65 FLRA No. 109

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
BUREAU OF THE PUBLIC DEBT
WASHINGTON, D.C.
(Agency)

0-NG-3076

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

February 14, 2011

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

I. Statement of the Case

This matter 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 provisions disapproved by the Agency head under § 7114(c) of the Statute.[2] The Agency filed a statement of position (SOP), the Union filed a response (response), and the Agency filed a reply (reply).

For the reasons that follow, we find that the provisions are not contrary to law, and we order the Agency to rescind its disapproval. In so doing, we modify the Authority's standard for determining, in the negotiability context, whether an agreed-upon contract provision constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute. Specifically, in this and future cases we will make that determination by applying an abrogation (waiver) – not an excessive-interference – standard.

II. Article 11, Section 4B and Article 18, Section 14B

A. Wording

Article 11, Section 4B

> When a detail or temporary promotion is expected to be less than one hundred and twenty (120) days, the temporary supervisor shall discuss performance expectations with the employee at the beginning of the detail. Normally, this will occur within five (5) workdays from the beginning of the detail. Such performance expectations shall be confirmed in writing by the temporary supervisor before the employee can be held responsible for such performance expectations. When an employee on detail has performed under the performance expectations for at least ninety (90) days, but less than one hundred and twenty (120) days, an evaluation of the employee's performance while on such a detail shall be furnished in writing from the temporary supervisor of the detail to the employee's regular supervisor. When an employee on detail has performed under the performance expectation for less than ninety (90) days, an evaluation of the employee's performance while on detail may be furnished in the form of a memorandum from the temporary supervisor of the detail to the employee's regular supervisor. The employee's regular supervisor shall give appropriate consideration to such evaluations when evaluating the employee's overall performance.

Petition for Review (Petition) at 10.

Article 18, Section 14B

> When a detail or temporary promotion is expected to be less than one hundred and twenty (120) calendar days, the temporary supervisor shall discuss performance expectations with the employee at the beginning of the detail. Normally, this will occur within five (5) work days from the beginning of the detail. Such performance expectations shall be confirmed in writing

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

2. The petition for review (petition) originally involved fifty-five provisions. *See* Petition at 5. Five provisions remain at issue.

> by the temporary supervisor before the employee can be held responsible. If an employee is provided written expectations, a written evaluation is required when the employee has performed under the expectations for at least ninety (90) calendar days. The evaluation will be provided within thirty (30) calendar days of the end of the detail or temporary promotion.
>
> When an employee on detail has performed under the performance expectations for less than ninety (90) calendar days, an evaluation of the employee's performance while on detail may be furnished in the form of a memorandum from the temporary supervisor of the detail to the employee's regular supervisor. This memorandum will be provided within thirty (30) calendar days of the end of the detail or temporary promotion. The employee's regular supervisor shall give appropriate consideration to such an evaluation when evaluating the employee's overall performance.

Id. at 13.

B. Meaning

The parties agree that the provisions set forth a performance-appraisal process for employees detailed or temporarily promoted to a position for fewer than 120 days. Record of Post-Petition Conference (Record) at 1-2. Specifically, they provide processes for providing feedback to detailed or temporarily promoted employees at various periods of time during the details or temporary promotions. *Id.* at 2; Petition at 13. Under the provisions, performance expectations must be communicated to the detailed or temporarily promoted employee in writing before the employee may be held responsible for those expectations. Record at 2. The Union asserts, and the Agency does not dispute, that the written expectations may be submitted to an employee either by e-mail or hard copy. *See* Response at 11-12; Reply at 7-8. This undisputed assertion is consistent with the wording of the provisions, and we adopt it for the purposes of assessing the negotiability of the provisions. *See Int'l Ass'n of Machinists & Aerospace Workers, Local 726*, 31 FLRA 158, 170 (1988) (adopting undisputed contention as to the meaning of a provision that was consistent with the provision's wording) (*IAMAW*). In addition, the Agency asserts, and the Union does not dispute, that the provisions would prevent the Agency from holding an employee responsible for those expectations even if a supervisor has communicated the expectations to the employee orally. *See* SOP at 2; Response at 3, 7, 12; Reply at 2. As this undisputed assertion is consistent with the wording of the provisions, we adopt it for purposes of this decision. *See IAMAW*, 31 FLRA at 170.

C. Positions of the Parties

1. Agency

The Agency contends that the provisions affect management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute because they prevent the Agency from "holding an employee accountable for performance expectations after the expectations have been communicated to the employee, but before they have been confirmed in writing." Reply at 2. The Agency also contends that the provisions are not appropriate arrangements under § 7106(b)(3) of the Statute because they excessively interfere with those management rights. *Id.* at 7-8. In this connection, the Agency asserts that the provisions "bar the exercise of . . . management[']s] right to evaluate employees[,]" a burden that outweighs the "speculative" benefits the provisions would provide to employees. *Id.* at 8. For support, the Agency cites *Patent Office Professional Ass'n*, 48 FLRA 129 (1993) (Member Armendariz dissenting) (*POPA*), *petition for review denied sub nom. Patent Office Professional Ass'n v. FLRA*, 47 F.3d 1217 (D.C. Cir. 1995) (*POPA v. FLRA*). SOP at 3. Finally, the Agency contends that the provisions are not procedures under § 7106(b)(2) of the Statute because they place "significant limitations on a protected management right." Reply at 6.

2. Union

The Union contends that the provisions are appropriate arrangements under § 7106(b)(3) of the Statute. Response at 4, 9. In this regard, the Union argues that the provisions are arrangements for employees who "may be disciplined or suffer an adverse performance evaluation as a result of management not clearly stating performance expectations . . . ." *Id.* at 10. According to the Union, the provisions would benefit employees by: protecting them from "being disciplined or suffering an adverse performance evaluation[;]" ensuring that performance expectations are clearly defined and that employees are aware of those expectations; and providing employees with "written documentation"

of those expectations to "serve as a reference" if an employee and a manager "disagree[] over the evaluation . . . of [an] employee's performance[.]" *Id.* at 11-12 (citing *Patent Office Prof'l Ass'n*, 47 FLRA 10 (1993)).

In addition, the Union contends that it is "hardly burdensome" to require a manager to send employees performance expectations via e-mail, which, the Union asserts, is "oftentimes . . . the predominant form of communication." *Id.* at 11. The Union also contends that, even if the performance expectations were submitted via hard copy, the provisions require the Agency to "perform a purely ministerial act by documenting performance expectations at the beginning of a detail[.]" *Id.* at 12. In this connection, the Union cites *AFGE, Local 32, AFL-CIO*, 28 FLRA 714, 718-20 (1987), as demonstrating that a provision is negotiable if it merely directs an agency to comply with the requirement of communicating performance standards to employees under 5 U.S.C. § 4302.[3] *See* Response at 12.

