65 FLRA No. 192

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1547
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA
(Agency)

0-NG-2924

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

June 15, 2011

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

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). The appeal involves the negotiability of three proposals. The Agency filed a statement of position (SOP), to which the Union filed a response (response). The Agency did not file a reply to the Union's response.

For the reasons that follow, we find that Proposals 1 and 2 are within the duty to bargain, and that Proposal 9 is outside the duty to bargain.

II. Background

The Agency implemented several initiatives to reduce personnel. One of these initiatives was the Air Force Program Budget Decision 720 (PBD). The Union's proposals address aspects of the reduction-in-force (RIF) process contained in the PBD.

III. Proposal 1

A. Wording

When the [e]mployer determines that a [c]ompetitive [s]ervice employee will be displaced by RIF, through Mock RIF[2] or otherwise, the [e]mployer will cross-reference all of the displaced [c]ompetitive [s]ervice employees['] experience brief job series with the job series held by the [e]mployer. If a position encumbered by a probationary [e]xcepted [s]ervice employee matches, in accordance with 5 CFR § 6.3, the [e]mployer will change the probationary employee's position to a "[t]erm" that will expire prior to the effective day of the applicable RIF, providing the [c]ompetitive [s]ervice employee has a higher Service Computation Date [(SCD)] than the probationary employee; the final RIF Retention Register [(RIF RR)] will include those vacated positions. These processes do not include temporary student positions identified in 5 CFR § 213.3202 and 5 CFR § 213.3102.

Petition at 3-4.

B. Meaning

As explained by the Union, Proposal 1 intends to lessen the adverse impact of a RIF on bargaining unit employees. Petition at 4. According to the Union, Proposal 1 would make more positions available for bump and retreat[3] for competitive service bargaining unit employees by converting appointments held by probationary excepted service Veterans Recruitment Appointments (VRAs)[4] to term appointments whose

1. Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

2. A Mock RIF is a RIF retention register that is prepared before the actual RIF. Its function is to identify the names of potentially affected employees and provide those employees advance notice for early registration with the Agency's Priority Placement Plan and other available programs. Union's Petition (Petition) at 4.

3. "Bump and retreat" describes the process whereby employees released from their competitive levels displace employees with lower retention standings. This process is set forth in 5 C.F.R. § 351.701.

4. VRA appointments are excepted service appointments, made without competition, to positions otherwise in the competitive service. *See* 5 C.F.R. § 307.103. Upon completion of a two-year probationary period, these

terms would expire prior to the effective date of the RIF. Response at 2; *see also* Record of Post-Petition Conference (Record) at 2. As the proposal further explains, "those vacated positions" would then be included with other available positions under the RIF retention register. Petition at 3-4. As the Union's explanation of Proposal 1's meaning is not inconsistent with its plain wording, we adopt it for purposes of determining Proposal 1's negotiability. *E.g., NATCA*, 64 FLRA 161, 162 (2009).

C. Positions of the Parties

1. Agency

The Agency argues that Proposal 1 dictates procedures that are contrary to government-wide regulations governing RIFs. SOP at 2, 5. Specifically, the Agency argues that Proposal 1 is contrary to 5 C.F.R. § 351.201(a)(2) and (c), which concern RIFs generally; 5 C.F.R. §§ 351.403 and 404, which provide for the establishment of competitive levels and retention registers; and 5 C.F.R. §§ 351.501 and 502, which concern the order of retention in the competitive and excepted service, respectively.[5] *Id.* at 2, 9.

In addition, the Agency argues that Proposal 1 is contrary to 5 C.F.R. §§ 316.301 and 401, which are government-wide regulations governing term employment. *Id*. at 9. Furthermore, the Agency claims that VRA appointments are covered under 5 C.F.R. § 213[6] and that it cannot convert appointments occupied by excepted service VRA appointees to term appointments under 5 C.F.R. § 6.3. *Id*. at 8. The Agency also asserts that Proposal 1 interferes with management's right to assign employees under § 7106(a)(2)(A) because it requires that management reassign probationary excepted service employees to term positions that will expire prior to the effective date of the RIF. *Id*. at 2. In addition, the Agency argues that Proposal 1 would require the Agency to take specific personnel actions prior to conducting a RIF and that this would interfere with management's right to layoff employees under 5 U.S.C. § 7106(a). *Id.* The Agency further contends that Proposal 1 is not an appropriate arrangement under § 7106(b)(3) of the Statute. *Id.* at 2, 5.

