FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-27

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
MILAN, MICHIGAN

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1741, AFL-CIO

CHARGING PARTY

Case No. CH-CA-12-0073

Ayo A. Glanton
For the General Counsel

Natalie R.W. Holick
For the Respondent

Paul Durkee
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

In the Unit Management department of FCI Milan, teams of case managers and correctional counselors are assigned to work with inmates in the different housing units of the institution. On a quarterly basis, department employees are allowed to bid, by seniority, on their shifts and days off, but they are not allowed to bid on the posts to which they are assigned. When the Agency announced a plan, in the autumn of 2011, to change the employees' post assignments, the Union submitted a set of impact and implementation proposals. The parties reached agreement on several proposals, but management refused to negotiate on four proposals that sought to introduce a bidding system to the assignment process.

The negotiability of the disputed proposals essentially turns on whether Agency management retains full control in determining which employees are best qualified for each assignment. Although the General Counsel argues that the proposals simply apply seniority rules to those employees who have been identified as "equally qualified" by management, Union negotiators insisted otherwise at the bargaining table and in their testimony. Because the proposals restrict management's ability to determine whether employees are equally qualified for a given post the proposals are nonnegotiable. Accordingly, the Agency did not commit an unfair labor practice by implementing the reassignments without negotiating on these proposals.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7101-7135 and the Rules and Regulations of the Federal Labor Relations Authority (the FLRA or Authority), part 2423.

On November 18, 2011, the American Federation of Government Employees, Local 1741, AFL-CIO (the Union), filed an unfair labor practice charge against the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution (FCI), Milan, Michigan (the Agency or Respondent). GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Chicago Region issued a Complaint and Notice of Hearing on June 4, 2012, alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by reassigning employees without bargaining over Union proposals concerning the reassignments. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on July 2, 2012, denying that it violated the Statute. GC Ex. 1(h).

A hearing was held in this matter on August 29, 2012, in Detroit, Michigan. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel (the GC) and Respondent filed post-hearing briefs which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency under § 7103(a)(3) of the Statute. The American Federation of Government Employees, Council of Prison Locals, AFL-CIO (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide bargaining unit of employees of the Federal Bureau of Prisons (BOP). The Union is an agent of AFGE for the purpose of representing bargaining unit employees at FCI Milan. GC Exs. 1(b) & 1(h). The AFGE and the BOP are parties to a nationwide collective bargaining agreement, known as the Master Agreement. GC Ex. 14.

FCI Milan is a low-security prison, and Unit Management is the department responsible for monitoring inmates' rehabilitation. Tr. 23, 104, 113. There are three bargaining unit positions within Unit Management: case manager, correctional counselor, and administrative assistant. Tr. 111. Case managers, who are the focus of this dispute, are responsible for interpreting and executing sentencing orders, maintaining inmate records, monitoring inmates' education and work programs, classifying inmates' security requirements, presiding over inmate disciplinary hearings, and meeting with inmates to review their educational progress and discuss any discipline. Correctional counselors work with case managers and specialize in helping inmates with their day-to-day problems, while the administrative assistants (or secretaries) support the case managers and correctional counselors. Tr. 19, 23, 104-06, 108.

Employees in Unit Management are assigned to work in one of eight inmate housing units. Tr. 23, 68. Four of the units, B-1, B-2, F-1, and F-2, are referred to as the "inside" units, which house inmates new to FCI Milan. Tr. 174. Three of the units are referred to as the "outside" units. One, the H Unit, is similar to the inside units, except that it houses inmates serving longer sentences. Tr. 110. Another, the A Unit, houses inmates participating a faith-based program called the Life Connections Program. *Id.* The third outside unit, the G Unit, houses inmates participating in the residential drug abuse program. Tr. 200. Finally, there is a detention center, which houses inmates who are awaiting trial or have just been tried and are awaiting transfer.[1] Tr. 110-11.

