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**IFPTE, Local 3 and Department of the
Navy, Philadelphia Naval Shipyard,
Philadelphia, PA**

Federal Labor Relations Authority

0-NG-2200; 51 FLRA No. 40; 51 FLRA 451

October 31, 1995

Judge / Administrative Officer

Before: Segal, Chair, Armendariz, Member

Related Index Numbers

**33.41 Bargaining Unit Determination Criteria,
Exclusions from Unit, Management**

**33.42 Bargaining Unit Determination Criteria,
Exclusions from Unit, Supervisor**

42.3 Scope of Bargaining, Prohibited Subjects

**44.372 Subjects of Bargaining, Conditions of
Employment, Job Security, Contracting Out**

**44.373 Subjects of Bargaining, Conditions of
Employment, Job Security, Reduction-in-Force**

**44.3731 Subjects of Bargaining, Conditions of
Employment, Job Security, Reduction-in-Force,
Procedures**

**44.5214 Subjects of Bargaining, Management
Rights, Title VII/Civil Service Reform Act of 1978,
Section 7106(a),
Hire/Assign/Direct/Furlough/Retain Employees -
7106(a)(2)(A)**

**44.5217 Subjects of Bargaining, Management
Rights, Title VII/Civil Service Reform Act of 1978,
Section 7106(a), Make Contracting Out
Determinations - 7106(a)(2)(B)**

**44.5219 Subjects of Bargaining, Management
Rights, Title VII/Civil Service Reform Act of 1978,
Section 7106(a), Make Selections for Appointments
- 7106(a)(2)(C)**

**44.524 Subjects of Bargaining, Management
Rights, Title VII/Civil Service Reform Act of 1978,
Section 7106(b)(3) Arrangements for Those
Adversely Affected**

Case Summary

THE AUTHORITY DETERMINED THE NEGOTIABILITY OF SEVERAL PROPOSALS RELATED TO AN RIF. (1) The union proposed the employer utilize vacant positions to minimize the adverse effect on employees affected by a reduction-in-force and waive any qualification requirements when it could be reasonably determined that the employee could perform the duties of the position within 90 days. The agency argued the proposal interfered with its rights to assign and select employees under 5 USC 7106(a)(2)(A) and (C)(ii), was not an appropriate arrangement, and that the obligation to waive mandatory minimum educational requirements was inconsistent with Government-wide regulations. The Authority accepted the union's explanation that the proposal was not intended to require the agency to waive mandatory minimum educational qualifications, finding the proposal was not inconsistent with Government-wide regulations. Although the Authority found the proposal affected management's rights to assign and select employees, it was found to be an appropriate arrangement because it focused on ameliorating the adverse effects of an RIF and did not excessively interfere with management's rights. Since the proposal was an appropriate arrangement under 5 USC 7106(b)(3), it was negotiable. (2) The union proposed the agency eliminate/cancel any contracting out of functions if positions related to those functions were to be abolished or downgraded, for 1 year from the effective date of the RIF. The agency argued the proposal excessively interfered with its right to make determinations with respect to contracting out under 5 USC 7106(a)(2)(B). The Authority found the proposal was nonnegotiable because it excessively interfered with a management right and did not constitute an appropriate arrangement. In order for a proposal that interferes with management's rights to constitute an appropriate arrangement, it must address or compensate for adverse effects on employees. The proposal at issue did not address or compensate for harm caused to employees by an RIF. Since the proposal did not ameliorate the adverse effect on