2. Union

The Union asserts that Proposal 1 is not contrary to the RIF regulations because it does not dictate RIF procedures. Response at 1-2. The Union claims that the Agency has discretion to implement Proposal 1 because, under 5 C.F.R. § 6.3, it may change apppointments occupied by excepted service employees to term appointments. *Id.* at 2. The Union also argues that Proposal 1 does not interfere with management's rights to assign or layoff employees under 5 U.S.C. § 7106(a). Response at 1. The Union asserts that Proposal 1 would minimize the adverse impact of a RIF on bargaining unit employees. *Id*. at 2; Petition at 4.

D. Analysis and Conclusions

1. Proposal 1 is not inconsistent with the RIF regulations.

The Agency argues that Proposal 1 is contrary to 5 C.F.R. § 351.201(a)(2) and (c), which concern RIFs generally; 5 C.F.R. §§ 351.403 and 404, which provide for the establishment of competitive levels and retention registers; and 5 C.F.R. §§ 351.501 and 502, which concern the order of retention in the competitive and excepted service, respectively. SOP at 2, 9.

The Authority has found proposals requiring agencies to take certain personnel actions *prior* to conducting a RIF consistent with the RIF regulations in dispute here. *See, e.g., NAGE, Local R4-45*, 54 FLRA 218, 227 (1998) (proposal requiring that employees with lowest retention standing for their competitive level be reassigned thirty days prior to issuance of a RIF notice was not inconsistent with RIF regulations). Proposal 1 requires the conversion of appointments held by probationary VRA excepted service employees to term appointments, but only when the Agency determines -- through a mock RIF prior to conducting a RIF -- that a competitive service employee in the same job series as the probationary employee will be displaced in the actual RIF. As the actions required by Proposal 1 would occur *prior* to conducting a RIF, we find that Proposal 1 is not

positions automatically convert to competitive service positions. *See id.*

5. All relevant regulations are set forth, in pertinent part, in the appendix to this decision.

6. The Agency's references to 5 C.F.R. § 213 appear to be references to 5 C.F.R. Part 213, which generally regulates the excepted service. Excepted service positions include all positions in the executive branch of the federal government that are specifically excepted from the competitive service by or pursuant to statute, by the President, or by the Office of Personnel Management, and that are not in the Senior Executive Service.

inconsistent with the above referenced government-wide RIF regulations.

2. Proposal 1 is not inconsistent with 5 C.F.R. §§ 316.301 and 401, or with 5 C.F.R. § 6.3.

The Agency also claims that Proposal 1 is contrary to 5 C.F.R. §§ 316.301 and 401, which are government-wide regulations governing term employment. However, the Agency fails to explain the basis for its claim. Other than stating what the regulations provide, the Agency fails to make any claims based on the regulations. Under § 2424.32(b) of the Authority's Regulation, agencies have the burden of "raising and supporting arguments that the proposal . . . is outside the duty to bargain[.]" 5 C.F.R. § 2424.32(b). In the absence of any argument in support of its claim that the proposal is contrary to the cited regulations, the Agency's argument constitutes an unsupported assertion that is insufficient to establish that the proposal is outside the duty to bargain. *See* 5 C.F.R. § 2424.32(b); *AFGE, Local 3584, Council of Prison Locals C-33*, 64 FLRA 316, 317 (2009) (*Local 3584*). Consequently, we dismiss this claim as it is unsupported.