Finally, the Union argues that the provisions are procedures under § 7106(b)(2) of the Statute. Response at 8-9.

D. Analysis and Conclusions

1. The provisions affect management's rights to direct employees and assign work.

Management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute include the rights to supervise employees and to determine the quantity, quality, and timeliness of employees' work. *AFGE, Local 3295*, 44 FLRA 63, 68 (1992) (*Local 3295*). The evaluation of employee performance is an exercise of management's rights to direct employees and assign work. *POPA*, 48 FLRA at 142. Thus, proposals or provisions that prohibit management from holding employees accountable for work performance affect the rights to direct employees and assign work. *See id.* Similarly, proposals or provisions that prohibit management from enforcing its established performance standards affect the rights to direct employees and assign work because they effectively alter the content of the standards. *See NTEU*, 47 FLRA at 710.

Here, the provisions would prohibit the Agency from holding an employee responsible for his or her performance expectations if those expectations have not been communicated to the employee in writing. Record at 2. As the provisions would prohibit management from holding employees accountable for work performance in these circumstances, we find that the provisions affect management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.

2. The provisions are appropriate arrangements.

i. Revised Analytical Framework

The Authority currently analyzes whether a proposal or provision is an appropriate arrangement under the framework set forth in *NAGE, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). Under this framework, the Authority first determines whether a proposal or provision is intended to be an arrangement for employees adversely affected by the exercise of a management right. *AFGE, Nat'l Council of Field Labor Locals*, 58 FLRA 616, 617 (2003). To establish that a proposal or provision is an arrangement, a union must establish the effects or reasonably foreseeable effects that flow from the exercise of management's rights and demonstrate how those effects are adverse. *AFGE, Local 1770*, 64 FLRA 953, 959 (2010). Additionally, the claimed arrangement must be sufficiently tailored to compensate those employees suffering adverse effects attributable to the exercise of management rights. *Id.* However, "[p]rophylactic" proposals or provisions will be found sufficiently tailored in situations where it is not possible to determine reliably which employees will be adversely affected by an agency action so as to draft a proposal or provision to apply only to those employees. *Id.* at 959-60.

If the proposal or provision is an arrangement, then, under the Authority's current standard, the Authority determines whether the arrangement is appropriate or whether it is inappropriate because it "excessively interferes" with management's rights. *Id.* In making this determination, the Authority balances the proposal's or provision's benefits to employees against its burdens on management. *Id.*

For the following reasons, we reexamine and revise the standard that we apply in the negotiability

3. 5 U.S.C. § 4302 states, in pertinent part, that an agency's performance appraisal system shall provide for "communicating to each employee the performance standards and the critical elements of the employee's position[.]"

context for determining whether an agreed-upon contract provision constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute. Specifically, we will no longer assess whether an arrangement is appropriate by applying an excessive interference standard. Rather, we will assess whether the provision "abrogates" – i.e., waives – the management right(s) that the provision affects.[4]

As an initial matter, it is well established that a bargaining proposal is outside the duty to bargain if it is contrary to law, rule, or regulation. *E.g., AFGE, Local 1226*, 62 FLRA 459, 462 (2008). However, as both the plain wording of the Statute and longstanding Authority precedent demonstrate, the mere fact that a proposal is outside the duty to bargain does not mean that it is contrary to law, rule, or regulation.

With regard to the plain wording of the Statute, § 7117(c) of the Statute provides that an exclusive representative may file a negotiability appeal "if an agency involved in collective bargaining with [the] exclusive representative alleges that the *duty to bargain* in good faith does not extend to any matter[.]" 5 U.S.C. § 7117(c) (emphasis added). By contrast, § 7114(c) of the Statute, which sets forth the process of agency-head review, does not speak in terms of whether an agreed-upon contract provision is within the duty to bargain. Rather, it provides, in pertinent part, that where an agency and an exclusive representative have reached an agreement, "[t]he head of the agency shall approve the agreement . . . if the agreement is *in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation* (unless the agency has granted an exception to the provision)." 5 U.S.C. § 7114(c)(2) (emphasis added).

It is well established that where Congress uses different terms in different parts of a statute, there is a presumption that Congress "did not view the two terms as being identical." *U.S. SEC, Wash. D.C.*, 61 FLRA 251, 255 (2005) (citing *Recording Indus. Ass'n of Am. v. Verizon Internet Serv.*, 351 F.3d 1229, 1235 (D.C. Cir. 2003)). That Congress did not state that an agency head may disapprove matters that are outside the "duty to bargain" is therefore significant. Put simply, Congress recognized that a matter may be outside the duty to bargain but, once agreed upon, may not be subject to agency-head disapproval unless it is contrary to the Statute or any other law, rule, or regulation. Further, the plain wording of § 7114(c)(2) states that an agency head "shall" – i.e., has no discretion not to – approve an agreed-upon contract provision unless that contract provision is contrary to the Statute or any other applicable law, rule, or regulation.

With regard to Authority precedent, consistent with the foregoing, the Authority has long held that the scope of what an agency head may disapprove is more limited than the scope of the duty to bargain. In this regard, in *National Ass'n of Government Employees, Local R4-75*, 24 FLRA 56 (1986) (*NAGE, Local R4-75*), the Authority stated that § 7114(c) of the Statute "strictly limits the occasions in which the head of the agency may invalidate an agreement[.]" *Id.* at 61 (quoting *AFGE v. FLRA*, 778 F.2d 850, 859 n.15 (D.C. Cir. 1985)). Specifically, the Authority found that, unless a contract provision negotiated under § 7106(b)(1) of the Statute is "otherwise inconsistent with applicable law, rule, or regulation," an agency head may not disapprove the provision because, in such circumstance, the provision is "not inconsistent with the Statute." *Id.* at 62. Consistent with *NAGE, Local R4-75*, and with the statutory wording discussed above, the Authority has held that although a matter may be a permissive subject of bargaining – and an agency may not be required to bargain over it – it may not be disapproved on agency-head review unless it is contrary to law, rule, or regulation. *See, e.g., NATCA, AFL-CIO*, 61 FLRA 336, 339 (2005) (provision regarding supervisory conditions of employment, a matter not within the duty to bargain, may not be disapproved on agency-head review); *id.* at 338 (same with regard to § 7106(b)(1) matter); *AFGE, Nat'l Mint Council*, 41 FLRA 1004, 1010 (1991) (agency-head review serves "limited purpose" of ensuring that contract provisions are not contrary to law, rule, or regulation).