employees attributable to the exercise of management's right to subcontract, it was not an appropriate arrangement and was nonnegotiable. (3) The union proposed that when the agency decided to re-establish and fill a position that had been abolished in an RIF, any qualified and available former incumbent of the position be reassigned to fill the position. The agency objected to the proposal, arguing it interfered with its right to make selections from any appropriate source under 5 USC 7106(a)(2)(C). The Authority agreed with the agency in determining the proposal restricted the source from which vacancies could be filled, and that the proposal was not an appropriate arrangement because it lacked the tailoring necessary to constitute an arrangement under 5 USC 7106(b)(3). The proposal lacked the requisite tailoring because it would apply without distinction to both employees adversely affected by RIF-related reassignments and those not so affected. Since the proposal affected a management right and did not constitute an appropriate arrangement under 5 USC 7106(b), it was nonnegotiable. (4) The union proposed a specific post-RIF organizational structure which included specific numbers of supervisory and management personnel to be assigned to several units. The agency argued the proposal was nonnegotiable because it concerned the conditions of employment of personnel who were excluded by statute from the bargaining unit. Authority precedent holds that proposals which directly determine the working conditions of supervisory and management personnel do not concern conditions of employment of unit employees and are therefore not within the duty to bargain. Since the proposal determined the conditions of employment of supervisors and managers by fixing the number of those personnel to be retained in each listed organizational element, the proposal was outside the agency's duty to bargain under 5 USC 7117, and was therefore nonnegotiable.

Full Text

DECISION AND ORDER ON
NEGOTIABILITY ISSUES*1

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and concerns the negotiability of four proposals relating to a reduction-in-force (RIF) at the Agency.

For the reasons stated below, we make the following findings. Proposal 1, requiring that management place employees affected by a RIF in certain vacancies, is negotiable as an appropriate arrangement under section 7106(b)(3) of the Statute. Proposal 2, which prevents the Agency from contracting out certain functions, is nonnegotiable because it affects the exercise of management's right under section 7106(a)(2)(B) of the Statute to make determinations with respect to contracting out and does not constitute an arrangement within the meaning of section 7106(b)(3). Proposal 3 concerns positions that management abolished in a RIF and subsequently reestablishes; the requirement that the Agency select former incumbents to fill such vacancies is nonnegotiable because it affects the exercise of management's right to select from any appropriate source and does not constitute an appropriate arrangement. Proposal 4, concerning the numbers and types of positions to be abolished in the RIF, seeks to regulate the conditions of employment of supervisory and management personnel and is not within the Agency's duty to bargain under section 7117(a)(1) of the Statute.

II. Proposal 1

The Employer agrees, to the maximum extent possible, to utilize vacant positions to minimize the adverse effect o[n] employees affected by the Reduction-in-Force. The Employer agrees to waive any qualifications requirements when it can be reasonably determined that the employee could perform the duties of the position within 90 days.

A. Positions of the Parties

1. Agency

The Agency contends that the obligation under Proposal 1 to fill vacancies with employees affected

by a RIF directly interferes with its rights to assign and select employees under section 7106(a)(2)(A) and (C)(ii) of the Statute. The Agency also asserts that the proposal is not an appropriate arrangement under section 7106(b)(3) because it eliminates management's discretion not to fill vacancies. Finally, the Agency maintains that the obligation to waive mandatory minimum educational requirements is inconsistent with Government-wide regulations and, consequently, the proposal is nonnegotiable under section 7117(a)(1).^{*2}

2. Union

The Union asserts that Proposal 1 requires the Agency to fill a vacancy with a RIF-affected employee only when it intends to fill the vacancy and only when the employee could become "minimally qualified within a very short period of time." Reply Brief at 3. In addition, according to the Union, the phrase "to the maximum extent possible[]" was included in the proposal to recognize "that other laws, rules, regulations and business requirements could prevent the [A]gency from utilizing a bargaining unit member to fill a vacancy." *Id.* The Union asserts that it "in no way intends to require the [A]gency to waive mandatory qualifications." *Id.* The Union contends that the proposal constitutes a negotiable appropriate arrangement within the meaning of section 7106(b)(3).

B. Analysis and Conclusions

The Union's explanations that Proposal 1 applies only to vacancies that management has decided to fill and does not obligate the Agency to waive mandatory minimum educational requirements are consistent with the proposal's plain wording and, therefore, we adopt them for purposes of this decision. See, e.g., *American Federation of Government Employees, Local 1900 and U.S. Department of the Army, Headquarters, Forces Command, Fort McPherson, Georgia*, 51 FLRA 133, 138-39 (1995) [95 FLRR 1-1090]. Interpreted consistent with the Union's explanation, Proposal 1 does not obligate the Agency to waive mandatory education requirements when it decides to fill a vacancy. Therefore, the proposal is

not inconsistent with 5 C.F.R. 351.703.