In addition, the Agency claims that it cannot convert appointments occupied by VRA excepted service appointees to term appointments under the discretion authorized by 5 C.F.R. § 6.3. SOP at 8. The Agency again fails to provide any arguments to support the basis for its claim. For the reasons stated above, the Agency's claim constitutes an unsupported assertion, and therefore it does not demonstrate that the proposal is outside the duty to bargain. 5 C.F.R. § 2424.32(b); *Local 3584*, 64 FLRA at 317. Consequently, we also dismiss this claim as it is unsupported.

3. Proposal 1 does not affect management's rights to assign and layoff employees under § 7106(a)(2)(A) of the Statute.[7]

The Agency argues that Proposal 1 interferes with management's right to assign employees under § 7106(a)(2)(A) because it requires that management reassign probationary excepted service employees to term positions. SOP at 2. The Agency also argues that Proposal 1's requirement that the Agency take specific personnel actions prior to conducting a RIF interferes with its management right to layoff employees under § 7106(a)(2)(A). *Id.*

Management's right to assign employees under § 7106(a)(2)(A) of the Statute includes the right to make initial assignments to positions, to reassign employees to different positions, and to make temporary assignments or details. *See NATCA*, 64 FLRA at 165. Proposal 1 does not affect management's right to assign employees because it does not require the assignment or reassignment of employees to any position. Proposal 1 only requires that when certain conditions are met, management will convert VRA appointments with a two-year probationary term to appointments with a term of less than two years. Proposal 1 does not affect what position the employee occupies. In this regard, under Proposal 1, a converted VRA employee would remain in the same position. Consequently, as Proposal 1 does not require the reassignment of employees, Proposal 1 does not affect management's right to assign employees under § 7106(a)(2)(A).

Management's right to layoff employees under § 7106(a)(2)(A) of the Statute includes the right to conduct a RIF and to exercise discretion in determining which positions will be abolished and which retained. *See, e.g., NTEU*, 60 FLRA 219, 222 (2004). Proposal 1 does not involve determining which positions will be abolished and which retained in a RIF. The proposal only operates "[w]hen the [e]mployer determines that a [c]ompetitive service

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7. The Agency makes a general claim that, to the extent that any proposal in this case concerns a permissive subject of bargaining under § 7106(b)(1), it has elected not to bargain. SOP at 9-10. However, the Agency does not explain how any of the proposals constitute a permissive subject of bargaining under § 7106(b)(1). Accordingly, to the extent the Agency is claiming that any of the Union's proposals concerns a permissive subject of bargaining under § 7106(b)(1), we reject the Agency's claim as bare assertion. *See* 5 C.F.R. § 2424.32(b); *Local 3584*, 64 FLRA at 317.

employee will be displaced by RIF[.]" Petition at 3. Therefore, Proposal 1 does not affect management's right to layoff employees under § 7106(a)(2)(A) of the Statute.

For the foregoing reasons, Proposal 1 is within the duty to bargain.[8]

IV. Proposal 2

A. Wording

> When the [e]mployer determines to fill positions from an external source because of mission requirements, and after a notice of proposed RIF has been presented to the Union, unless the [e]mployer shows to the Union that the particular position being filled will be a job series not affected by the RIF, no positions will be filled with the discretionary VRA appointments until after all of the RIFs are completed. All "[t]emporary" and "[t]erm" positions will be included in the RIFs.

Petition at 5.

B. Meaning

The Union explains that the intent of Proposal 2 is that the Agency would suspend the filling of vacant positions with excepted service VRA employees until the RIF is completed. Petition at 6-7. According to the Union, Proposal 2 aims to protect employees by requiring that, when the Agency fills vacant positions, those positions be filled with competitive service employees whose positions will be available for bump and retreat purposes for bargaining unit employees affected by the RIF. *Id*. The Union clarifies that Proposal 2 is not intended to suspend or freeze the filling of positions from other appointment authorities, but rather to suspend the "discretional hiring" of excepted service employees that will take positions from the competitive service RIF. Response at 3.

With regard to the meaning of the last sentence of the proposal, the Union explains that Proposal 2 also intends that all positions filled with term or temporary appointments be included in the RIF in order to have those positions available for bump and retreat purposes for bargaining unit employees affected by the RIF. Record at 2. The Union further explains that it intends for Proposal 2 to encompass both competitive and excepted service temporary and term positions. *Id*.