In sum, although a particular proposal may be outside the duty to bargain because it is contrary to law, rule, or regulation, an agreed-upon contract provision is not contrary to law, rule, or regulation merely because, at the bargaining table, it was outside the duty to bargain.[5]

4. The excessive interference standard will continue to apply in negotiability cases involving contract proposals to which parties have not yet agreed.

5. Accordingly, the dissent's statement that the concept of a subject being contrary to the Statute "*includes*" the concept of being outside the duty to bargain is backwards; the former is narrower than the latter. Dissent at 20. Further, the dissent's references to "a proposal [that] proceeds to agency head review," *id.* at 19, and "a

The Authority has acknowledged this difference in the context of contract provisions that affect management rights under § 7106(a) of the Statute. In this connection, in *United States Environmental Protection Agency*, 65 FLRA 113 (2010) (Member Beck concurring) (*EPA*), the Authority addressed whether an arbitration award was contrary to management rights under § 7106(a) of the Statute. The Authority stated that "the Statute recognizes that agency management is permitted to agree to a broader range of matters than those strictly within its duty to bargain[,]" and "[n]o basis [was] provided to conclude that the situation is any different when management rights under § 7106(a) are involved." *Id.* at 118. Further, acknowledging that § 7122(a)(1) of the Statute charges the Authority with setting aside arbitration awards if they are "contrary to any law, rule, or regulation[,]" *id.* at 114, the Authority found it appropriate, in assessing whether an arbitrator is enforcing an appropriate arrangement under § 7106(b)(3) of the Statute, to apply a different standard than the Authority applies when determining whether a proposal is within the duty to bargain. Specifically, rather than applying the "excessive interference" standard that the Authority has applied in the negotiability context -- which involves assessing whether a proposal's burdens on management rights outweigh the proposal's benefits to employees -- the Authority found that a contractual arrangement that does not "abrogate" -- i.e., waive -- a management right is not contrary to law. *Id.* at 119.

Although *EPA* involved Authority review of exceptions to an arbitration award, rather than a negotiability appeal involving agency-head disapproval of contract provisions, the pertinent wording of § 7122(a) (governing Authority review of arbitration awards) is substantively identical to the wording in § 7114(c)(2) (governing agency-head review of agreements). Specifically, as stated previously, § 7122(a) provides that the Authority shall set aside an arbitration award if it is "contrary to any law, rule, or regulation[,]" and § 7114(c)(2) provides that an agency head shall approve an agreement if the agreement is "in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation . . . ." Thus, if a contract provision enforced by an arbitrator is not contrary to § 7106 of the Statute, then it cannot be disapproved by an agency head on the basis of § 7106. Consistent with this principle, as a contractual arrangement that does not abrogate a management right is not contrary to § 7106 in the arbitration context, *see EPA*, 65 FLRA at 118, it necessarily follows that an agency head may not rely on § 7106 to disapprove such an arrangement.[6]

provisionally-agreed-to proposal[,]" *id.* at 20, mischaracterize *provisions*, which are part of *contracts* that may be disapproved only on limited grounds.

6. We note that in *EPA*, the Authority did not identify as a relevant factor whether the agency head had timely disapproved the agreement. In fact, the Authority expressly stated that its analysis "call[ed] into question whether abrogation also should be the standard applied in negotiability cases involving contract provisions (where agreement has been reached and subsequently disapproved), rather than proposals." 65 FLRA at 118 n.11. The dissent concurred in *EPA* and "applaud[ed]" the majority's decision to abandon the excessive interference standard; unlike the majority, however, the dissent would not "engage in *any* assessment of whether a contract provision that is being enforced by an arbitrator violates management's rights." *Id.* at 119. In other words, in the arbitration context, the dissent would find that there is *no* level of interference with a management right -- whether excessive interference or abrogation -- that renders a provision unenforceable as long as parties have agreed to it.

In addition, the dissent's reliance on *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183 (D.C. Cir. 1983) (*Local 2782*), and *AFGE v. FLRA*, 778 F.2d 850 (D.C. Cir. 1985) (*AFGE*), is misplaced. *Local 2782* involved an assessment of whether proposals were within the duty to bargain -- not whether agreed-upon provisions were enforceable -- and expressly left it "for the Authority to determine in the first instance[]" the meaning of the word "appropriate" in § 7106(b)(3). 702 F.2d at 1188. *AFGE* held only that the Authority reasonably had determined that an agency head may disapprove a contract that is contrary to law, rule, or regulation, even if that contract had been imposed by the Federal Service Impasses Panel (the Panel). Nothing in this decision is inconsistent with this principle, as we continue to find, consistent with *EPA*, that an arrangement that does not abrogate a management right is an appropriate arrangement and, thus, *not* contrary to law, rule, or regulation. In addition, although the court in *AFGE* stated that the purpose of agency head review is simply "to allow the head of the agency an extra [thirty] days to do that which his subordinates could have done earlier," 778 F.2d at 860 n.16, it did not hold that the scope of matters that an agency head may properly disapprove is coextensive with the scope of matters that may be declared outside the duty to bargain at the bargaining table. In fact, in dicta, the court stated that "an argument can be made that Congress'[] explicit policy to allow the head of an agency to invalidate an agreement may have even stronger justifications for terms imposed by the . . . Panel, than for those negotiated by the parties[,]" because "[i]n the latter case, the agency's own authorized representative has agreed to the terms." *Id.* at 858. In other words, the court acknowledged that the parties' agreement to a provision at the bargaining table may be a relevant consideration.

The decision to apply an "abrogation" standard in the arbitration context was based, in large part, on a policy of deferring to bargaining parties' choices. In this regard, in *EPA*, the Authority reiterated that, during bargaining, the parties' representatives are authorized to, and should, assess the burdens that a proposal would have on management rights and the benefits that the proposal would afford employees. *See* 65 FLRA at 117 (citing *U.S. DOJ, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA 158, 162 (2001) (Chairman Cabaniss dissenting) (*BOP, Okla. City*)). Specifically, the Authority stated that bargaining parties should assess "what provisions best fit their working conditions and what arrangements are 'appropriate.'" *Id.* (quoting *BOP, Okla. City*, 57 FLRA at 162). The Authority also stated that this policy reflected a "justifiable reluctance" on the part of the Authority to substitute its judgment for that of the parties who have negotiated an agreement. *Id.*

The Authority has deferred to bargaining parties' choices in the negotiability context as well. For example, in negotiability disputes involving agreed-upon contract provisions, the Authority defers to the parties who negotiated the provision -- not the agency head -- when assessing the provision's meaning. *See IBEW, Local 350*, 55 FLRA 243, 244 (1999) (deferring to the meaning provided by "the parties who agreed on the provision"). In addition, the Authority has held that a contract becomes effective even where an agency has not timely submitted the contract for agency-head review under § 7114(c) or where the agency head does not disapprove (or timely disapprove) a provision. *See U.S. Dep't of the Treasury, Bureau of Engraving & Printing*, 44 FLRA 926, 938-40 (1992). This recognizes that the bargaining parties' choices can have binding effects, without regard to the potential concerns of agency heads. Of course, a contract that becomes effective in these circumstances does so "subject to the provisions of [the Statute] and any other applicable law, rule, or regulation." 5 U.S.C. § 7114(c)(3). In that situation, as noted above, the provision is enforceable in arbitration unless it abrogates a management right.[7] *See EPA*, 65 FLRA at 118.