Employees in Unit Management work in one of four work groups, each with a supervisor and at least one case manager, counselor, and administrative assistant: (1) the A and G Units; (2) the B-1 and B-2 Units; (3) the F-1, F-2, and H Units; and (4) the detention center.[2] Tr. 68-69.

Every quarter, management creates a "blank" roster, and case managers and counselors bid against others in their work group for the shifts and days off available under that roster.[3] Tr. 88, 92-94, 146-48. A "roster committee," made up of at least one representative each from management and the Union, oversees the process of granting the bids based on seniority. Once a roster is set, it is forwarded to the Warden for final approval. Tr. 30-31, 149.

---

[1] Although the detention center is often considered to be "its own entity" – for example, the head of employees is the detention center administrator, not a unit manager – differences between it and the other housing units are irrelevant here. Tr. 107, 146.

[2] An administrative assistant assigned to the detention center is not a bargaining unit employee. Tr. 69.

[3] The work schedules of administrative assistants are fixed and, thus, not the subject of bidding. Tr. 93.

The roster creation process for Unit Management is based on Article 18(f) of the Master Agreement, which "recommend[s]," but does not require, using the procedures in Article 18(d), which sets forth the roster creation process for the Correctional Services department.[4] GC Ex. 14 at 39.

In contrast to the detailed procedures spelled out in Article 18(d) for the Correctional Services department, Article 18(f) offers few specific requirements concerning the roster creation process for other departments; rather, the parties have used Article 18(f) as a starting point for further, sometimes informal, bargaining. In this regard, one witness stated at the hearing that Article 18(f) requires local management and the Union to "come up with . . . real

---

[4] Article 18(f) of the Master Agreement provides:

> Roster committees outside the Correctional Services department will be formed to develop a roster unless mutually waived by the department head and the Union. It is recommended that the procedures in Section d. be utilized. These rosters will be posted three (3) weeks prior to implementation. Copies will be given to the local President or designee at the time of posting.

GC Ex. 14 at 41.

Article 18(d) of the Master Agreement provides:

> Quarterly rosters for Correctional Services employees will be prepared in accordance with the below-listed procedures.
> 1. a roster committee will be formed which will consist of representative(s) of Management and the Union. . . .
> 2. seven (7) weeks prior to the upcoming quarter, the Employer will ensure that a blank roster for the upcoming quarter will be posted . . . .
>   a. employees may submit preference requests for assignment, shift, and days off . . . .
>   b. employee preference requests will be signed and dated by the employee . . . .
>   c. if multiple preference requests are submitted by an employee, the request with the most recent date will be the only request considered; and
>   d. the roster committee will consider preference requests in order of seniority and will make reasonable efforts to grant such requests. Reasonable efforts means that Management will not arbitrarily deny such requests. (Seniority is defined in Article 19).
> 3. the roster committee will meet and formulate the roster assignments . . .
> 4. the committee's roster will be posted . . .
> 5. once the completed roster is posted, all Correctional Officers will have one (1) week to submit any complaints or concerns. . . .
> 6. the roster will be forwarded to the Warden for final approval;
> 7. the completed roster will be posted three (3) weeks prior to the effective date of the quarter change. . . .
>
> . . . .

GC Ex. 14 at 39-40

meaning to their own particular institutions and missions." Tr. 91. Similarly, it was said that Article 18(f) "allows for the department head and the Union official to reach an agreement to modify Article 18(d)." Tr. 83.

Consistent with Article 18(f), the roster creation process in Unit Management resembles the process set forth in Article 18(d) for Correctional Services, but only in some respects. Thus, while employees in Correctional Services are entitled, under Article 18(d), to bid by seniority on assignments every quarter, employees in Unit Management are not so entitled. Tr. 30, 74. The Agency did allow employees in Unit Management to bid on assignments in 2010, but that was done only as a one-time event, not as a regular practice. Tr. 133. Every three months, however, a roster is posted for Unit Management employees, and they bid by seniority for their days off and shifts. Tr. 88.

