64 FLRA No. 203

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 221
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
BOSTON HEALTHCARE SYSTEM
BOSTON, MASSACHUSETTS
(Agency)

0-NG-2974

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

July 30, 2010

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

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 five proposals relating to the Agency's proposed tuberculosis screening and testing policy. The Agency filed a statement of position (SOP), to which the Union filed a response. The Agency filed a reply to the Union's response. The Agency also submitted a supplemental submission.

For the reasons that follow, we dismiss the Union's petition to the extent it covers employees listed under 38 U.S.C. § 7421(b), consider the petition to the extent it covers employees not listed under § 7421(b), and find that the Union's proposals are outside the duty to bargain.

II. Background

The Agency has a tuberculosis testing policy (current policy) that offers employees the option of undergoing annual tuberculosis testing. *See* SOP at 3. All prospective employees, however, are required to undergo such testing. *See id.* Testing is a two-step process. First, employees receive a tuberculosis skin test (skin test), which consists of an injection of a non-active tuberculosis sample into the skin and observation of the skin to determine whether it reacts to the sample. *See id.* at 3 n.2. Second, if the skin reacts to the sample, the employee receives a symptoms screen. *See id.* A symptoms screen is an examination conducted by a practitioner, in which he or she asks the employee several questions to determine whether the employee has symptoms of tuberculosis. *See id.* The practitioner also may order a chest x-ray of the employee. *See id.*

The Agency drafted a proposed policy (2005 policy) that requires all Agency employees to undergo annual testing for tuberculosis. *See id.* at 4. The Agency subsequently modified the 2005 policy to alleviate concerns raised by the Union. Under the revised policy (2008 policy), employees still would be required to undergo mandatory annual testing, but the Agency would consider an alternative to a skin test if an employee provides "proper medical documentation" to establish the validity of the alternative. *Id.* at 5 (quoting SOP, Attach. C at 12).

The Union -- which consists of Title 5, Title 38[1] and hybrid Title 38 employees[2] -- filed an unfair labor practice (ULP) charge over the 2005 policy. *See* Petition at 2. The Union withdrew the charge after the Agency agreed to bargain over the Union's proposals. *See id.* The Agency has yet to implement either the 2005 or 2008 policy. Response at 4.

III. Preliminary Issues

A. The Authority will consider the Agency's supplemental submission.

The Agency submitted an additional document -- a letter from the Agency Under Secretary of Health (Under Secretary) addressing whether bargaining over the Union's proposals is permissible under 38 U.S.C. § 7422 (§ 7422).[3] In its SOP, the Agency stated that it planned to submit a request to the Under Secretary to consider this issue. *See* SOP at 6. It also asked the Authority to place this matter in abeyance until the Under Secretary issued his determination, at

1. Title 38 refers to one portion of the United States Code that governs the Agency.

2. "Hybrid" employees are Agency employees "who are subject to both title 38 and title 5 [of the United States Code]." *U.S. Dep't of Veterans Affairs v. FLRA*, 9 F.3d 123, 126 (D.C. Cir. 1993).

3. The relevant statutes are set forth in the attached Appendix.

which point the Agency would provide the Authority with a copy of that determination. *See id.* The Union asserted that the Authority should resolve the Union's petition and not place this matter in abeyance; however, the Union did not object to the filing of the Under Secretary's letter. *See* Response at 3-4.

Under § 2429.26 of the Authority's Regulations, the Authority may, in its discretion, grant a party leave to file other documents as it deems appropriate. Because the Agency made an unopposed request in its SOP to submit the Under Secretary's determination, we will consider the Agency's supplemental submission. *See* 5 C.F.R. § 2429.26; *NAGE, Local R1-187, SEIU,* 64 FLRA 627, 627-28 (2010) (*NAGE*) (Authority granted Agency leave under § 2429.26 to submit letter from Under Secretary concerning his § 7422 determination).

B. The Authority has jurisdiction to consider the Union's petition to the extent it covers employees listed under 38 U.S.C. § 7421(b).