Deferring to the bargaining parties' choices and applying an "abrogation" standard in cases where the parties have agreed to contract provisions also is consistent with the Statute's requirement that agencies "be represented at . . . negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment[.]" 5 U.S.C. § 7114(b)(2). In this connection, § 7114(b)(2) recognizes that agencies are required to provide bargaining representatives who adequately represent management's interests at the bargaining table *before* any agreement is reached. Thus, if a union proposal would impose burdens on an agency that the agency deems excessive, then those burdens should be assessed during negotiations – not after the parties have reached agreement.[8]

7. As noted above, such provision is enforceable, in the dissent's view, even if it abrogates a management right.

8. There is no basis for the dissent's speculation about what will occur under this revised approach; specifically, that agency heads will be more likely to get directly involved in collective bargaining, which, in turn, will impede the bargaining process. *See* Dissent at 21. As an initial matter, parties already have the ability to reach binding agreements with regard to a wide range of permissive subjects of bargaining -- including, but not limited to, "the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty," and "the technology, methods, and means of performing work[,]" 5 U.S.C. § 7106(b)(1) -- and there is no evidence that this has resulted in the situation that the dissent predicts. In addition, there is no reasonable basis for finding that local agency representatives routinely fail to object to union proposals on management-rights grounds -- as evidenced by the plethora of Authority negotiability decisions in the past two years alone that have involved local agency negotiators declaring bargaining proposals outside the duty to bargain on those grounds. *See, e.g., AFGE, Local 221*, 64 FLRA 1153, 1155 (2010); *AFGE, Local 1345*, 64 FLRA 949, 950 (2010); *United Am. Nurses, D.C. Nurses Ass'n & United Am. Nurses Local 203*, 64 FLRA 879, 880 (2010); *AFGE, Local 1367*, 64 FLRA 869, 870 (2010) (Member Beck dissenting in part); *AFGE, Local 1547*, 64 FLRA 813, 813-14 (2010); *AFGE, Council of Prison Locals 33*, 64 FLRA 728, 728 (2010) (Member Beck concurring in the result); *NTEU, Chapter 83*, 64 FLRA 723, 724 (2010); *PASS*, 64 FLRA 474, 476 (2010) (Member Beck concurring in part and dissenting in part); *AFGE, Local 171, Council of Prison Locals 33*, 64 FLRA 275, 275 (2009); *AFGE, Local 2145*, 64 FLRA 231, 232 (2009); *NATCA*, 64 FLRA 161, 162 (2009); *NAGE, Local R1-109*, 64 FLRA 132, 133 (2009) (Member Beck dissenting); *AFGE, Local 801*, 64 FLRA 62, 63 (2009); *AFGE, Local 1156*, 63 FLRA 649, 649 (2009); *AFT, Indian Educators Fed'n, Local 4524*, 63 FLRA 585, 586 (2009); *AFGE, Local 1968*, 63 FLRA 481, 483 (2009); *AFGE, Local 1458*, 63 FLRA 469, 470 (2009); *NATCA*, 63 FLRA 387, 389 (2009); *AFGE, Local 1156*, 63 FLRA 340, 341 (2009); *AFGE, Local 1547*, 63 FLRA 174, 175 (2009). This is in stark contrast to the two negotiability decisions in the past two years that have involved agency-head disapproval of contracts on management-rights grounds. *See AFGE, Local 1770*, 64 FLRA 953, 955 (2010); *Nat'l Weather Serv. Emps. Org.*, 63 FLRA 450, 451 (2009). Further, although the dissent states that the Authority has not yet found that a contract provision abrogates a management right, *see*

For the foregoing reasons, in this and in future cases, we will find that a contractual arrangement is an "appropriate" arrangement within the meaning of § 7106(b)(3) of the Statute – and that an agency head may not disapprove such an arrangement on § 7106 grounds – unless the arrangement abrogates, or waives, a management right. Previous Authority decisions to the contrary will no longer be followed. In determining whether a contract provision abrogates a management right, we will assess whether the contract provision "precludes [the] agency from exercising" the affected management right. *U.S. Dep't of Transp., FAA*, 65 FLRA 171, 174 (2010).

ii. Application of Revised Analytical Framework

The Union contends that the provisions are arrangements for employees who are adversely affected by the Agency's exercise of its management right to evaluate employees' work performance. Response at 10. In this regard, the Union claims that the provisions will lessen the chance that an employee will receive an adverse performance evaluation, or will be disciplined, as a result of management "not clearly stating performance expectations[,]" thereby mitigating an adverse effect. *Id.* By contrast, the Agency does not explain how negative performance evaluations or discipline would not adversely affect employees, or how these harms are merely "speculative." Reply at 7. In addition, the Authority has found that a similar provision -- one that lessened the likelihood that an employee would be adversely affected by a negative performance evaluation because of matters beyond an employee's control -- constituted an arrangement. *See Patent Office Prof'l Ass'n*, 47 FLRA at 35-36. Moreover, as it is not possible to reliably determine in advance which employees are likely to be adversely affected, the provisions are prophylactic and are sufficiently tailored to benefit those employees who receive negative performance evaluations and suffer related adverse effects such as discipline. *See, e.g., AFGE, Council of Prison Locals 33*, 65 FLRA 142, 146 (2010). Consistent with the foregoing, we find that the provisions are arrangements.

With regard to whether the arrangements are appropriate, the provisions limit management's ability to hold employees accountable for work performance only in limited circumstances, specifically, where performance expectations have not been communicated to the employees in writing (including e-mail). As such, they do not preclude the Agency from exercising its rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. Therefore, the provisions do not abrogate those management rights and, thus, are appropriate arrangements.