Around the summer of 2011, Associate Warden Moses Stancil, the head of Unit Management, was told by outside reviewers that his department was "falling short []" in certain areas. Tr. 145, 150-51, 169. This was due in part to a number of clerical errors – employees were "messing" with file counts, some inmates were "being scored incorrectly," and there were "cases where transfer paperwork was missing." Tr. 151.

Stancil determined that he would improve the department's performance by reassigning employees so as to "match . . . skill sets with skill needs." *Id.* He announced the plan at a department meeting in September 2011. Stancil emphasized that employees would not be able to bid on assignments as they had done in 2010. Tr. 111-12.

On October 6, Stancil notified the Union by memorandum that new assignments, set forth in an attached roster, would take effect on November 6. Tr. 19-20; Jt. Exs. 2(a) & 2(b). In addition to assigning employees to certain positions, the roster also referred to a previously established position, that of a case manager who filled in for employees on leave, as "sick and annual," which was later referred to as "special assignment . . . ." Tr. 138, 142; GC Ex. 13.

Matthew Call, a case manager and the Union's chief steward, believed that under Stancil's plan, long-serving employees could wind up in the same work group, forcing some of them to be stuck with "the least desirable shifts . . . working on Saturdays and Friday late nights . . . ." Tr. 112. Call believed that work groups that were more diverse in terms of work experience would benefit new and experienced employees alike. While the experienced employees would be able to pick the best schedules, they would also be in a position to swap parts of their schedules with the newer employees, allowing them to take an occasional weekend or holiday off. Tr. 112-13.

On October 11, James Billingsley, the Union's labor-relations chairperson and a case manager, formally requested bargaining over "procedures and appropriate arrangements" pertaining to the reassignments. GC Ex. 4. Billingsley and Call drafted ten proposals, which they submitted to management on October 19. GC Ex. 8. The parties ultimately reached agreement on Proposals 3 through 8. Tr. 45; Jt. Ex. 3. I discuss the remaining proposals – the ones in dispute – below. Generally, those proposals would let employees bid on, and be placed in, assignments based on seniority. Tr. 95.

Negotiations took place on November 16 and 17. The Union was represented by Billingsley, Call, Union Vice President Brian Ceckiewicz, and AFGE Regional Vice President Mike Rule. Tr. 40-41. The Agency was represented by Stancil and Human Resource Manager Ginger Auten; Kristi Rodriguez, a unit manager at FCI Milan, attended as a management observer. Tr. 155, 207, 218.

On the first day of negotiations, management informed the Union that it would not bargain over Proposals 1, 2, 9, and 10.[5] Tr. 42-43, 45, 47, 49. The Agency submitted a counterproposal to the Union's Proposal 2, which would have maintained the status quo, but the counterproposal was not discussed in any substantive way. Tr. 52, 160; GC Ex. 10(b). On the second day of negotiations, the Union submitted a modified version of Proposal 1 (Proposal 1-A). GC Ex. 10(e); Jt. Ex. 3 at 1. Management rejected that proposal as well.[6] Tr. 157; Jt. Ex. 3 at 1.

The disputed proposals read as follows:

Proposal 1

> Assignment of Case Managers, Counselors, and Administrative Assistants will be determined by seniority preference, amongst equally qualified employees, from a blank roster detailing available assignments from which the requests will be based, and the alignment of the work groups of the available assignments will be defined on the blank roster. Seniority is defined in Article 19.[7] Work groups are defined as the arrangement of the Unit Teams under the supervision of a Unit Manager. Work group definition is provided due to the inference upon scheduling, weekend coverage, and holiday coverage requirement of persons assigned to a work group.

Proposal 1-A

> On a quarterly basis, a roster committee will be held to allow Bargaining Unit Employees to submit request[s] for their location of work. The process will be in accordance with Article 18, Section d.

---

[5] Management also initially refused to bargain over Proposal 3 (see Jt. Ex. 3 at 2), but at some point in the negotiations, agreement was reached on a compromise form of that proposal. *See* Stipulation at Tr. 8; GC Ex. 9(a).