As a preliminary matter, the Agency contends that the Authority lacks jurisdiction to review the Union's petition to the extent it covers employees listed under 38 U.S.C. § 7421(b) (1)-(8). According to the Agency, the Under Secretary -- acting pursuant to delegated authority[4] -- determined that the Union's proposals involve matters or questions that concern or arise out of the professional conduct or competence of certain Title 38 employees. *See* Supplemental Submission at 1 (citing 38 U.S.C. § 7422). The Agency contends that, once the Secretary or a designee makes such a determination, a union's proposals are rendered non-negotiable. *See id.* (citing *AFGE, Local 446 v. Nicholson*, 475 F.3d 341 (D.C. Cir. 2007) (*Nicholson*)). Moreover, the Agency asserts that the Authority may not review this determination. *See id.* The Agency, accordingly, asserts that the Authority should not review the Union's petition to the extent it covers employees listed under § 7421(b). *See id.* However, the Agency concedes that the Under Secretary's determination does not apply to the remaining employees covered by the Union's petition. *See* Reply at 1.

The Union contends that mandatory tuberculosis testing does not concern professional conduct or competence under 38 U.S.C. § 7422. *See* Response at 3-4. The Union, accordingly, asserts that the Authority may consider its petition.

The authority of the Secretary to prescribe, by regulation, the hours and conditions of employment of Agency employees referenced under § 7421(b) is subject to their right to engage in collective bargaining in accordance with the Statute. 38 U.S.C. § 7422(a). Such collective bargaining, however, "may not cover, or have any applicability to, any matter or question concerning or arising out of . . . professional conduct or competence[.]" 38 U.S.C. § 7422(b). Whether a matter or question concerns or arises out of professional conduct or competence "shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency." 38 U.S.C. § 7422(d). Accordingly, once the Secretary or his or her designee has made a determination under § 7422(d) that a matter or question concerns or arises out of professional conduct or competence, and is not subject to collective bargaining under the Statute, the Authority is deprived of jurisdiction over the matter or question at issue. *See, e.g., Nicholson,* 475 F.3d at 347; *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Asheville, N.C.,* 57 FLRA 681, 683-84 (2002) (*VAMC*) (Authority dismissed ULP complaint after Under Secretary determined that § 7422(d) removed matter from scope of collective bargaining); *Wis. Fed'n of Nurses & Health Prof'ls, Veterans Admin. Staff Nurses Council, Local 5032,* 47 FLRA 910, 914 (1993) (Authority dismissed negotiability petition after Secretary determined that § 7422(d) removed matter from scope of collective bargaining). However, § 7422 does not deprive the Authority of jurisdiction of a negotiability matter if a union's petition does not concern employees identified under § 7421(b). *See, e.g., NAGE, Local R5-136,* 56 FLRA 346, 347 (2000) (rejecting assertion that § 7422 prevented Authority from considering petition involving hybrid Title 38 employees).

As stated above, the Under Secretary determined that the Union's petition involves matters or questions concerning or arising out of professional conduct or competence of employees listed under § 7421(b). The Under Secretary's determination, which is unreviewable, removes the Union's proposals from the scope of collective bargaining under the Statute to the extent they cover the aforementioned employees. *See* 38 U.S.C. § 7422(b) and (d); *see also, e.g., Nicholson,* 475 F.3d at 347; *VAMC,* 57 FLRA at 683. The Authority, therefore, lacks jurisdiction to review the entirety of the Union's petition; accordingly, we dismiss the Union's petition to the extent it covers employees

4. The Under Secretary asserts that the Secretary has delegated final authority to him to decide whether a matter concerns or arises out of professional conduct or competence as defined under 38 U.S.C. § 7422(b). *See* Supplemental Submission, Attach. at 8. The Union does not dispute this assertion.

listed under § 7421(b). *See NAGE,* 64 FLRA at 629 (Authority dismissed petition concerning Agency's proposed tuberculosis policy because Under Secretary determined it involved matters covered by § 7422).

However, the Union's petition also covers Title 5 and hybrid Title 38 employees, who are not covered by the Under Secretary's determination. *See NAGE, Local R5-136,* 56 FLRA at 347. Accordingly, we consider the Union's petition to the extent it covers employees not listed under § 7421(b). *See id.*

IV. Proposals 1 and 4[5]

Proposal 1

> To amend Section 4q.(1)(e) of the [2005] policy to read, "All [Agency] employees, [Agency] paid trainees, researchers, at-risk volunteers and clinical contractors will be offered [tuberculosis] testing annually.[6]

Record of Post-Petition Conference (Record) at 2.

Proposal 4

> To amend {8. Procedures (page 4)} [of the 2008 policy] to read "should the number of active [tuberculosis] cases decrease and the [Agency] drop [sic] to a low risk category, [tuberculosis] testing program will revert back to 'will be offered annually to employees.'"

Id. at 3.