For the foregoing reasons, the provisions are appropriate arrangements within the meaning of § 7106(b)(3) of the Statute and, thus, are not contrary to § 7106(a)(2)(A) and (B) of the Statute.[9]

III. Article 22, Section 3B

A. Wording

> In those cases where [the Agency] has sound reason to believe that an employee is abusing "emergency" annual leave, the employee shall be counseled concerning such abuse. If such counseling is unsuccessful, and the employee continues to abuse "emergency" annual leave, [the Agency] may issue a written notice to the employee that all subsequent "emergency" annual leave absences must be supported by credible evidence justifying such absences.

Petition at 57.

B. Meaning

The parties agree that the provision has the following meaning. If the Agency suspects an employee of abusing emergency annual leave, then the Agency must counsel the employee. Record at 2. If the employee continues to abuse emergency annual leave following the counseling, then the Agency could advise the employee in writing that he or she must provide supporting evidence to justify all subsequent uses of emergency annual leave. *Id.* Counseling must precede the written notice. *Id.* In addition, the Union asserts, and the Agency does not dispute, that, under the provision, the Agency could respond to a first offense of leave abuse with any form of discipline *other than* the issuance of a leave restriction notice. *See* Response at 2, 16. Because the provision is silent as to this matter, and the Union's clarifying explanation is consistent with the plain wording of the provision, the Authority adopts

Dissent at 19 n.1, if this proves anything at all, then it proves that parties are sufficiently sophisticated so as not to agree to contract provisions that abrogate management's rights.

9. As such, it is unnecessary to determine whether the provisions also are procedures under § 7106(b)(2).

this explanation for the purpose of construing what the provision means. *See, e.g.*, *AFGE, Local 1770*, 64 FLRA 953, 958 (2010).

C. Positions of the Parties

1. Agency

The Agency contends that the provision affects management's right to discipline employees under § 7106(a)(2)(A) of the Statute "because it requires management to counsel an employee prior to being able to take disciplinary action." SOP at 6. In this regard, the Agency argues that the "issuance of a leave restriction letter is an inherently disciplinary act[,]" and that the Authority's precedent supports this position. Reply at 10 (citing *NFFE, Local 858*, 42 FLRA 1169, 1171-72 (1991) (*Local 858*)). *See also* SOP at 7 (citing *AFGE, Local 1156*, 42 FLRA 1157, 1161 (1991) (*Local 1156*)). In addition, although the parties' agreement provides that notices of *sick leave* restriction will not be considered disciplinary action, the Agency asserts that "there is no similar or parallel language . . . which would apply to notices of emergency annual leave restriction."[10] SOP at 6.

Additionally, the Agency argues that the provision is not an appropriate arrangement under § 7106(b)(3) of the Statute because the Authority has held that where, as here, a provision precludes management from issuing a leave-restriction letter until after counseling has taken place, the provision excessively interferes with management's right to discipline employees. Reply at 11 (citing *Local 858*, 42 FLRA at 1173). The Agency also argues that the provision is not a procedure within the meaning of § 7106(b)(2) of the Statute. *Id.* at 10-11.

2. Union

The Union argues that the provision is not contrary to management's right to discipline employees because "[a] requirement that the employee provide credible evidence in utilizing leave does not equate to discipline." Response at 13. In this regard, the Union contends that the provision in the parties' agreement stating that written notices of sick leave restrictions will not be considered disciplinary action also applies to written notices of emergency annual leave restrictions. *Id.* at 13 & n.1.

In addition, the Union argues that the provision is an appropriate arrangement under § 7106(b)(3) of the Statute because it "mitigates the adverse effects on employees when management exercises its right to discipline by requiring an employee to provide supporting documentation for emergency leave usage." *Id.* at 15. Further, the Union asserts that the provision does not delay or limit the Agency's ability to impose discipline for abuse of emergency annual leave, *id.* at 13, and that "nothing in [the provision] would limit the [Agency] from disciplining an employee while contemporaneously providing counseling[,]" *id.* at 16. According to the Union, the provision does not excessively interfere with management's right to discipline employees because it only limits the Agency's ability to notify an employee suspected of leave abuse that he or she must supply supporting evidence justifying future absences, while the Agency remains free to "discipline[e] employees for underlying offenses such as AWOL." *Id.* at 15-16.

Finally, the Union argues that the provision is a procedure within the meaning of § 7106(b)(2) of the Statute. *Id.* at 16-17.

D. Analysis and Conclusions

1. The provision affects management's right to discipline.

The Authority has held that "management's right to discipline includes placing an employee in a restricted leave use category." *NFFE, Local 405*, 42 FLRA 1112, 1131 (1991). Thus, the Authority has held that provisions or proposals that preclude management from imposing a leave restriction in response to a first offense of leave abuse affect management's right to discipline employees under § 7106(a)(2)(A). *See, e.g.*, *NAGE, Local R5-82*, 43 FLRA 25, 28 (1991) (*NAGE*); *Local 858*, 42 FLRA at 1171-72; *Local 1156*, 42 FLRA at 1161.

Under the provision, the Agency would be precluded from requiring an employee to provide evidence justifying subsequent emergency annual leave absences until after the Agency has counseled the employee regarding the suspected leave abuse, given the employee an opportunity to improve, and seen no improvement. Thus, management would not be able to require an employee to provide evidence justifying future emergency annual leave absences based on the *initial* incident(s) giving rise to a "sound reason to believe" that the employee is "abusing 'emergency' annual leave[.]" Petition at 57. The Authority has held that similar provisions affect

10. Article 23, Section 4C of the parties' agreement provides, in pertinent part, that "written notices of sick leave restrictions . . . . will not be considered disciplinary action." Response, Attach., Article 23 at 4.

management's right to discipline under § 7106(a)(2)(A) of the Statute. *See NAGE*, 43 FLRA at 28; *Local 858*, 42 FLRA at 1172; *Local 1156*, 42 FLRA at 1162.

As stated previously, the Union cites a provision in the parties' agreement providing that written notices of sick leave restriction will not be considered disciplinary action in support of its argument that notices of emergency annual leave restriction are not discipline. Response at 13 & n.1. Contrary to the Union's claim, however, the plain wording of the cited provision applies specifically to notices of sick leave restrictions, not emergency annual leave restrictions, and the Union provides no basis for concluding that the provision has broader application. *See* Response, Attach., Article 23 at 4. Moreover, the Authority considered and rejected a virtually identical argument in *Local 1156*, 42 FLRA at 1162, and the Union provides no basis for reaching a different conclusion here.

For the foregoing reasons, we find that the provision affects management's right to discipline employees.