As the Union's explanation of Proposal 2's meaning is not inconsistent with its plain wording, we adopt it for purposes of determining Proposal 2's negotiability. *E.g., NATCA*, 64 FLRA at 162.

C. Positions of the Parties

1. Agency

The Agency argues that Proposal 2 interferes with management's right to hire employees under § 7106(a). SOP at 3. The Agency contends that proposals that preclude an agency from exercising a management right unless or until other events occur are generally not within the duty to bargain. *Id*. The Agency also asserts that proposals that specify criteria pursuant to which management must exercise its rights interfere with management's rights. *Id*. Finally, the Agency argues that Proposal 2 is not an appropriate arrangement under § 7106(b)(3) of the Statute. *Id.* at 5.

2. Union

The Union asserts that Proposal 2 does not interfere with management's right to hire. Response at 2. According to the Union, Proposal 2 would not prevent management from hiring through other appointing authorities, but would only suspend the discretionary hiring of excepted service VRA employees that would make certain positions unavailable to competitive service employees for bump and retreat purposes. *Id*. at 2-3.

D. Analysis and Conclusions

The Agency argues that Proposal 2 affects management's right to hire employees under § 7106(a). SOP at 3. Even assuming that the proposal affects that management right, we find, for the following reasons, that it is within the duty to bargain as an appropriate arrangement under § 7106(b)(3) of the Statute.

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8. The decisions on which the dissent relies do not support a different conclusion. One of the decisions, *NFFE, Local 2192*, 59 FLRA 868, 871 (2004), did not involve the management rights that are allegedly affected in this case. In the other decision, *AFGE, National Border Patrol Council*, 51 FLRA 1308, 1332-33 (1996), the Authority found that a provision requiring the agency to fill vacant positions that the agency elected to leave vacant affected the right to assign employees. Proposal 1 in the instant case does not impose a similar requirement.

To constitute an appropriate arrangement, a proposal must meet two requirements: it must be intended as an arrangement and it must be appropriate because it does not excessively interfere with the exercise of management's rights. *Id.; NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*).

1. Proposal 2 is an arrangement.

In order to meet the first requirement, the Union must identify: (1) the adverse effects on employees that flow from the exercise of management's rights and (2) show that the arrangement is sufficiently tailored to compensate or benefit employees suffering those adverse effects. *Id.*

Proposal 2 satisfies the first *KANG* requirement. The impending RIF action and the possible consequence of termination from employment would have a severe, negative impact on any employee who undergoes them. *See U.S. Dep't of Def., Fort Bragg Dependents Sch., Fort Bragg, N.C.,* 49 FLRA 333, 352 (1994).

Proposal 2 is also sufficiently tailored because it benefits employees who could be affected by the RIF. The purpose of suspending the filling of positions with excepted service employees unless the positions are in a job series not affected by the RIF, or until after all of the RIFs are completed, is to prevent any decrease during the RIF in the number of positions available to competitive service employees for bump and retreat purposes. By doing this, the proposal mitigates the adverse effect of the RIF on affected employees. Therefore, Proposal 2 is an arrangement within the meaning of § 7106(b)(3) of the Statute.

2. The arrangement is appropriate.

In applying the second *KANG* requirement – that the proposal is appropriate because it does not excessively interfere with the exercise of management's rights – the Authority weighs the benefits the proposal affords to employees against the burden on the exercise of management's rights. *See KANG*, 21 FLRA at 31-33.

Although Proposal 2 limits the Agency's ability to use certain appointment authorities until the RIF is completed, it provides a substantial benefit to employees affected by the RIF. Proposal 2 protects against the reduction of employee bump and retreat opportunities during the RIF. In contrast, the burden on the Agency's ability to hire is not substantial. For example, under the proposal, the hiring limitation imposed on the Agency is not absolute. The proposal's hiring limitation only applies to RIF-affected positions. Further, although the Agency would be unable to hire VRA applicants into RIF-affected positions for the duration of the RIF, the Agency would still be able to fill vacancies during the RIF from other sources. Moreover, the hiring restriction is only effective until the termination of the RIF, which is ultimately a matter under the Agency's control. *See NTEU*, 24 FLRA 479, 481 (1986). Therefore, balancing the demonstrated benefit to employees against the burden on management's rights, we find that the proposal does not excessively interfere with management's rights and, therefore, constitutes an appropriate arrangement under § 7106(b)(3). *See AFGE, Local 1367*, 64 FLRA 869, 871-72 (2010).