A. Meaning of the Proposals

The parties agree that Proposal 1 would have the following operation and meaning: Annual tuberculosis testing for all Agency bargaining unit employees would be voluntary, rather than mandatory. *See* Record at 2. Because there is no dispute over the meaning of Proposal 1, we will adopt this meaning for the purposes of our analysis. *See NATCA, e.g.,* 64 FLRA 161, 161 (2009) (Member Beck dissenting).

The parties agree that Proposal 4 would have the following operation and meaning: Currently, the Agency classifies itself as being in "the intermediate risk category" for tuberculosis; under Proposal 4, the Agency would agree to make tuberculosis testing voluntary if the Agency classifies itself as belonging in the "low risk" category. Record at 3. Because there is no dispute over the meaning of Proposal 4, we will adopt this meaning for the purposes of our analysis. *See, e.g., NATCA,* 64 FLRA at 161.

B. Positions of the Parties

1. Agency

The Agency asserts that the proposals violate management's right to determine its internal security practices. SOP at 10. The Agency contends that tuberculosis screening and testing would safeguard its personnel and operations from the risk of acute and prolonged exposure to tuberculosis. *See id.* at 11. The Agency asserts that annual testing would allow the Agency to monitor tuberculosis exposure throughout its facilities, thereby helping the Agency to identify and limit sources of tuberculosis exposure. *See id.* at 11-12. According to the Agency, the "goal of any [tuberculosis] screening program is to afford a level of protection to people in a healthcare environment." *Id.* at 11. The Agency contends that the tuberculosis "test ensures that the Agency can monitor exposures . . . in order to indentify and address sources of infection." *Id.* at 11-12. The Agency further asserts that, if it is limited to testing employees only after they have been exposed to tuberculosis, the Agency "would be left without any preemptive means to safeguard its operations, personnel, and physical property against the internal or external risk of [tuberculosis] infection." Reply at 3 (citation omitted).

Further, the Agency asserts that, even if the Union's proposals constitute "arrangements[,]" they are not appropriate because they would prohibit the Agency from performing mandatory testing of its employees. Reply at 3 (citing *AFGE, Local 2185,* 31 FLRA 45, 49 (1988)).

The Agency also argues that the proposals are inconsistent with government-wide regulations, specifically, Office of Personnel Management (OPM) regulations set forth in 5 C.F.R. Part 339. SOP at 7. Further, the Agency contends that the proposals affect management's right to assign work because

5. At the post-petition conference, the parties agreed that Proposals 1, 2, and 3 refer to the 2005 policy, while Proposals 4 and 5 refer to the 2008 policy. *See* Record of Post-Petition Conference at 2. Moreover, they agreed that the proposals would apply only to bargaining unit employees. *See id.*

6. Section 4q.(1)(e) of the 2005 policy provides, in relevant part: "All employees, [Agency] paid trainees, researchers, at-risk volunteers and clinical contractors *will be required* to have testing annually." SOP, Attach. B at 11 (emphasis added).

tuberculosis testing is a work assignment and the proposals would impermissibly deprive management of its ability to make this assignment. *See id.* at 9-10 (citations omitted).

2. Union

The Union rejects the Agency's assertion that its proposals would affect management's right to determine its internal security practices. The Union contends that annual tuberculosis testing does not actually protect employees; moreover, it asserts that skin tests do not sufficiently identify whether an employee has been exposed to tuberculosis and often produce "false positives[.]" Response at 6-7. Further, the Union argues that only a blood test can accurately detect tuberculosis, and that tuberculosis is at a very low level in the region in which the Agency is located. *See id.* at 7.

The Union alleges that its proposals constitute arrangements because they would mitigate: (1) discipline for refusing to undergo mandatory testing, Petition at 8; (2) overtesting and "inconvenience[,]" *id.* at 6; and (3) concerns from employees that have medical, religious, or personal objections to the skin tests. Response at 2. Alternatively, the Union argues that its proposals are appropriate arrangements because the parties have already negotiated over tuberculosis testing, resulting in the current policy. *See id.* at 5, 6. The Union contends that the current policy, which makes testing voluntary, does not excessively interfere with the Agency's goal of maintaining internal security because it still permits testing "in times of real risk[.]" *Id.* at 6.

The Union rejects the Agency's assertion that the proposals are inconsistent with government-wide regulations, specifically, OPM regulations set forth in 5 C.F.R. Part 339. *See id.* at 4. Additionally, the Union argues that the proposals do not affect management's right to assign work because tuberculosis screening is not a work assignment. *See id.* at 5.