In *American Federation of Government Employees, Local 1345 and U.S. Department of the Army, Headquarters, Fort Carson and Headquarters, 4th Infantry Division, Fort Carson, Colorado*, 48 FLRA 168, 194-96 (1993) [93 FLRR 1-1198] (Ft. Carson), the dispute involved, in part, a sentence of a proposal requiring the agency to reassign an employee with a handicapping condition to a vacancy, provided the employee could perform the duties of the position. In concluding that the disputed sentence directly interfered with the exercise of management's right to assign employees, the Authority cited *American Federation of Government Employees, Local 2024 and U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 37 FLRA 249, 258-62 (1990) [90 FLRR 1-1456] (Portsmouth), where a proposal requiring, among other things, that the agency assign disabled employees to positions compatible with their handicaps was held to directly interfere with management's right to assign employees under section 7106(a)(2)(A). The Authority also found that the requirement directly interfered with management's right to select under section 7106(a)(2)(C) by affecting management's authority to determine the qualifications, skills, and abilities required to perform the work of a position and to make selections from any appropriate source. *Ft. Carson*, 48 FLRA at 195. Based on *Ft. Carson* and *Portsmouth*, and noting that the Union does not argue to the contrary, we find that Proposal 1 "affect[s] the authority" of management "in accordance with applicable laws . . . [to] assign . . . employees" and "with respect to filling positions, to make selections for appointments from . . . appropriate source[.]" 5 U.S.C. 7106(a)(2)(A) and (C)(ii).

In determining whether Proposal 1 is negotiable as an appropriate arrangement under section 7106(b)(3), as the Union claims, we first examine whether the proposal is intended as an arrangement for employees adversely affected by the exercise of a management right. See *National Association of*

Government Employees, Local R14-87 and Kansas Army National Guard, 21 FLRA 24, 31-33 (1986) [86 FLRR 1-1492] (KANG). In addition to ameliorating the adverse effects of the exercise of management right(s), the purported arrangement must be "tailored" to compensate or benefit employees suffering those adverse effects. See, e.g., National Treasury Employees Union, Chapter 243 and U.S. Department of Commerce, Patent and Trademark Office, 49 FLRA 176, 184 (1994) [94 FLRR 1-1042] (Patent and Trademark Office) (Member Armendariz concurring in part and dissenting in part). If the proposal is such an arrangement, we then determine whether the arrangement is appropriate or inappropriate because it excessively interferes with management's rights. See KANG, 21 FLRA at 31-33.

Proposal 1 addresses the adverse effects on employees of management's decision to exercise its rights, under section 7106(a)(2)(A), to assign, demote, and layoff employees by conducting a RIF. As a result of the exercise of those rights, employees can be adversely affected by downgradings or terminations. The proposal expressly requires management to use vacancies to minimize the "adverse effect" on employees affected by the RIF, and the proposal's requirement that RIF-affected employees be placed in vacant positions that management has decided to fill could reduce the number of demotions, and would reduce the number of terminations, resulting from the RIF. Therefore, the proposal is focused on ameliorating the adverse effects of a RIF and would do so only for those employees who would be demoted or terminated because of a RIF. As such, the proposal constitutes an arrangement.

As the proposal neither requires waiver of mandatory qualifications requirements nor obligates management to fill vacant positions,*3 it has the same effect as Proposal 3 in Portsmouth, 37 FLRA at 253, which required the agency to minimize displacement actions in a RIF through the reassignment of, and filling of vacancies with, employees affected by the RIF. Proposal 1 affords employees significant

benefits by obligating management to minimize the adverse effects of a RIF to the extent possible. On the other hand, the interference with the exercise of management's rights is not excessive. The proposal does not obligate management to fill vacancies, and, although management may be required to accept less than fully acceptable performance for up to 90 days, it need not assign employees who cannot perform the work acceptably within that period. See *id.* 37 FLRA at 257. Accordingly, for the reasons more fully set out in Portsmouth, we conclude that Proposal 1 does not excessively interfere with management's rights and is negotiable as an appropriate arrangement under section 7106(b)(3).