For the foregoing reasons, Proposal 2 is within the duty to bargain.[9]

V. Proposal 9

A. Wording

> For the purposes to RIF, the [e]mployer will establish [c]ompetitive [l]evels based on the OPM identified [o]ccupational [s]eries (i.e. [j]ob [s]eries) and [p]ay [g]rade. Competitive [l]evels will not be broken down into any type of sub[]groups associated with locally created additional duties (i.e. multitasking, etc.) that may be identified in an employee's [c]ore

9. The decisions upon which the dissent relies are inapposite. In this regard, several of the decisions involved either no allegations, or bare assertions, regarding § 7106(b)(3). *See NAGE, Local R1-109*, 53 FLRA 403, 416-18 (1997); *AFGE, Local 1345*, 48 FLRA 168, 171-75 (1993) (Member Armendariz concurring in part and dissenting in part); *NAGE, Local R5-82*, 43 FLRA 25, 34-36 (1991) (*Local R5-82*); *Int'l Plate Printers, Die Stampers & Engravers Union of N. Am., AFL-CIO, Local 2*, 25 FLRA 113, 144-46 (1987). Finally, the proposals in the one remaining decision, *AFGE, Local 1923*, 44 FLRA 1405 (1992), placed a substantially greater burden on management's rights than does Proposal 2. Specifically, those proposals required the agency to fill certain vacancies, regardless of whether vacancies existed or whether management wanted to fill them. *See id.* at 1462-70. Proposal 2, which places temporary, partial restrictions on the Agency's ability to fill vacant positions, has no comparable effect.

[d]ocument, or as applicable, [p]osition [d]escription.

Petition at 7-8.

B. Meaning

The Union states that the proposal is designed to lessen the impact of a RIF on the competitive service employees in the bargaining unit. Record at 3. The Union maintains that using employees' position descriptions to establish competitive levels would restrict or limit the ability of other employees in that series to bump and retreat into such designated positions. *Id.* The Union claims the proposal seeks to eliminate consideration of such subgroup designations during a RIF. *Id.* As the Union's explanation of Proposal 9's meaning is not inconsistent with its plain wording, we adopt it for purposes of determining Proposal 9's negotiability. *E.g., NATCA*, 64 FLRA at 162.

C. Positions of the Parties

1. Agency

The Agency first argues that Proposal 9 is contrary to the RIF regulations, specifically 5 C.F.R. Part 351, because it attempts to define RIF procedures. SOP at 3. The Agency also claims that Proposal 9 interferes with management's right to assign work, which includes the right to determine the particular duties that will be assigned. In addition, the Agency asserts that Proposal 9 interferes with management's rights because it defines competitive levels in a way that eliminates or interferes with management's discretion to determine qualifications for positions. *Id.* The Agency also argues that Proposal 9 is not an appropriate arrangement under § 7106(b)(3) of the Statute. *Id.* at 3, 5. Finally, the Agency claims that, as written, Proposal 9 would apply to non-bargaining unit employees and consequently is only negotiable at the election of the Agency. *Id.*

2. Union

The Union argues the Proposal 9 is not contrary to RIF regulations. Response at 3. The Union's position is that Proposal 9 is intended to establish competitive levels based on the Office of Personnel Management's (OPM's) established Occupational Job Series to allow each employee their bump and retreat rights within each of the occupational series in accordance with 5 C.F.R. Part 351. *Id.* The Union argues that Proposal 9 does not define qualifications, but rather uses OPM's definition for each of the occupational series instead of relying on descriptions of additional duties locally created by the Agency. *Id.* at 3. The Union further argues that Proposal 9 would not interfere with management's right to assign work. *Id.* The Union claims that the Agency has the discretion to establish competitive levels, and that the proposal would be an appropriate arrangement to minimize the adverse impact of a RIF on the bargaining unit. *Id.* Finally, contrary to the Agency's claim, the Union asserts that Proposal 9 does not concern any non-bargaining unit employees. *Id.*