[6] While Billingsley testified that Proposals 1 and 1-A were both on the table – "there were two proposals out there by the Union to which we wanted to negotiate[]" – the Agency believed that Proposal 1 had been superseded by Proposal 1-A. Tr. 81, 219.

[7] Article 19(e) of the Master Agreement states, in pertinent part: "Seniority in the Federal Bureau of Prisons is defined as [the] total length of service in the Federal Bureau of Prisons." GC Ex. 14 at 44.

Proposal 2

Assignment of Case Managers, Counselors, and Administrative Assistants to the blank roster (as defined in Proposal One) will occur procedurally in the fashion of Article 18, Section(d)(1) (2) (2a) (2b) (2c) (2d) (3) (4) (6) (7). The language of Article 18 in the aforementioned sections will be used in determination of the time line for completion of the assignment process by seniority to the particular assignments on the blank roster.

Proposal 9

In cases of vacancies of a Case Manager, Counselor, or Administrative Assistants due to transfer, retirement, promotion, etc., equally qualified staff may bid for reassignment to the open assignment. The Employer will determine effective dates of reassignment due to attrition.

Proposal 10

When there is a designation such as "Special Assignment " or "Sick and Annual" to identify a Case Manager, Counselor, or Secretary without a typical Unit Team assignment on the blank roster, assignment to this post will not exceed nine months. When vacancy of this type of post occurs, equally qualified staff will be afforded the opportunity to bid for reassignment to such vacancy.

GC Ex. 10(a)-(e).

Beginning November 16, the Agency sent Unit Management employees emails containing their assignments for the upcoming quarter. The Union viewed the emails as implementing the change prior to the completion of bargaining, leading it to file the unfair labor practice charge, on November 18. Tr. 56-57; GC Exs. 11(a)-(c).

On November 28, Stancil sent the Union a memorandum asserting that the Agency had no duty to bargain over Proposals 1-A, 2, 9, and 10, because they "violate[] Management's right to assign work" and "[are] not . . . valid impact and implementation proposal[s]." Jt. Ex. 3 at 1-3.

On December 18, the Agency implemented the change, with a slightly revised assignments roster. Tr. 58; GC Ex. 13.

At the hearing, witnesses for both sides elaborated on the impact of the Union's proposals. Billingsley and Call both testified that the Union's overarching goal was to allow employees to bid on and receive assignments based on seniority. *See* Tr. 94-95, 117.

To Stancil, the Union made it clear at the bargaining table that the proposals would not allow the Agency to make distinctions between employees. *See* Tr. 190-91. Call confirmed this; when I asked him whether management could determine that employees were equally qualified, he answered, "No." Tr. 134-35. In Call's view, "the proposals outline a bidding process that's dictated by seniority," so that employees' bids are based on "seniority and seniority alone . . . ." *Id.* Billingsley, by contrast, asserted that "management determines who's qualified," and that the Union understood that "'equally qualified' . . . wasn't something the Union was determining." Tr. 250-51. Billingsley acknowledged, though, that the Union did not define what it meant by "equally qualified." Tr. 251. Billingsley also acknowledged that the Union insisted at negotiations that employees with the same job titles were, by definition, equally qualified – that "a case manager is a case manager is a case manager." Tr. 267; *see also* Tr. 190-91, 209, 216. As such, management would have no reason to make distinctions between case managers (or correctional counselors).

In this regard, Call insisted that employees in the same job title were "interchangeable," and Billingsley appeared to agree, saying that "if someone is not qualified to be a case manager, they're not qualified to be a case manager." Tr. 123, 266. At the same time, Billingsley allowed that some case managers "have . . . stronger communication [skills], some have better paperwork skills," and that case managers range widely in experience. Tr. 77, 98. On the Agency side, Stancil argued that employees in the same position description still varied in "communication skills whether . . . written or verbal, [and] the ability to deal with inmates." Tr. 173.