III. Proposal 2

The Employer will eliminate/cancel contracting out its functions, if positions related to those functions were to be abolished or downgraded, for one year from the effective date of the RIF.

A. Positions of the Parties

1. Agency

The Agency contends that Proposal 2 excessively interferes with management's right to make determinations with respect to contracting out under section 7106(a)(2)(B) of the Statute. The Agency asserts that "the reach of the proposal is extraordinarily broad" and that the proposal would prevent it from "contracting out small, residual functions which, though they might be required for mission accomplishment, would not justify retention of a civilian position." Supplemental Statement of Position at 2. The Agency contends that the proposal's adverse impact on its right is disproportionate to any benefit accruing to employees. Finally, the Agency argues that the proposal conflicts with the requirement in section 7101(b) of the Statute that the Statute be interpreted in a manner consistent with the requirements of an effective and efficient Government.

2. Union

The Union contends that Proposal 2 is negotiable as an appropriate arrangement under section

7106(b)(3) of the Statute.

B. Analysis and Conclusions

Proposal 2 is not clearly worded, and the Union does not explain its meaning, other than to assert, without elaboration, that the proposal is an appropriate arrangement for adversely affected bargaining unit employees. However, the proposal contains wording very similar to that used in a provision reviewed in *National Federation of Federal Employees, Local 1655 and U.S. Department of Defense, National Guard Bureau, Alexandria, Virginia*, 49 FLRA 874, 890 (1994) [94 FLRR 1-1102] (*National Guard Bureau*), a case cited by the Union.*4 Accordingly, we will interpret Proposal 2 consistent with the Authority's interpretation of the provision in that case. Doing so, we construe Proposal 2 to prohibit the Agency from contracting out any function that had undergone a RIF for a 1-year period following the effective date of the RIF.*5

Proposals prescribing when a management right may be exercised constitute substantive limitations on, and directly interfere with the exercise of, that right. See, e.g., *National Guard Bureau*, 49 FLRA at 890. By prohibiting the Agency from exercising its right to contract out during the specified time period, Proposal 2 constitutes such a substantive limitation. Accordingly, consistent with *National Guard Bureau*, and noting the absence of any Union argument to the contrary, we find that Proposal 2 affects the exercise of management's right, under section 7106(a)(2)(B), to make determinations with respect to contracting out.

The Union does not explain how Proposal 2 addresses or compensates for adverse effects on employees. In addition, there is no reference to adversely affected employees in the proposal itself, and the proposal does not ameliorate the harm to employees caused by a RIF. As the proposal does not ameliorate the adverse effect on employees attributable to the exercise of a management right, it does not constitute an arrangement. Therefore, it is unnecessary for us to address whether it is "appropriate" under the KANG analysis. See, e.g.,

American Federation of Government Employees, Local 3434 and National Aeronautics and Space Administration, Marshall Space Flight Center, Alabama, 49 FLRA 382, 391 (1994) [94 FLRR 1-1050] (*Marshall Space Flight Center*) (Member Armendariz concurring).

Because Proposal 2 affects the exercise of management's right to make determinations with respect to contracting out under section 7106(a)(2)(B) of the Statute and does not constitute an appropriate arrangement under section 7106(b)(3), it is nonnegotiable. In light of this conclusion, it is unnecessary to address the Agency's additional argument that the proposal is inconsistent with section 7101(b) of the Statute.

IV. Proposal 3

When the Employer decides to re-establish and fill a position that had been abolished in a RIF, any qualified and available former incumbent of the position will be reassigned to fill the position.

A. Positions of the Parties

1. Agency

The Agency contends that Proposal 3 affects the exercise of its right to make selections from any appropriate source under section 7106(a)(2)(C) of the Statute. The Agency further asserts that the proposal does not constitute an arrangement, within the meaning of section 7106(b)(3), because it "would apply regardless of whether [an] employee had suffered any adverse consequences as a result of reassignment in the course of a RIF." Statement of Position at 5. Therefore, in the Agency's view, Proposal 3 is not negotiable as an appropriate arrangement.