D. Analysis and Conclusions

For the reasons that follow, we find that Proposal 9 is inconsistent with 5 C.F.R. § 351.403(a)(1) & (a)(2) and that it is therefore outside the duty to bargain under § 7117(a)(1) of the Statute.

Proposals that require that an agency act contrary to RIF regulations are inconsistent with government-wide regulations and are outside the duty to bargain. *AFGE, Local 1547*, 64 FLRA 813, 814-15 (2010); *see also NAGE, Local R4-6,* 52 FLRA 124, 127 (1996), and *Laborers' Int'l Union of N. Am., AFL-CIO-CLC, Local 1267,* 14 FLRA 686, 688 (1984).

By its terms, Proposal 9 affects the manner in which the Agency establishes the competitive levels of its employees. 5 C.F.R. § 351.403 dictates how competitive levels are established. Under § 351.403, competitive levels include:

> all positions in a competitive area which are in the same grade (or occupational level) and classification series, and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that an agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption.

5 C.F.R. § 351.403(a)(1).

In addition, "[c]ompetitive level determinations are based on each employee's official position, not the employee's personal qualifications." 5 C.F.R. § 351.403(a)(2).[10]

[10] The current version of 5 C.F.R § 351.403(a)(2) was amended on August 11, 2008. 5 C.F.R § 351.403(a)(2)(i)

Proposal 9 is inconsistent with 5 C.F.R. § 351.403(a)(1) because it prevents the Agency from establishing competitive levels consistent with regulatory requirements. Specifically, Proposal 9 prevents the Agency from including in a competitive level positions which are "similar enough" to each other because they have similar position descriptions. *See id*. Proposal 9 is also inconsistent with 5 C.F.R. § 351.403(a)(2) because it contradicts the regulation's explicit direction that agencies base competitive level determinations on, among other things, official position descriptions. *See id.*

Consequently, as Proposal 9 is inconsistent with 5 C.F.R. §§ 351.403(a)(1) & (a)(2), it is outside the duty to bargain pursuant to § 7117(a)(1) of the Statute.[11]

VI. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, negotiate over Proposals 1 and 2.[12] The petition for review is dismissed with regard to Proposal 9.

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provides: "Except as provided in paragraph (a)(2)(ii) of this section for pay band positions, competitive level determinations are based on each employee's official position of record (including the official position description), not the employee's personal qualifications."

11. Given this conclusion, it is not necessary to address the Union's assertion that Proposal 9 is an appropriate arrangement. In this regard, a proposal that is contrary to law or government-wide regulation remains so regardless of whether it is a procedure or an appropriate arrangement. *See NTEU*, 55 FLRA 1174, 1181 (1999).

12. In finding the proposals to be within the duty to bargain, we make no judgment as to their merits.

APPENDIX

PART 351--REDUCTION IN FORCE

5 C.F.R. § 351.204 Responsibility of agency.

Each agency covered by this part is responsible for following and applying the regulations in this part when the agency determines that a reduction force is necessary.

5 C.F.R. § 351.403 Competitive level.

(a)(1) Each agency shall establish competitive levels consisting of all positions in a competitive area which are in the same grade (or occupational level) and classification series, and which are similar enough in duties, qualification requirements, pay schedules, and working conditions so that an agency may reassign the incumbent of one position to any of the other positions in the level without undue interruption.

(2) Competitive level determinations are based on each employee's official position, not the employee's personal qualifications.[13]

. . . .

(b) Each agency shall establish separate competitive levels according to the following categories:

(1) By Service. Separate levels shall be established for positions in the competitive service and in the excepted service.

. . . .