C. Analysis and Conclusions

1. Proposals 1 and 4 affect management's right to determine its internal security practices.

The right to determine internal security practices includes the authority to determine the policies and practices that are part of an agency's plan to secure or safeguard its personnel, physical property or operations against internal and external risks. *AFGE, Fed. Prison Council 33*, 51 FLRA 1112, 1115 (1996) (*AFGE*). The Authority has concluded that, where management shows a link, or a reasonable connection, between its objective of safeguarding its personnel, physical property, or operations and an investigative technique designed to implement that objective, a proposal that "conflicts with" that investigative technique affects management's rights under § 7106(a)(1). *Id.* (citations omitted). Once a link has been established, the Authority will not review the merits of an agency's plan in the course of resolving a negotiability dispute. *AFGE, Local 2143,* 48 FLRA 41, 44 (1993) (Member Talkin concurring) (citations omitted).

The Agency has established the requisite link between its internal security objectives and its annual mandatory testing policy. The parties do not dispute that tuberculosis is an "infectious disease" that "can be asymptomatic" for periods of time and can, ultimately, lead to death if untreated. SOP at 11. Indeed, it is further undisputed that several patients at the Agency's facilities in the past year have become infected with tuberculosis, including one patient who died from it. *Id.*; Reply at 4. Thus, tuberculosis clearly poses a risk to the Agency, its personnel, and members of the public who utilize its services. The Agency's testing policy provides the Agency with a "preemptive means" of protecting its operation and personnel against this risk by identifying those who have been exposed to tuberculosis. Reply at 3. As stated by the Agency, annual tuberculosis testing "ensures that [it] can monitor [tuberculosis] exposures . . . in order to identify and address sources of infection." SOP at 11-12. Indeed, the standard practice for hospitals within the Boston region is to require mandatory annual testing for their staffs. *See* Reply at 4. Consequently, and based on the foregoing, we find that the Agency has established a reasonable link between its annual mandatory testing policy and its internal security objectives. *See, e.g., AFGE, Local 1345,* 64 FLRA 949, 951 (2010) (mandatory annual flu vaccinations policy for medical staff affected internal security); *NAGE, Local R7-72,* 42 FLRA 1019, 1031 (1991) (agency requirement that employees wear certain protective gear while operating motorcycles on agency property affected internal security); *NFFE, Local 15*, 30 FLRA 1046, 1055-56 (1988) (agency's random drug testing policy affected internal security), *rev'd and remanded as to other matters sub. nom. Dep't of the Army, U.S. Army, Aberdeen Proving Ground, Installation Support Activity v. FLRA,* 890 F.2d 467 (D.C. Cir. 1989).

The Union's arguments against annual mandatory testing do not lead us to a different

conclusion. The Union contends that the testing method proposed by the Agency does not sufficiently detect or prevent tuberculosis and that a blood test is more reliable. *See* Response at 6-7. However, the Authority does not review the merits of an agency's plan once it has established a reasonable link between its policy and its internal security objectives. The Union's arguments challenge the merits of the Agency's testing policy. Consequently, they provide no basis for concluding that the Agency's testing policy does not affect internal security. *See, e.g., AFGE, Local 1345,* 64 FLRA at 951.

The Union's proposals prohibit the Agency from making annual testing mandatory; as such, they obviously "conflict" with the Agency's policy. *See AFGE,* 51 FLRA at 1115. Consequently, we find that Proposals 1 and 4 affect management's right to determine its internal security practices under § 7106(a)(1) of the Statute. *See id.*

2. Proposals 1 and 4 are not appropriate arrangements.

A proposal that affects management's rights under § 7106(a) of the Statute is nevertheless negotiable if it constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute. A proposal constitutes an appropriate arrangement if it is: (1) intended as an arrangement for employees adversely affected by the exercise of a management right; and (2) appropriate because it does not excessively interfere with the exercise of management's rights. *NAGE, Local R14-87,* 21 FLRA 24, 31 (1986) (*KANG*). If the Authority finds that a proposal is an arrangement, then the Authority determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with management's rights. *See NTEU,* 59 FLRA 978, 981 (2004). The Authority does this by weighing the benefits afforded employees under the arrangement against the intrusion on the exercise of management's rights. *See id.*

The Agency does not address whether Proposals 1 and 4 are arrangements; rather, it assumes they are and limits its challenge to whether the proposals are appropriate. *See* Reply at 3. Consequently, we limit our analysis to whether the arrangements are appropriate. *See* 5 C.F.R. 2424.32(c)(ii)(2); *NATCA, AFL-CIO,* 61 FLRA 336, 339 (2005) (where agency failed to address union's claims that provisions constituted procedures, Authority determined that agency conceded this point).