2. Union

The Union states that the proposal is an appropriate arrangement and that it "clearly intends that the [proposal] reach only those employees adversely [a]ffected by the RIF." Reply Brief at 4-5.

B. Analysis and Conclusions

The Agency asserts and we agree that, by

requiring the Agency to fill vacancies with former incumbents, the proposal restricts the "source" from which the vacancies will be filled, thereby "affect[ing] the authority of any management official of any agency . . . in accordance with applicable laws . . . with respect to filling positions, to make selections for appointments from . . . any . . . appropriate source[.]" 5 U.S.C. 7106 (a)(2)(C)(ii). See, e.g., Laurel Bay Teachers Association. OEA/NEA and U.S. Department of Defense, Stateside Dependents Schools, Laurel Bay Schools, Laurel Bay, South Carolina, 49 FLRA 679, 683 (1994) [94 FLRR 1-1082].

Further, we find that the wording of the proposal supports the Agency's position that the proposal applies to employees without regard to whether they suffered any adverse effects resulting from RIF-related reassignments. Use of the adjective "any" to modify "former incumbent" implies that the only requirement -- other than qualifications and availability -- for reassignment under the proposal is that the employee occupied a position that was abolished by a RIF and subsequently reestablished. The Union's assertion to the contrary is inconsistent with the language of the proposal. It is well-established that the Authority does not base a negotiability determination on a statement of intent that does not comport with the proposal's wording. See, e.g., National Federation of Federal Employees, Local 251, Forest Service Council and U.S. Department of Agriculture, Forest Service, Region 10, 49 FLRA 1070, 1081 (1994) [94 FLRR 1-1119]. Therefore, we conclude that Proposal 3 applies to all "qualified and available former incumbent[s]" of a position.

Not all employees affected by a RIF are necessarily adversely affected. For example, because of an employee's seniority, tenure group, and current annual performance rating, he or she may be able to displace another employee in a position equivalent to the one occupied before the RIF. See 5 C.F.R. 351.701 ("Assignment involving displacement.") Proposal 3 would apply without distinction to both

employees adversely affected by RIF-related reassignments and those not so affected. Furthermore, as it is not expressly limited to employees adversely affected by a RIF, the proposal would also apply to employees who voluntarily accepted reassignments for other than RIF-related reasons. In addition, the proposal would cover employees involuntarily removed from the positions based on other than RIF-related grounds. Therefore, the proposal lacks the tailoring necessary to constitute an arrangement under section 7106(b)(3). See, e.g., Patent and Trademark Office, 49 FLRA at 184. As Proposal 3 "affect[s] the authority" of management, "in accordance with applicable laws . . . with respect to filling positions, to make selections for appointments from . . . any . . . appropriate source[]" and does not constitute an arrangement under section 7106(b)(3), it is nonnegotiable. 5 U.S.C. 7106(a)(2)(C)(ii).

V. Proposal 4

This proposal, submitted in handwritten form, responds to the Agency's post-RIF organizational structure in several units. The proposal establishes the organizational structure in these units by, among other things, specifying the number of supervisory and management personnel to be assigned.

A. Positions of the Parties

1. Agency

The Agency argues that, by establishing the number of supervisory and managerial positions to be retained following a RIF, the proposal is nonnegotiable because it concerns the conditions of employment of personnel who are excluded by the Statute from the bargaining unit.

2. Union

The Union provides no arguments in either its petition for review or reply brief supporting the negotiability of Proposal 4.

B. Analysis and Conclusions

Proposals that directly determine the working conditions of supervisory and management personnel do not concern conditions of employment of unit

employees and are not, therefore, within the duty to bargain. See U.S. Department of Defense, Defense Contract Audit Agency, Central Region and American Federation of Government Employees, Local 3529, 47 FLRA 512, 523-24 (1993) [93 FLRR 1-1097] (Defense Contract Audit Agency). See also United States Department of the Navy, Naval Aviation Depot, Cherry Point, North Carolina v. FLRA, 952 F.2d 1434, 1442 (D.C. Cir. 1992) [82 FLRR 1-8003].

