*), "where the Authority stated that the covered-by defense should be treated as a statutory right." Union's Response to Agency's Statement of Position. However, noting that the Authority has also stated that the covered-by defense was subject to waiver and arises from agreements negotiated by the parties exercising their bargaining rights under the Statute, the Union asserts that the Authority "should follow its line of cases holding that the covered-by defense is a contractual defense which arises from those provisions found in the parties' collective bargaining agreements." *Id.* In support of its assertion, the Union relies on *SSA* and on *Soc. Sec. Admin., Headquarters, Bait., Md.*, 57 FLRA 459 (2001) (*SSA III*).

The Union additionally contends that, because the "covered by" doctrine is a contractual defense, the proposals in this case "are similar to mid-term re-opener and zipper clause proposals which also allow the parties to determine for themselves what matters can and cannot be negotiated during the life of the parties' term agreement." *Id.* at 1.

V. Analysis and Conclusions

A. Meaning of the Proposals

Both proposals would require the Agency to engage in mid-term bargaining, either over Agency-initiated changes (Proposal 1) or over Union requests for mid-term bargaining (Proposal 2), unless the subject matter of bargaining is specifically addressed in the parties' National Agreement or an existing Memorandum of Understanding. The effect of both proposals would be to preclude the Agency from using the second prong of the "covered by" doctrine to excuse its failure to bargain in these circumstances. Because the proposals have the same effect, we will address them jointly.

B. Proposals 1 and 2 Constitute Matters that Are Negotiable at the Election of the Agency

Both proposals would require the Agency to waive part of the "covered by" doctrine that it would

otherwise be entitled to assert as a defense under the Statute to counter a claim that it has failed to bargain in good faith. The Agency asserts that the "covered by" doctrine involves the exercise of a statutory right and that, although it could elect to agree to a limitation on its ability to apply the "covered by" defense, it cannot be required to bargain to agree to such a limitation. The Union asserts that the "covered by" doctrine is a contractual defense, not a statutory right.

In order to resolve the negotiability dispute in this case, we first examine the collective bargaining obligations of an agency and a union under the Statute. An agency and an exclusive representative are required to negotiate in good faith for the purposes of arriving at a collective bargaining agreement. 5 U.S.C. § 7114(a)(4). "Collective bargaining" means the performance of the mutual obligation of the parties to, among other things, bargain with respect to the conditions of employment of unit employees as defined in 5 U.S.C. § 7103(a)(14) and to execute, if requested by either party, a written collective bargaining agreement. 5 U.S.C. § 7103(a) (12). Once a collective bargaining agreement is executed, the terms of the agreement govern the parties' relationship as to those matters during the life of the agreement. The "covered by" doctrine recognizes that certain matters -- both those expressly set forth in an agreement as well as those inseparably bound up with matters expressly set forth in the agreement -- are not subject to renewed bargaining during the life of the agreement because, as set forth in *SSA*, the purpose of the agreement is to provide stability and repose as to those matters.

In addition to the obligation to bargain concerning employees' conditions of employment, "the parties to a collective bargaining relationship may also negotiate over a wide range of 'permissive' subjects." *United States Food and Drug Admin., Northeast and Mid-Atlantic Regions*, 53 FLRA 1269, 1273 (1998) (FDA). "As the name implies, parties may, but are not required to, bargain over permissive subjects." *Id.* at 1273-74. Permissive subjects include

"proposals that a party negotiate to limit a right granted to it by the Statute." *Id.* See generally *AFGE, Local 32*, 51 FLRA 491, 497 n.11 (1995) (noting that bargaining proposals fall into three categories under the Statute: mandatory, permissive, and prohibited).

In *FDA*, the Authority held that a proposal by an agency to negotiate two separate collective bargaining agreements within one bargaining unit was a permissive subject. *Id.*, 53 FLRA at 1273-77. In this regard, the Authority noted that local negotiation (as opposed to negotiation only at the level of exclusive recognition) is a permissive subject of bargaining, because parties are only required to bargain at the certified exclusive representative and agency level. *Id.* at 1274. See also *DODDS*, 12 FLRA at 53 (where a union's exclusive recognition was at the national level, "the Statute does not require negotiations at other than the national level").