5 C.F.R. § 351.404 Retention register.

(a) When a competing employee is to be released from a competitive level under this part, the agency shall establish a separate retention register for that competitive level. The retention register is prepared from the current retention records of employees.

. . . .

5 C.F.R. § 351.501 Order of retention—competitive service.

(a) Competing employees shall be classified on a retention register on the basis

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[13] *See supra* note 10.

of their tenure of employment, veteran preference, length of service, and performance in descending order as follows:

(1) By tenure group I, group II, group III; and

(2) Within each group by veteran preference subgroup AD, subgroup A, subgroup B; and

(3) Within each subgroup by years of service as augmented by credit for performance under § 351.504, beginning with the earliest service date.

5 C.F.R. § 351.502 Order of retention—excepted service.

(a) Competing employees shall be classified on a retention register in tenure groups on the basis of their tenure of employment, veteran preference, length of service, and performance in descending order as set forth under § 351.501(a) for competing employees in the competitive service.

PART 316 -- TEMPORARY AND TERM EMPLOYMENT

5 C.F.R. § 316.301 Purpose and duration.

(a) An agency may make a term appointment for a period of more than 1 year but not more than 4 years to positions where the need for an employee's services is not permanent. Reasons for making a term appointment include, but are not limited to: project work, extraordinary workload, scheduled abolishment, reorganization, contracting out of the function, uncertainty of future funding, or the need to maintain permanent positions for placement of employees who would otherwise be displaced from other parts of the organization. Agencies may extend appointments made for more than 1 year but less than 4 years up to the 4-year limit in increments determined by the agency. The vacancy announcement should state that the agency has the option of extending a term appointment up to the 4-year limit.

(b) OPM may authorize exceptions beyond the 4-year limit when the extension is clearly justified and is consistent with applicable statutory provisions. Requests to make and/or extend appointments beyond the 4-year limit must be initiated by the employing office and sent to the appropriate OPM service center.

5 C.F.R. § 316.401 Purpose and duration.

(a) *Appropriate use.* An agency may make a temporary limited appointment--

(1) To fill a short-term position (i.e., one that is not expected to last longer than 1 year);

(2) To meet an employment need that is scheduled to be terminated within the timeframe set out in paragraph (c) of this section for such reasons as abolishment, reorganization, or contracting of the function, anticipated reduction in funding, or completion of a specific project or peak workload; or

(3) To fill positions on a temporary basis when the positions are expected to be needed for placement of permanent employees who would otherwise be displaced from other parts of the organization.

(b) *Certification of appropriate use.* The supervisor of each position filled by temporary appointment must certify that the employment need is truly temporary and that the proposed appointment meets the regulatory time limits. This certification may constitute appropriate documentation of compliance with the limits set out in paragraph (c) of this section. The reason(s) for making a temporary limited appointment must be stated on the form documenting each such appointment.

(c) *Time limits--general.* (1) An agency may make a temporary appointment for a specified period not to exceed 1 year. The appointment may be extended up to a maximum of 1 additional year (24 months of total service). Appointment to a successor position (i.e., to a position that replaces and absorbs the position to which an individual was originally appointed) is considered to be an extension of the original appointment. Appointment to a position involving the same basic duties and in the same major subdivision of the agency and same local commuting area as the original appointment is also considered to be an extension of the original appointment.

(2) An agency may not fill a position by temporary appointment if that position has previously been filled by temporary appointment(s) for an aggregate of 2 years,

or 24 months, within the preceding 3-year period.

(d) *Exceptions to general time limits.*

(1) Agencies may make and extend temporary appointments to positions involving intermittent or seasonal work without regard to the requirements in paragraph (c) of this section, provided that:

(i) Appointments and extensions are made in increments of 1 year or less.

(ii) Employment in the same or a successor position under this and any other appointing authority totals less than 6 months (1,040 hours), excluding overtime, in a service year. The service year is the calendar year that begins on the date of the employee's initial appointment in the agency. Should employment in a position filled under this exception total 6 months or more in any service year, the provisions of paragraph (c) of this section will apply to subsequent extension or reappointment unless OPM approves continued exception under this section. An individual may be employed for training for up to 120 days following initial appointment and up to 2 weeks a year thereafter without regard to the service year limitation.