Proposal 4 contractually determines, among other things, the conditions of employment of supervisors and managers by fixing the number of those personnel to be retained in each listed organizational element. Accordingly, Proposal 4 does not concern a condition of employment of unit employees and is not within the Agency's duty to bargain under section 7117 of the Statute. See Defense Contract Audit Agency, 47 FLRA at 523-24.

VI. Order

The Agency shall upon request, or as otherwise agreed to by the parties, negotiate over Proposal 1.*6 The petition for review, as it pertains to Proposals 2 through 4, is dismissed.

1. Member Armendariz' concurring opinion is set forth at the end of this decision.

2. The Agency cites 5 C.F.R. 351.703 which provides, in pertinent part:

Exceptions to qualifications.

An agency may assign an employee to a vacant position . . . without regard to OPM's [Office of Personnel Management] standards and requirements for the position if:

(a) The employee meets any minimum education requirement for the position; and

(b) The agency determines that the employee has the capacity, adaptability, and special skills needed to satisfactorily perform the duties and responsibilities of the position.

3. In this latter regard, we note that the Authority

found that a similarly-worded proposal eliminated the agency's discretion not to fill vacancies in Bremerton Metal Trades Council and Naval Supply Center Puget Sound, 32 FLRA 643, 654-57 (1988) [88 FLRR 1-1260]. The Authority's conclusion was based, among other things, on the absence of a union rebuttal to the agency's "crucial" argument that the proposal removed its option not to fill vacancies. *Id.* at 656. Here, in contrast, the Union responded to the Agency's assertion that Proposal 1 deprives it of the authority to decide whether to fill vacancies by stating that the proposal applies only after management has elected to fill a vacancy.

4. Provision 10 in National Guard Bureau provided as follows:

The agency will not contract out its functions, if positions in those functions were to be abolished or downgraded, for one (1) year after the effective date of a RIF.

The Authority stated that Provision 10 "prohibit[ed] the Agency from contracting out any function that had undergone a reduction-in-force (RIF) for a period of 1 year after the effective date of the RIF." 49 FLRA at 890.

5. The wording of Proposal 2 differs from that of the National Guard Bureau provision in one respect: Proposal 2 requires the Agency to "eliminate/cancel contracting out[.] It is unclear whether this phrase is intended to require cancellation of contracts already awarded. However, the negotiability issue can be resolved without, and our resolution of that issue would not be affected by, determining whether the proposal imposes this additional limitation. Therefore, it is unnecessary to determine the meaning of this phrase and we will not address it further.

6. In finding Proposal 1 to be negotiable, we make no judgment as to its merits.

Concurring opinion of Member Armendariz:

Member Armendariz reaffirms his position that a proposal constitutes an "arrangement" within the meaning of section 7106(b)(3) of the Statute only if it

is tailored to benefit or compensate only those employees who would suffer an identifiable adverse affect as the result of an exercise of a management right. See Patent and Trademark Office, 49 FLRA at 209-14. Member Armendariz concurs in the conclusion that Proposal 1 is an arrangement because it provides for the reassignment to vacant positions only of employees who are terminated or demoted as a result of the exercise of management's right to layoff under section 7106(a)(2)(A) of the Statute. Member Armendariz also concurs with the conclusion that Proposal 2 is not an arrangement. However, consistent with his concurrence in Marshall Space Flight Center, Member Armendariz notes that, even assuming that the Union had identified a cognizable adverse effect on unit employees that resulted from the exercise of a management right, the proposal would not constitute an arrangement inasmuch as it would encompass within its scope, and provide benefits to, employees of a function that had undergone a RIF who had not been adversely affected by that RIF. Finally, because Proposal 3 does not provide that the Agency will fill vacant positions only with employees who have been adversely affected by a RIF, Member Armendariz concurs in the conclusion that the proposal does not constitute an arrangement within the meaning of section 7106(b)(3) of the Statute.