Neither the record nor the arguments before us support a conclusion that Proposals 1 and 4 are appropriate. Although the proposals would permit tuberculosis testing "in times of real risk" and when an employee first begins his or her employment, Response at 2, 6, as argued by the Agency, they would prohibit *any* mandatory annual testing. *See* Reply at 3. Proposals 1 and 4, therefore, have the effect of preventing the Agency from carrying out its internal security practice, i.e., annual tuberculosis testing, and the purposes for which it was adopted. Consequently, the proposals would significantly burden the Agency's ability to determine internal security. *See, e.g., NTEU,* 62 FLRA 267, 271-72 (2007) (Chairman Cabaniss dissenting in part) (*NTEU II*), *aff'd in relevant part, rev'd as to other matters sub. nom. NTEU v. FLRA,* 550 F.3d 1148 (D.C. Cir. 2008) (proposal that would prohibit agency from requiring *any* grooming standards for officers excessively interfered with management's right to determine internal security where Authority determined that grooming standard affected internal security); *see also, e.g., NFFE, Local 28*, 47 FLRA 873, 880 (1993) (*NFFE*) (proposal that limited agency's ability to conduct random searches of employees' belongings to certain situations significantly burdened management's right to determine internal security); *AFSCME, Local 3097,* 42 FLRA 412, 423-25 (1991) (*AFSCME*) (proposal that limited agency's ability to conduct random drug testing to certain situations significantly burdened management's right to determine internal security).

Moreover, the proposals limit the Agency's ability to safeguard its personnel and members of the public. As stated by the Agency, annual testing is a preventive measure that "monitor[s] exposures . . . in order to identify and address sources of infection" within its facilities. SOP at 11-12. Removing the Agency's ability to perform these tests effectively removes a safeguard that assists the Agency in protecting its personnel and operations against tuberculosis exposure and infection, particularly from individuals with asymptomatic cases of tuberculosis. The foregoing further supports our conclusion that the proposals place significant burdens on the Agency. *See, e.g., NTEU,* 59 FLRA 978, 982 (2004) (*NTEU I*) (citing *NAGE, SEIU, Local R7-51*, 30 FLRA 415, 419 (1987)) (proposal excessively interfered with management's right to determine internal security, in part, because it interfered with agency's ability to safeguard personnel and the public).

The Union contends that the proposals offer several benefits; however, those putative benefits do not lead us to conclude that the proposals are appropriate. Although the Union asserts that its proposals would alleviate the concerns of employees

who have religious and medical opposition to the skin tests, it concedes that these tests are acceptable for employees when they begin their employment. *See* Response at 3; Petition at 7. The Union's assertion that an employee's principled objection to annual testing should be accommodated is undermined by the Union's concession that the same individual can be required to submit to initial testing.

Additionally, the Union provides little information on the type of benefit employees would receive if the Agency recognized "personal" objections to skin tests. Response at 2. Specifically, the Union does not explain: what constitutes personal objections; how many employees have these objections; or how the Agency could assess the genuineness of such objections. Thus, any benefits employees with personal objections would receive from these proposals are diminished by the fact that those benefits are too "vague and generalized, rather than clearly and precisely substantiated." *AFGE, Local 1345,* 64 FLRA at 951-52 (proposal that would allow employees to "opt out" of mandatory flu vaccinations for personal reasons excessively interfered with management's right to determine internal security where union failed to explain which employees would opt out or how agency could ascertain validity of employees' reasons).

The Union's remaining arguments concerning the benefits offered by the proposals likewise do not support its claim. The Union asserts that the proposals would eliminate "over-testing and inconvenience" and prevent discipline. Petition at 7. However, the Union has failed to identify anything in the record that establishes that mitigating these problems would provide bargaining unit employees with any significant benefits. Consequently, the benefits accrued from alleviating the problems would not outweigh the significant burdens the proposals would place on the Agency's right to determine internal security.[7]

Based on the foregoing, the burdens of Proposals 1 and 4 on the Agency's exercise of its right to determine its internal security practices clearly outweigh their benefits to the employees. Accordingly, we find that Proposals 1 and 4 excessively interfere with management's right to determine internal security practices and are not appropriate arrangements. *See, e.g, NFFE, Local 28*, 47 FLRA at 880 (proposal that limited agency's ability to conduct searches of personal belongings excessively interfered with management's right to determine internal security where its burdens outweighed its benefits).

Based on the foregoing, we find that Proposals 1 and 4 are outside the duty to bargain.