Similarly, although the Statute gives an agency the right to decline to bargain over the types of employees or volunteers to be assigned to a particular work group, an agency may elect to bargain over this matter because this matter constitutes a permissive subject of bargaining. See *United States Dep't of Def., Def. Contract Audit Agency, Cent. Region*, 47 FLRA 512 (1993).³

The Authority has expressly, and in our view correctly, held that the "covered by" defense constitutes a right under the Statute. See *SSA II*, 55 FLRA at 377. In this regard, the Authority specifically stated:

In [*SSA*], the Authority advised that the Statute provides stability and repose to matters reduced to writing in a collective bargaining agreement. 47 FLRA at 1017. Accordingly, the Statute frees an agency from a requirement to continue negotiations over terms and conditions of employment already resolved by previous bargaining. *Id.* at 1018. However, a statutory right, such as the refusal to bargain based on an affirmative "covered-by" defense pertaining to the parties' collective bargaining agreement, is subject to waiver.

SSA II, 55 FLRA at 377 (emphasis added). The Authority concluded in *SSA II* that the agency had, in fact, "waived its right to assert a 'covered by' defense under [*SSA*] to a statutory obligation to bargain except to the extent the matter is set forth explicitly and comprehensively in an agreement." *Id.*

In this case, the proposals concern a permissive subject because they seek to limit, or partially waive, the Agency's ability to use the statutory "covered by" defense. Although application of the "covered by" defense involves an examination of the parties' collective bargaining agreement to determine what is or is not expressly encompassed in it or inseparably bound up with its terms, this fact does not detract from the Authority's previously established conclusion that the right to raise the "covered by" defense is a statutory right. Stated otherwise, the right to use the "covered by" doctrine as a defense flows from the Statute. As set forth above, *SSA* established the doctrine, consistent with private sector and judicial precedent, to serve the Statute's purposes of stability and repose. The doctrine is based in the Statute; it is not a right that either party must negotiate into a collective bargaining agreement in order to make use of it.

It is well established that a party cannot be forced to waive its statutory rights, and that a proposal to require such a waiver constitutes a permissive subject of bargaining. See *Merit Sys. Prot. Bd. Prof'l Ass'n*, 30 FLRA 852, 861-62 (1988). Because a party (an agency or a union) cannot be forced to waive its statutory rights and because the "covered by" doctrine constitutes such a statutory right, the proposals here are negotiable only at the election of the Agency. The Agency could choose to agree to a limitation on its ability to use the "covered by" doctrine, but cannot be required to bargain to agree to such a limitation.

The Union's assertion that the Authority "should follow its line of cases holding that the covered-by defense is a contractual defense which arises from those provisions found in the parties' collective bargaining agreements" is without merit. Union's Response to Agency's Statement of Position. For the

reasons set forth above, the "covered by" doctrine arises from the Statute, not a contract. Moreover, the Union's reliance on *SSA III* is unavailing. In *SSA III*, 57 FLRA at 460, the Authority found that the "covered by" doctrine did not apply because neither party was raising the doctrine as a defense to an alleged unlawful refusal to bargain. The Authority made no determination in that case that undermines the statutory nature of the "covered by" doctrine. Accordingly, the Union's reliance on *SSA III* is misplaced.

Similarly, the Union's contention that the proposals in this case are mandatory subjects of bargaining because they are similar to mid-term re-opener proposals is also without merit. First, the Union's argument is premised on its view, which we have rejected, that the "covered by" doctrine is based in contract, not in the Statute. Additionally, cases in which the Authority has addressed the negotiability of re-opener clause proposals are not dispositive here because in none of those cases does the record reflect that an agency made the claim, as the Agency does here, that those proposals constituted permissive subjects of bargaining. *See, e.g., Patent Office Prof'l Ass'n*, 56 FLRA 69, 72-73 (2000); *AFGE, Local 1995*, 47 FLRA 470, 472-73 (1993).

Accordingly, the proposals in this case concern permissive subjects of bargaining and are negotiable only at the election of the Agency.

VI. Order

Proposals 1 and 2 are negotiable only at the election of the Agency.

¹Pursuant to the Homeland Security Act of 2002 (Pub. L. 107-296; 6 U.S.C. § 101 et. seq.), the United States Customs Service transferred to the United States Department of Homeland Security, Customs and Border Protection. *See* 6 U.S.C. § 203(a)(1). There is no evidence in the record that this change has affected the continued processing of this case.

²Member Pope's dissenting opinion is set forth at the end of the decision.