(2) OPM will authorize exceptions to the limits set out in paragraph (c) of this section only when necessitated by major reorganizations or base closings or other unusual circumstances. Requests based on major reorganization, base closing, restructuring, or other unusual circumstances that apply agencywide must be made by an official at the headquarters level of the Department or agency. Requests involving extension of appointments to a specific position or project based on other unusual circumstances may be submitted by the employing office to the appropriate OPM service center.

5 C.F.R. § 6.3 - Method of filling excepted positions and status of incumbents.

(a) The head of an agency may fill excepted positions by the appointment of persons without civil service eligibility or competitive status and such persons shall not acquire competitive status by reason of such appointment: Provided, that OPM, in its discretion, may by regulation prescribe conditions under which excepted positions may be filled in the same manner as competitive positions are filled and conditions under which persons so appointed may acquire a competitive status in accordance with the Civil Service Rules and Regulations.

(b) To the extent permitted by law and the provisions of this part, appointments and position changes in the excepted service shall be made in accordance with such regulations and practices as the head of the agency concerned finds necessary.

Member Beck, Dissenting:

I disagree with my colleagues' determinations that Proposal 1 does not affect management's rights to assign and layoff employees and that Proposal 2 constitutes an appropriate arrangement.

Proposal 1 requires the Agency to convert probationary excepted service employees to term appointments when specific circumstances -- defined solely by the Union -- occur. It then restricts how long the Agency may run the term appointment – until "the effective day of [the RIF]." Petition at 3-4. This Proposal unduly interferes with management's § 7106(a)(2)(A) rights to assign and layoff employees by imposing an absolute requirement on management to take a specific action and then requiring the Agency to terminate the action on a specific date.

We have found that similar provisions excessively interfere with management's rights. *See, e.g., NFFE, Local 2192*, 59 FLRA 868, 871 (2004) (proposal that imposes an absolute requirement on management to make certain work assignments not an appropriate arrangement); *AFGE, Nat'l Border Patrol Council*, 51 FLRA 1308, 1332-33 (1996) (provision that permits no exception to requirement that an employee be assigned to one of three positions identified by the employee is not an appropriate arrangement).

In similar fashion, Proposal 2 effectively restricts both *when* the Agency may fill a position -- not "until after all of the RIFs are completed," and *from what sources* -- it may make no "discretionary VRA appointments." Petition at 5.

We have held that "proposals that preclude an agency from exercising a management right *unless or until* other events occur are not within the duty to bargain." *NAGE, Local R1-109*, 53 FLRA 403, 418 (1997) (emphasis added) (proposal that prevents agency from detailing employees "until such time as" facilities are "formally and officially" consolidated is not within agency's duty to bargain), citing *AFGE, Local 1345,* 48 FLRA 168, 173-74 (1993).

Proposals that restrict the sources from which an agency can hire have similarly been found to fall outside an agency's duty to bargain:

- Requiring agency to fill positions with certain types of employees directly interferes with management's right to hire. *AFGE, Local 1923*, 44 FLRA 1405, 1465 (1992).
- Requiring agency to hire from a single source directly interferes with the right to select and is not an appropriate arrangement. *Id*. at 1468-70, citing *NAGE, Local R5-82*, 43 FLRA 25, 35-36 (1991).
- Requiring agency to hire from a particular source is non-negotiable because it violates the right to hire (§ 7106(a)(2)(A)) and the right to determine the personnel by which the agency's operations will be conducted (§ 7106(a)(2)(B)). *Int'l Plate Printers, Die Stampers & Engravers Union of N. Am., AFL-CIO, Local 2*, 25 FLRA 113, 145-46 (1987).

In this case, the Union's proposal would impermissibly prevent the Agency from using a particular source – VRA appointees.

Accordingly, I conclude that Proposals 1 and 2 excessively interfere with management's rights and do not constitute appropriate arrangements.