V. Proposals 2 and 3

Proposal 2

> To further amend Section 4q.(1)(e) [of the 2005 policy] to read, "All prior positives, with a chest x-ray report on file, will be offered a symptom screen annually."[8]

Record at 2.

Proposal 3

> To amend Section 4.(q)(k)(1) [of the 2005 policy] to read "Annual chest x-rays are unnecessary for individuals with a (+) [skin test] without clinical evidence of active disease, however an annual symptom screen will be offered."[9]

Id.

A. Meaning of the Proposals

The parties agree that Proposal 2 would have the following operation and meaning: Agency bargaining unit employees who previously have tested positive for tuberculosis, and have a chest x-ray on file, will be offered an annual symptoms screen; however, they will not be required to undergo an annual symptoms screen. *See* Record at 2. Because there is no dispute over the meaning of this language, we will adopt this meaning for the purposes of our analysis. *See NATCA,* 64 FLRA at 161.

7. The Union also asserts that, because the parties have already negotiated over the current testing policy, its proposals are appropriate arrangements; accordingly, the Union argues, the Agency must negotiate any changes to the policy. Response at 3. However, the Union fails to offer any arguments in support of this position. Consequently, it constitutes nothing more than a bare assertion.

8. Section 4q.(1)(e) of the 2005 policy provides, in relevant part: "All prior positives, with a chest x-ray report on file, *will be required* to have a symptom screen annually." SOP, Attach. B at 11 (emphasis added).

9. Section 4.(q)(k)(1) of the 2005 policy provides, in relevant part: "Annual chest x-rays are unnecessary for individuals with a (+) [skin test] without clinical evidence of active disease; however, an annual symptom screen *is required*." SOP, Attach. B at 12 (emphasis added).

The parties agreed and explained that "symptom screen" refers to an examination conducted by an occupational health practitioner in which the practitioner asks an employee five questions to determine whether that employee has symptoms of tuberculosis. Record at 2. The Agency does not object to this explanation. The Union's explanation of this phrase is not inconsistent with the plain meaning of the phrase; accordingly, we adopt the Union's definition for the purposes of our analysis. *See NATCA,* 64 FLRA at 162.

The parties agree that Proposal 3 would have the following operation and meaning: Bargaining unit employees with positive skin tests would be offered a symptom screen annually, but would not be required to undergo such screening. *See* Record at 3. As there is no dispute over the meaning of Proposal 3, we will adopt this meaning for the purposes of our analysis. *See NATCA,* 64 FLRA at 161.

B. Positions of the Parties

1. Agency

The Agency relies upon the same arguments as set forth above in our discussion of Proposals 1 and 4.

2. Union

The Union relies upon the same arguments as set forth above in our discussion of Proposals 1 and 4.

C. Analysis and Conclusions

1. Proposals 2 and 3 affect management's right to determine its internal security practices.

As set forth above, where management shows a link, or a reasonable connection, between its objective of safeguarding its personnel, physical property, or operations and an investigative technique designed to implement that objective, a proposal that "conflicts with" that investigative technique affects management rights under § 7106(a)(1) to determine its internal security. *AFGE,* 51 FLRA at 1115 (citations omitted).

As we concluded above, the Agency's annual tuberculosis test affects internal security. The Union's proposals seek an exemption from part of that test -- symptoms screens -- if certain conditions are met. The proposals, therefore, would result in a modification of the Agency's internal security practice, i.e., the annual testing policy, because it would eliminate part of it. Consequently, we find that Proposals 2 and 3 affect internal security. *See, e.g., NTEU II,* 62 FLRA at 277 (proposal that sought to modify agency's grooming standard -- which itself affected internal security -- affected internal security); *see also NAGE, Local R7-72,* 42 FLRA 1019, 1030-31 (1991) (proposal that made the wearing of motorcycle helmets voluntary affected internal security even though it still permitted agency to require employees to wear other articles of protective gear).

2. Proposals 2 and 3 are not appropriate arrangements.

As discussed above, a proposal constitutes an appropriate arrangement if it is: (1) intended as an arrangement for employees adversely affected by the exercise of a management right; and (2) appropriate because it does not excessively interfere with the exercise of management's rights. *KANG,* 21 FLRA at 31. Also, as discussed above, if an arrangement excessively interferes with management's rights, it is not appropriate. *Id.*

Like Proposals 1 and 4, the Agency does not address whether Proposals 2 and 3 are arrangements. Accordingly, we address solely whether Proposals 2 and 3 are appropriate.