³It is also well established that, even if parties

have negotiated over a permissive subject in the past, there is no basis to conclude that such previous bargaining renders future bargaining mandatory. In *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 187 (1971), the Supreme Court considered the effect of an employer's prior agreement to a contract provision that constituted a permissive subject of bargaining, on the employer's duty to bargain under section 8(d) of the National Labor Relations Act. The Court held that by once bargaining and agreeing on a permissive subject, the parties do not make the subject a mandatory topic of future bargaining. Because the duty to bargain under the Statute parallels the duty to bargain under the Act, the Authority adopted the rationale of the Court in that case with respect to the duty to bargain over permissive subjects. *See NATCA*, 56 FLRA at 291. *See also AFGE, Local 225*, 56 FLRA 686, 689 (2000).

Member Carol Waller Pope, dissenting;

The majority finds that the proposals at issue are permissive, rather than mandatory, subjects of bargaining because they would require the Agency to waive a statutory right. Majority Opinion at 10-11. For the following reasons, I disagree.

The majority's analysis begins and ends with its conclusion that the "covered by" defense is grounded in the Statute and, since this defense is a "statutory right," it may be voluntarily waived but need not be negotiated. Decision at 9-10. However, in addressing whether particular proposals relating to rights rooted in the Statute are mandatory or permissive subjects of bargaining, the Authority, applying principles enunciated by the Court of Appeals for the District of Columbia Circuit, employs a different test, which examines the nature of the rights at issue and the policy issues implicated by requiring bargaining over a particular subject. *See United States Food and Drug Admin., Northeast and Mid-Atlantic Regions*, 53 FLRA 1269, 1274 (1998) (*FDA*), *citing AFGE, Locals 225, 1504, and 3723*, 712 F.2d 640, 646 (D.C. Cir. 1983) (*AFGE*). Applying the proper test, I would

find that the parties are required to bargain over the proposals.

In *AFGE*, the court affirmed the Authority's conclusion that the scope of the negotiated grievance procedure is a mandatory subject of bargaining. *Id.* The Authority had held that parties must bargain over the scope of the grievance procedure and may insist on a particular proposal to impasse. *See Vermont Air National Guard*, 9 FLRA 737, 740 (1982). In upholding the Authority's decision, the court reasoned that permissive subjects of bargaining are distinguished from mandatory subjects because they are linked to "unilateral rights specifically vested in one party." *AFGE*, 712 F.2d at 646. The court noted that "[i]t is sensible to view all matters relating to conditions of employment as mandatory subjects of bargaining unless the Act explicitly or by unambiguous implication vests in a party an unqualified 'right,'" *Id.* at 646 n. 27, and that the grievance procedure section of the Statute "is simply not cast in the same mold; it is not designated as a union rights clause and it labels no subject bargainable at a party's election." *Id.* at 646-47.

In *FDA*, the Authority adopted the *AFGE* court's reasoning that permissive subjects of bargaining are generally linked to rights specifically vested in one party, and held that an Agency's proposal for more than one collective bargaining agreement was a permissive subject of bargaining, 53 FLRA at 1275-76. The Authority reasoned that the Union had a unilateral right to negotiate with "an agency," and that permitting an agency to insist on more than one agreement would allow it to turn itself into more than one entity. *Id.* at 1276. The Authority stated that "there are certain features of collective bargaining that any party may rely on" and that "[o]ne such feature is that the basic bargaining relationship is between one union and one employer." *Id.*

Applying *AFGE* and *FDA* here, the "covered by" doctrine is not linked to any unilateral right in the Statute, either explicit or implicit.¹ Rather, as the majority notes, the doctrine is rooted in the general policy goals of promoting the resolution of disputes

through bargaining and avoiding endless bargaining on the same subject. Decision at 3, quoting *United States Dep't of HHS, SSA, Bait., Md.*, 47 FLRA 1004, 1017 (1993) (*SSA*). The doctrine is not based on a unilateral right but on promoting "stability and repose" and "a respite from unwanted change to both parties." *Id.* The doctrine is linked to mutual interests, not unilateral rights.

As a matter that relates to the mutual rights and obligations of the parties, the "covered by" doctrine is similar to the scope of the grievance procedure, found to be a mandatory subject of bargaining in *AFGE*. Further, as a policy matter, the second prong of the "covered by" test, which is at issue here, is particularly appropriate for negotiations. In this connection, the second prong of the test provides that parties may not demand bargaining over matters that are "inseparably bound up with, and, thus, plainly an aspect of" an agreed on contract term. *SSA*, 47 FLRA at 1018 (citations omitted). As the majority notes, an important aspect of this determination is the parties' "intent" in bargaining. Decision at 4, quoting *U.S. Customs Service*, 56 FLRA 809, 814 (2000). The Union's proposals would simply memorialize the intent that the parties are bound only by matters specifically agreed upon, and not other, related matters.