2. The provision is an appropriate arrangement under § 7106(b)(3) of the Statute.

As discussed previously, under the Authority's revised framework for determining whether a provision is an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute, the Authority assesses: (1) whether the provision is intended to be an arrangement for, including being sufficiently tailored to compensate, employees adversely affected by the exercise of a management right; and (2) if so, then whether the contract provision abrogates the affected management right. *See supra*, § II.D.2.i. (citations omitted).

Applying that framework here, as the Union explains, the provision would "mitigate" the adverse effects of management's exercise of its right to discipline. Response at 15. In this regard, the provision would protect employees suspected of abusing emergency leave from being required to support future emergency annual leave requests with documentation without first receiving counseling and the opportunity to correct problematic emergency annual leave usage. Moreover, the proposal is tailored because it applies only to those employees whom management suspects of emergency annual leave abuse, but who have not yet received counseling that any future leave abuse may result in leave restriction. Accordingly, we conclude that the proposal is sufficiently tailored and that the proposal constitutes an arrangement for employees adversely affected by management's right to discipline.

As to whether the provision constitutes an appropriate arrangement, as stated above, the provision precludes management from requiring an employee to provide evidence justifying subsequent emergency annual leave absences until after the Agency has counseled the employee regarding the suspected leave abuse, given the employee an opportunity to improve, and seen no improvement. However, the provision does not preclude management from imposing other forms of discipline on the employee. Thus, the provision merely limits the circumstances in which management may exercise its right to discipline; it does not preclude the Agency from exercising that right. Accordingly, we find that the provision does not abrogate management's right to discipline employees under § 7106(a)(2)(A) of the Statute and, thus, is an appropriate arrangement.

For the foregoing reasons, we find that the provision is an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute and, thus, is not contrary to § 7106(a)(2)(A) of the Statute.[11]

IV. Article 38, Section 2A, 2D

A. Wording

Article 38, Section 2

> Unless contrary to law or regulation the Employer shall include, in its open market bid request, or request for proposals, the following requirements:
>
> A. Employees who are identified as potentially adversely affected by the decision to contract shall receive right of first refusal by the Contractor, for employment openings for ninety (90) days after the beginning of contract performances.
>
> . . . .
>
> D. By the contract start date, the Contractor shall provide the Contracting Officer with the following:

11. As such, it is unnecessary to address whether the provision also is a procedure under § 7106(b)(2).

1. The names of potentially adversely affected Federal employees offered an employment opening.

2. The date the offer was made.

3. A brief description of the position.

4. The date of acceptance of the offer and the effective date of employment.

5. The date of rejection of the offer, if applicable.

6. The names of potentially adversely affected Federal employees who applied but were not offered employment and the reason(s) for withholding an offer.

Petition at 70, 72.

B. Meaning

The parties agree that, under Section A, employees who are identified as being potentially adversely affected by a decision to contract out work shall receive a right of first refusal for ninety days after the beginning of contract performance. Record at 2. This right of first refusal would be subject to the parties' negotiated grievance procedure unless making the right of first refusal subject to the negotiated grievance procedure is contrary to law or regulation, including Office of Management and Budget (OMB) Circular A-76 (A-76). *Id.* The parties agree that, under Section D, the Agency would be required to request that contractors provide the items listed in subsections 1-6. As with Section A, Section D would not operate if it is contrary to law or regulation. *Id.* at 2-3.

C. Positions of the Parties

1. Agency

The Agency contends that the provisions are inconsistent with A-76, a government-wide regulation, because they would subject matters that are provided for by A-76 to the negotiated grievance procedure. SOP at 12, 15 (citing *Dep't of the Treasury, IRS v. FLRA*, 494 U.S. 922 (1990) (*IRS*); *AFGE, Local 1345*, 48 FLRA 168 (1993)). The Agency maintains that these provisions are distinguishable from the proposal found negotiable in *AFGE, Local 1827*, 58 FLRA 344, 350 (2003). In this connection, the Agency asserts that the proposal at issue in *AFGE, Local 1827* did not apply in circumstances covered by A-76, while the provisions in this case would apply in such circumstances. *Id.* at 13, 15. Also in this connection, the Agency argues that the parties' collective bargaining agreement does not expressly preclude grievances over matters involving A-76. Reply at 13. Further, the Agency contends that the introductory language "[u]nless contrary to law or regulation" does not render the provisions negotiable. SOP at 13, 16-17.

2. Union

The Union contends that the provisions do not subject the rights afforded employees under A-76 to the negotiated grievance procedure. Response at 18. In this regard, the Union argues that the parties' agreement directly precludes alleged violations of A-76 from being grieved. *Id.* at 19. Finally, the Union contends that these provisions are distinguishable from the proposal in *IRS* because they do not provide for any sort of appeals procedure or access to the negotiated grievance procedure. *Id.* at 19-20.

D. Analysis and Conclusions

A-76 sets forth several requirements that federal agencies must follow when contracting out agency functions, and states, with certain exceptions not relevant here, that "*[n]oncompliance with [A-76]* shall not be interpreted to create a substantive or procedural basis to challenge agency action or inaction[.]" A-76 Revised, para. 5.g. (2003) (emphasis added). In *United States Department of the Treasury, IRS v. FLRA*, 996 F.2d 1246, 1248 (D.C. Cir. 1993) (*Dep't of the Treasury*), the court held that substantively identical wording in a previous version of A-76[12] precluded bargaining over a union proposal to subject alleged violations of A-76 to the negotiated grievance procedure. *Id.* at 1250. In this connection, the court stated that "collective bargaining over the method for resolving disputes concerning application of [A-76] and arbitration of claimed 'violations' of [A-76] would both be inconsistent with [A-76]." *Id.* Consistent with *Dep't of the Treasury*, the Authority has held that grievances over compliance with A-76 *itself* are

12. At the time of the court's decision, A-76 stated, in part, that except for an agency's internal appeal system, "This Circular and its Supplement shall not . . . establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular." *Dep't of the Treasury*, 996 F.2d at 1248. The court noted that a supplement to A-76 "add[ed] that a decision in the internal review process should not be subject to appeal outside the agency." *Id.*

barred, and that proposals subjecting disputes over compliance with A-76 *itself* are outside the duty to bargain. *See AFGE, Local 1513*, 52 FLRA 717, 719-22 (1993) (grievance not arbitrable); *AFGE, Local 1345*, 48 FLRA 168, 205-06 (1993) (Member Armendariz concurring and dissenting as to other matters) (proposal outside duty to bargain).