As with Proposals 1 and 4, Proposals 2 and 3 impose significant burdens on the Agency. The proposals would limit the Agency's ability to conduct symptoms screens, which are a part of its overall tuberculosis testing procedure. The proposals, therefore, would burden the Agency's ability to utilize its adopted security practice. Moreover, the Union's proposals would significantly restrict the Agency's ability to safeguard its personnel and the public because the Agency would not be able to completely test employees that already have tested positive for exposure to tuberculosis. *See* Record at 2-3 (proposing that bargaining unit employees that have received positive skin tests would not be required to undergo further screening). Based on the foregoing, Proposals 2 and 3 clearly place significant burdens on the Agency's ability to determine internal security. *See, e.g., NTEU II,* 62 FLRA at 271-72.

Moreover, like Proposals 1 and 4, the benefits offered by Proposals 2 and 3 are, at best, minimal. The Union's assertion that the proposals would alleviate the fears of those who have objections to the skin test is not germane because these proposals address only the symptoms screen portion of the test. Additionally, as we stated above, the Union has failed to establish that eliminating "over-testing and

inconvenience," and preventing discipline provide employees with benefits that are greater than the burdens imposed on the Agency. Petition at 6.

The burdens Proposals 2 and 3 would place on the Agency clearly outweigh the benefits they offer employees. Consequently, we find that the proposals would excessively interfere with management's right to determine internal security and are, therefore, not appropriate. *See, e.g., NTEU I,* 59 FLRA at 982 (proposal excessively interfered with management's right to determine internal security, in part, because it interfered with agency's ability to safeguard personnel and the public); *NFFE, Local 28*, 47 FLRA at 880 (proposal that limited agency's ability to conduct random searches of employees' belongings to certain situations excessively interfered with management's right to determine internal security); *AFSCME, Local 3097,* 42 FLRA at 423-25 (proposal that limited agency's ability to conduct random drug testing to certain situations excessively interfered with management's right to determine internal security).

Based on the foregoing, we find that Proposals 2 and 3 are outside the duty to bargain.

VI. Proposal 5

> h. Exclusions/Contradictions: add a Section IV [to the 2008 policy]:[10] An employee can refuse a [skin test] in cases of pregnancy or breast feeding, [r]eligious or personal beliefs, having had a live virus injected in the last 30 days or has a known allergy to the medication. A symptom[s] screen will be done in place of a [skin test] if any employee refuses a [skin test]. In cases where the Occupational Health practitioner is questioning the results of the symptom[s] screen, a chest x-ray may be ordered or a consult could be sent to the Infection Control physician.

Record at 3.

A. Meaning of the Proposal

The parties agree that Proposal 5 would have the following operation and meaning: Under Proposal 5, certain bargaining unit employees may refuse to take a skin test. *See* Record at 3. If these employees refuse a skin test, they would undergo a symptom screen. The practitioner conducting the symptom screen also could order a chest x-ray or refer the employee for a consultation with an Infection Control physician. *See id*. Because there is no dispute over the meaning of Proposal 5, we will adopt this meaning for the purposes of our analysis. *See NATCA,* 64 FLRA at 161.

B. Positions of the Parties

1. Agency

The Agency relies upon the same arguments set forth above in our discussion of Proposals 1 and 4.

2. Union

As discussed above, the Union disputes the Agency's assertion that its proposals affect internal security. It also rejects the Agency's claims that its proposals affect management's right to assign work and is contrary to OPM regulations.

The Union contends that the proposal is an appropriate arrangement because it would alleviate concerns from employees with religious, personal, and medical objections to skin testing. *See* Response at 2; Petition at 7-8. The Union contends that the proposal would assist those concerned about their religious beliefs. Additionally, the Union alleges that the proposal would alleviate the fears of those with medical conditions and women who are breast-feeding and pregnant; according to the Union, an insert provided with the medication used for the skin test states that the test "has not been evaluated for [its] carcinogenic or mutagenic potentials or impairment of fertility" and should not be administered to pregnant women unless necessary. Petition at 7. Finally, the Union asserts that the proposal would address concerns raised by employees with fears of "routine injections" and needles. *Id.* Although the Union concedes that a "one-time" test at the start of employment is permissible, Response at 3, it contends -- without explanation -- that yearly testing is an entirely different situation. *Id*. The Union further notes that its proposal would still permit symptoms screening. Petition at 7-8.