Moreover, like reopener proposals, finding the proposals here within the scope of mandatory bargaining would enhance stability of bargaining relationships by encouraging parties to enter contracts with longer durations. *See NLRB v. Lion Oil Co.*, 352 U.S. 282, 289-91 (1957). In this regard, in the private sector, reopener proposals -- which, by definition, seek bargaining over matters that are "covered by" a contract -- are both common and considered mandatory subjects of bargaining. *McAllister Bros., Inc.*, 312 N.L.R.B. 1121, 1121, 1129 (1993) (proposal that management could reopen agreement if its competitors operate during a strike with nonunion replacements represented by another labor organization and capturing a specified percentage of the ship docking work normally performed by

respondent). *Cf. Dolly Madison Indus's, Inc.*, 182 N.L.R.B. 1037, 1037-38 (1970) ("most favored nations" clause permitting management to automatically modify agreement if union entered into contract with management's competitors providing for more favorable terms regarding wages, hours, and other conditions of employment). Reopener proposals have been found negotiable under the Statute, also. *See, e.g., Patent Office Prof'l Ass'n*, 56 FLRA 69, 72-73 (2000) (*POPA*) (proposal allowing reopening of agreement one year after implementation of an automated search program in order to consider problems or conditions that have arisen); *AFGE, Local 1995*, 47 FLRA 470, 472-73 (1993) (proposal providing that at midterm of agreement, either party may request to reopen agreement to renegotiate a maximum of two articles of agreement); *AFGE, AFL-CIO, Local 3804*, 21 FLRA 870, 889-91 (1986) (proposal providing that, if agency proposes changes to travel regulations, union may reopen agreement for limited bargaining).²

I find no principled basis for distinguishing the instant proposals from reopener proposals. In fact, the instant proposals have a more limited effect on the stability of contracts than many reopener proposals. In this connection, while reopener proposals may seek to reopen a contract as to entire subjects, the instant proposals would permit reopening only as to those aspects of subjects that are not expressly addressed in the contract. In addition, it is reasonable to expect that requiring parties to bargain over the instant proposals would further, not impede, the policies the "covered by" doctrine balances: "favoring the resolution of disputes through bargaining" and avoiding "the disruption that can result from endless negotiations over the same general subject matter." *SSA*, 47 FLRA at 1017. In this connection, the proposals would encourage parties to reach more comprehensive collective bargaining agreements, and make the intent of those agreements more clear, which could result in fewer disputes as to meaning and application. In these circumstances, I would find that public and private sector precedent supports finding them within the

duty to bargain.

For the foregoing reasons, I would find the proposals to be within the duty to bargain. Accordingly, I dissent.

¹The majority correctly notes that, in *SSA*, 55 FLRA 374 (1999), the Authority referred to the "statutory right" to raise an affirmative "covered by" defense. *Id.* at 377. However, the Authority's statement in *SSA* was unexplained, unsupported by pertinent precedent, and unnecessary to the Authority's holding in that case. That is, the statement was mere dicta. In this connection, the Authority's conclusion in *SSA* was that the respondent had entered into an agreement that limited the application of the "covered by" doctrine -- a conclusion that is in no way dependent on whether the Agency was obligated, or merely permitted, to bargain over this subject. *See* 55 FLRA at 377.

²The majority correctly observes that none of the Authority decisions concerning reopener proposals involved arguments that the proposals were permissive subjects of bargaining. This may indicate that the majority would consider reopener proposals also to be permissive, a result that would, in my view, seriously undermine effective collective bargaining.

Statutes Cited

5 USC 7105(a)(2)(E)
6 USC 101
6 USC 203(a)(1)
5 USC 7116(b)(5)
5 USC 7116(a)(5)
5 USC 7114(a)(4)
5 USC 7103(a)(14)
5 USC 7103(a)(12)

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47 FLRA 470
53 FLRA 1269 -- Cited in Dissent
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9 FLRA 737 -- Cited in Dissent
47 FLRA 1004 -- Cited in Dissent