However, neither the plain wording of A-76 nor the above-cited court and Authority decisions support a conclusion that parties are precluded from agreeing to, and enforcing in arbitration, contract provisions that independently impose on agencies obligations that are the same as, or similar to, the requirements set forth in A-76. In this connection, the Authority has stated that a proposal was not contrary to A-76 where it would merely limit grievances "to the right guaranteed by the contract – not the right guaranteed by . . . A-76." *AFGE, Local 1827*, 58 FLRA at 350. As Article 38, Sections 2A and 2D do not subject enforcement of A-76 to the negotiated grievance procedure and the Agency does not argue that the provisions are otherwise contrary to law, we find that they are not contrary to law.

V. Order

The Agency shall rescind its disapproval of the provisions.

Member Beck, Dissenting:

My colleagues have chosen to jettison decades of precedent with respect to the standard by which we assess whether an agency head may, under § 7114(c)(2), reject a contract proposal that affects management's rights. They have decided to do so based on an exercise in statutory interpretation that is so strained as to be untenable. Further, they have created an inconsistency in approach that defies common sense; under their new regime, the same proposal that is legally invalid if it "excessively interferes" with management rights at the bargaining table magically becomes valid and binding when it lands on the agency head's desk.

Consequently, I must vigorously dissent.

In 1983, the D.C. Circuit examined the tension between management rights and the duty to bargain and concluded that a proposal affecting management rights should be deemed within the duty to bargain unless it interferes with statutory management rights "to an excessive degree." *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983). Notably, the Court did not say that a proposal must be considered negotiable unless it "abrogates" management rights. By taking care not to articulate what would have been an easy-to-apply, bright-line test -- abrogation, the Court indicated that the proper standard for assessing the negotiability of proposals that affect management rights is something short of total abrogation.

Since that time, the Authority has consistently applied the "excessive interference" standard to management assertions that bargaining proposals are outside the duty to bargain because they impermissibly interfere with management's rights under § 7106(a). *See, e.g., Nat'l Ass'n of Indep. Labor, Local 7*, 64 FLRA 1194, 1198 (2010) (proposal that would require bargaining unit employees to wear civilian uniforms provided by the agency when performing civilian duties excessively interferes with the right to determine methods and means of performing work); *Prof'l Airways Sys. Specialists*, 61 FLRA 97, 99 (2005) (proposal that requires agency to provide training in accordance with collective bargaining agreement excessively interferes with the right to assign work); *AFGE, Local 3529*, 57 FLRA 172, 179 (2001) (proposal that precludes agency from holding employees accountable for failing to accomplish task excessively interferes with right to direct employees and assign work); *AFGE, Local 1138, Council 214*, 51 FLRA 1725, 1735 (1996) (proposal that requires

agency to place mechanics and operators on the same seniority list excessively interferes with the right to assign employees); *AFGE, Local 644*, 21 FLRA 658, 662 (1986) (proposal that requires agency to convert library space into office space excessively interferes with the right to determine internal security practices); *Ass'n of Civilian Technicians, Mont. Air Chapter*, 20 FLRA 717, 731 (1985) (proposal that would preclude management, regardless of circumstances, from obtaining additional personnel with skills unavailable in the bargaining unit excessively interferes with the right to provide numbers and types of employees to perform the agency's work).

This standard was applied whether the agency announced its position at the bargaining table or at the later stage of agency head review under § 7114(c). *Ass'n of Civilian Technicians, P.R. Army Chapter*, 60 FLRA 1000, 1008 (2005) (provision that requires the agency to reimburse employees for personal expenses related to cancelled leave excessively interferes with the right to assign work); *NFFE, Local 1214*, 49 FLRA 215, 221 (1994) (provision that would restrict agency's use of ethics and values in the evaluation of performance excessively interferes with the right to assign work and the right to discipline); *NTEU*, 31 FLRA 181, 185-86 (1988) (provision that would prevent the agency from detailing or temporarily promoting union officer or steward excessively interferes with the right to assign employees and to assign work); *AFGE, Local 1409*, 28 FLRA 109, 112 (1987) (provision that prevents agency from assigning duties that might conflict with any medical restrictions excessively interfere with the right to assign work).

The Majority now declares that it will apply a new standard of "abrogation" when a proposal that was provisionally accepted at the bargaining table is rejected as a result of agency head review. That is to say, *once a proposal proceeds to agency head review, it will be binding on the agency even if it "excessively interferes" with management's rights.* An agency head will now be permitted to reject a proposal only if it nullifies completely -- only if it eliminates entirely -- one or more statutory management rights. My research reveals *no case* in the past 20 years in which the Authority has found that a contract provision abrogates any management right; it just doesn't happen.[1] So, as a practical matter, post-bargaining table agency head review will no longer play any role in preserving the management prerogatives that Congress sought to protect through § 7106(a). This result is flatly inconsistent with Congressional intent. *See AFGE v. FLRA*, 778 F.2d 850, 863 (D.C. Cir. 1985) (Congress intended that the head of an agency may reject a contract term -- even a settlement imposed by the Federal Service Impasses Panel -- if "it is violative of management prerogatives under the Act").

The crux of my colleagues' reasoning is a bit of statutory interpretation that involves contrasting the language of § 7117(c)(1) (which relates to the statutory duty to bargain) with § 7114(c)(2) (which relates to agency head review). As identified by the Majority, the telling statutory language is as follows:

§ 7117(c)(1)	**§ 7114(c)(2)**
An exclusive representative may file a negotiability appeal "if an agency involved in collective bargaining with [the] exclusive representative alleges that the *duty to bargain* in good faith does not extend to any matter[.]" (Emphasis supplied by the Majority.)	Where an agency and an exclusive representative have reached an agreement, "[t]he head of the agency shall approve the agreement ... if the agreement is *in accordance with the provisions of [the Statute] . . . .*" (Emphasis supplied by the Majority.)

These two provisions reflect a couple of unremarkable propositions. First, § 7117(c)(1) tells us that a negotiability appeal involves questions about whether a proposal is outside the duty to bargain. Second, § 7114(c)(2) tells us that an agency head may reject a provisionally agreed-to proposal if

1. In 2002, the Authority abandoned the "abrogation" standard for the "excessive interference" standard when addressing management rights challenges to arbitral awards. At that time, Member Armendariz observed that, "in the 12 years that the abrogation standard [for arbitral awards] has been in existence, the Authority has never applied that standard in such a way to find that an award was deficient. Such a uniformly one-sided application effectively renders the test meaningless and removes all of its utility." *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 115 (2002) (Concurring Opinion of Member Armendariz). My colleagues revived the abrogation standard in September 2010 (*see U.S. EPA*, 65 FLRA 113, 116 (2010) (*EPA*)) and have yet to conclude that the enforcement of any contract provision abrogates a management right.

he determines that it is not in accordance with the Statute.