C. Analysis and Conclusions

1. Proposal 5 affects management's right to determine its internal security.

As discussed above, where management shows a link, or a reasonable connection, between its objective of safeguarding its personnel, physical

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10. "Section IV" appears to refer to Section 4.(p)(1)(i), "Exclusions/Contradictions for [skin tests]," of the 2008 policy. *See* SOP, Attach. C at 12.

property, or operations and investigative technique designed to implement that objective, a proposal that "conflicts with" that investigative technique affects management's rights under § 7106(a)(1) to determine internal security. *AFGE,* 51 FLRA at 1115 (citations omitted).

As we concluded above, the Agency's tuberculosis testing policy affects internal security. Proposal 5 would grant employees the right to be exempted from one portion of that test -- the skin test -- for various reasons, including personal objections. Because Proposal 5 would allow exemptions from a portion of the Agency's tuberculosis testing program, we find that it affects internal security. *See, e.g., NTEU II,* 62 FLRA at 276 (proposal that would allow exceptions from agency's grooming standard due to cultural objections affected internal security where Authority had already determined that grooming standard affected internal security).

2. Proposal 5 is not an appropriate arrangement.

As discussed above, a proposal constitutes an appropriate arrangement if it is: (1) intended as an arrangement for employees adversely affected by the exercise of a management right; and (2) appropriate because it does not excessively interfere with the exercise of management's rights. *KANG,* 21 FLRA at 31. Also as discussed above, if an arrangement excessively interferes with management's rights, then it is not appropriate. *Id.*

As with the other proposals, the Agency does not address whether Proposal 5 is an arrangement. Accordingly, we address solely whether Proposal 5 is appropriate.

Proposal 5 would, among other things, grant employees the right to be exempt from skin tests due to "personal beliefs[.]" Petition at 6. However, the term "personal beliefs," as used in this proposal, is too vague to support a conclusion that Proposal 5 is appropriate. *Id.* Based on the record in this case, there is no basis to conclude that this wording would provide any more than minimal benefits. As we discussed above with respect to Proposals 1 and 4, the Union has failed to offer any explanation how the Agency would determine which employees held these types of beliefs or how the Agency could assess the genuineness of those beliefs. In this regard, the proposal would mandate that the Agency exempt *any* employee who merely states that his or her "personal beliefs" prohibit him or her from receiving a skin test. Record at 3. The Union's proposal, therefore, would significantly burden the Agency's ability to utilize its internal security practice. *See AFGE, Local 1345,* 64 FLRA at 951-52 (proposal that would allow employees to "opt out" of mandatory flu vaccinations for personal reasons excessively interfered with management's right to determine internal security where union failed to explain which employees would opt out or how agency could ascertain validity of employees' reasons). Consequently, we find that the proposal excessively interferes with management's right to determine internal security and is, therefore, inappropriate. *See id.*

Although Proposal 5 addresses concerns raised by employees other than those that object to skin tests due to "personal beliefs," Petition at 6, the Union has not made any request to sever this portion of the proposal from the remainder of the proposal. Consequently, because this portion of Proposal 5 is not appropriate, the entirety of Proposal 5 is inappropriate. *See, e.g., NATCA, AFL-CIO,* 62 FLRA 174, 181 (2007) (Chairman Cabaniss concurring, in part).

Accordingly, we find that Proposal 5 is outside the duty to bargain.

VII. Order

The Union's petition is dismissed to the extent it covers employees listed under 38 U.S.C. § 7421(b)(1)-(8). To the extent that the merits of the Union's petition are considered, it too is dismissed.[11]

11. Based on this conclusion, it is unnecessary to address the Agency's arguments that the proposals affect management's right to assign work and are contrary to OPM regulations.

APPENDIX

38 U.S.C. § 7421 provides, in relevant part:

> (a) Notwithstanding any law, Executive order, or regulation, the Secretary shall prescribe by regulation the hours and conditions of employment and leaves of absence of employees appointed under any provision of this chapter in positions in the Veterans Health Administration listed in subsection (b).
>
> (b) Subsection (a) refers to the following positions:
>
> > (1) Physicians.
> >
> > (2) Dentists.
> >
> > (3) Podiatrists.
> >
> > (4) Optometrists.
> >
> > (5) Registered nurses.
> >
> > (6) Physician assistants.
> >
> > (7) Expanded-duty dental auxiliaries
> >
> > (8) Chiropractors.

38 U.S.C. § 7422 provides, in relevant part:

> (a) Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under [38 U.S.C. § 7421] is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with [the Statute].
>
> (b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in [§] 7421(b) of this title may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.
>
> . . . .
>
> (d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence . . . shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.