For my colleagues in the Majority, it is a crucial point that "Congress did not state that an agency head may disapprove matters that are outside the 'duty to bargain.'" Majority at 6. For them, this apparent omission indicates that an agency head is prohibited from rejecting a proposal merely because it is outside the duty to bargain. To be sure, their observation about the statutory language is technically accurate (Congress did not expressly include "outside the duty to bargain" as a reason for agency head rejection of a proposal); however, the legal conclusion that they draw from it is wholly unjustified. What they have missed is that the two attributes -- (1) being outside the duty to bargain and (2) being not in accordance with the Statute -- are not mutually exclusive. The reference to the latter in § 7114(c)(2) does not *preclude* the former; rather, it *includes* the former.

Simply put, when a proposal impermissibly interferes with a management right, it is prohibited by § 7106(a). And a proposal that is prohibited by § 7106(a) can properly be characterized as being *both* outside the duty to bargain and not "in accordance with the provisions of [the Statute]." Such a proposal is subject to agency head rejection under § 7114(c)(2).[2] Rather than follow this axiomatic reading of the Statute, the Majority pursues a cramped interpretation that amounts to this: A proposal that violates § 7106(a) must nevertheless be treated by the agency head as being "in accordance with the provisions of [the Statute]."

Putting aside my colleagues' manifestly erroneous interpretation of the statutory language, the Majority's new regime just does not survive the test of common sense. What sense is there in applying a different test for negotiability at the stage of agency head review than is applied at bargaining table? As the D.C. Circuit has explained, the purpose of agency head review under § 7114(c) is simply "to allow the head of the agency an extra 30 days to do that which his subordinates could have done earlier." *AFGE v. FLRA*, 778 F.2d at 860 n.16.

Under the new approach announced by the Majority, a proposal runs afoul of the Statute if it "excessively interferes" with management rights when it is presented at the bargaining table; yet, when the same proposal reaches the agency head, it is somehow transmuted so that it now runs afoul of the Statute only if it "abrogates" management rights (which is virtually never found to occur).[3] The Statute does not possess the alchemic properties that the Majority ascribes to it. Nothing in the Statute's structure or purpose indicates that § 7106 means one thing at the bargaining table and something entirely different when agency head review takes place. Under § 7106, a proposal that affects management rights either is or is not a permissible limitation on those rights. Aside from its maladroit attempt to interpret § 7114(c)(2), the Majority offers no reason to apply a bifurcated standard of validity that is less rigorous at the stage of agency head review.

Of course, the practical effect of the Majority's new regime will be to impede normal labor relations and to slow the bargaining process. Knowing that they may no longer review new contract provisions

2. The Majority cites a few cases in which the Authority has held that a contract provision is not inconsistent with the Statute under § 7114(c)(2) merely because it was negotiated as a permissive subject of bargaining under § 7106(b)(1). Majority at 6-7. Based on this precedent, the Majority reaches the inappropriately broad conclusion that the concept of being not in accordance with the Statute excludes the concept of being outside the duty to bargain. *See* Majority at n.5. But these cases, in which an agency agreed to proposals on permissive subjects under § 7106(b)(1), tell us nothing about situations (like the one presented here) in which provisions negotiated under § 7106(b)(2) or (b)(3) are rejected because they impermissibly interfere with management rights. Provisions that are negotiated under § 7106(b)(1) are necessarily "in accordance with the provisions of [the Statute]" because such negotiation occurs entirely at the discretion of management and such proposals, by definition, cannot impermissibly interfere with management rights. In contrast, matters that an exclusive representative seeks to negotiate under § 7106(b)(2) or (b)(3) may impermissibly interfere with the management rights that Congress sought to protect under § 7106(a). If so, the proposal can hardly be characterized as being "in accordance with the provisions of [the Statute]" as contemplated by § 7114(c)(2).

3. The Majority mischaracterizes my view on provisions that have become binding contractual terms after agency head review and are then being enforced in arbitration. The Majority asserts that I view such a provision as "enforceable . . . even if it abrogates a management right." Majority at 9 n.7. As I explained in *EPA*, by agreeing to include a provision in its collective bargaining agreement (after agency head review) and to be bound by that provision in arbitration, an agency "concedes that the provision is a permissible limitation on [its management] rights under § 7106(b)." 65 FLRA at 120 (Dissenting Opinion of Member Beck). By definition, a contract provision that is being enforced in these circumstances can hardly be seen as an abrogation of management rights.

with an eye toward preserving their statutory management rights, agency heads are likely to delegate less authority to their labor relations officials in the field and reserve to themselves much more active and hands-on supervision of collective bargaining. My colleagues in the Majority are telling agency heads that the only meaningful review they now have is a review that occurs before -- not after -- preliminary agreement is reached at the bargaining table. As a consequence, each proposal that might affect management rights will languish in limbo until it is transmitted to, and reviewed by, the agency head -- an added step that is likely to increase substantially the time necessary to reach agreement on, or to resolve disagreements about, specific proposals.[4] This state of affairs can hardly be what Congress intended when it sought to promote "effective and efficient" federal-sector labor relations (§ 7101(b)) and "avoid unnecessary delays" in collective bargaining. § 7114(b)(3). As the D.C. Circuit has observed:

> Congress might have limited the head of the agency's review opportunity to the negotiation phase, but it apparently was unwilling to impose a continuous burden on the head of the agency to review each and every proposal as it arose in the course of day-to-day bargaining

AFGE v. FLRA, 778 F.2d at 858. My colleagues in the Majority have now decided to impose on agency heads precisely the burden that Congress sought to avoid.

As for the specific provisions at issue here, applying the "excessive interference" standard, I do not agree that the provisions in Articles 11, 18, and 22 constitute appropriate arrangements. I agree with my colleagues that the provisions in Article 38 are not contrary to law because they do not subject the Agency's decision to contract out specific functions to the parties' negotiated grievance procedure. *See AFGE, Local 1513*, 52 FLRA 717, 719-21 (1996); *see also U.S. Dep't of the Army, U.S. Army Corps of Eng'rs, Mobile Dist., Mobile, Ala.*, 64 FLRA 508, 512 (2010) (Dissenting Opinion of Member Beck).

4. Under § 7114(c)(3), there is a 30-day time limit on the post-bargaining table agency head review that the Majority has today eviscerated. There is no time limit placed on the earlier and more frequent agency head reviews that are likely to take place as a result of the Majority's new regime.