In addition, the witnesses held differing views as to whether different assignments required different skills. According to Billingsley, there is "essentially the same paperwork in all the housing units." Tr. 80. By contrast, Stancil testified that there were significant differences between assignments and the skills needed for them, saying, "if I know I have a population of inmates in B-1 that don't respond to staff as well as the inmates in F-1, then, of course, I'm going to try to marry that better communicator with the inmates that are less likely to cooperate with staff as easily." Tr. 173. Stancil testified that the A Unit, which houses inmates in faith-based program, requires a case manager who is "organized" and can "communicate with inmates as well as the public, because they're talking to mentors who are outside of the Agency." Tr. 174-75.

As for the G Unit, which houses inmates in the substance abuse program, Stancil testified that work at that unit is "more complex" and involves "more volume," and "not all of the case managers can handle that work load." Tr. 158. Therefore, Stancil would want to assign a case manager with a "strong multi-task ability." Tr. 175-76. Stancil believed that if paperwork wasn't done, then inmates "couldn't transfer. We couldn't . . . get them to graduate [from] the program," which could result in inmates missing out on early releases and, thus, "doing longer time." Tr. 158-59. That, in turn, could pose a security risk, for "when inmates aren't getting what they feel they have coming . . . they respond in a negative way." Tr. 159. Stancil further argued that "you need time and you need experience to prepare for" such difficult assignments. Tr. 166.

Call countered that seniority-based bidding would allow employees to gain experience in other housing units, making them more "promotable," and even help them network. Tr. 124. Specifically, an employee could bid for a post at the detention center, where he or she could "develop . . . connections with maybe the U.S. Marshal Service, the U.S. Court Service." Tr. 125.

There was also testimony on whether allowing for quarterly reassignments would affect operations. Billingsley agreed with counsel for the Respondent that it is beneficial to have the same case manager follow an inmate through all of an inmate's participation in the drug and alcohol program, which lasts for nine months, or the faith-based program, which lasts for eighteen months, and that Unit Management is "not really conducive to quarterly roster assignments." Tr. 81. Rodriguez added that "it takes months to . . . even get familiar with your case load," and that one "would not be able to know your case load and do anything effective with it" in just a quarter. Tr. 206.

Witnesses also testified at least briefly on each proposal. With regard to Proposal 1, Billingsley testified that the proposal was intended to allow Unit Management employees to bid on assignments based on seniority, along with shifts and days off. *See* Tr. 41-42. Billingsley insisted that "nothing" in Proposal 1 would "curtail management deciding who was equally qualified." Tr. 95. By contrast, Rodriguez testified that Proposal 1 would prevent management from making such distinctions. Tr. 209.

Billingsley testified that Proposal 1-A was similar to Proposal 1, in that it provided for seniority-based bidding on assignments. He added that while Proposal 1-A did not use the words "equally qualified," the reference to Article 18(d) of the Master Agreement had a similar effect – it allowed management to deny bids as long as the reason for doing so was "non-arbitrary." Tr. 100, 258, 264-65. Stancil, by contrast, believed that Proposal 1-A would undoubtedly "take away management's right to determine qualifications and skill needs for skilled jobs." Tr. 157.

With respect to quarterly bidding under Proposal 1-A, Billingsley admitted that the proposal barred management from keeping employees at the housing units to which they'd been assigned for longer than three months. Tr. 254.

With regard to Proposal 2, Billingsley explained that the proposal clarifies that the terms of Article 18(d), which sets forth the quarterly bidding on shifts, days off, and assignments in Correctional Services, would "specifically be applied" to Unit Management. Tr. 44. Billingsley added that Proposal 2 is "tied to Proposal 1" in that it involves a blank roster and a "fair and equitable bidding process" on assignments. *Id.* Stancil also viewed Proposal 2 as being "very closely related to the first one," as the Union was "looking for seniority to be the driving factor for posts . . . ." Tr. 159-60.

The Union drafted Proposal 9, Billingsley stated, "to address how [employees] fill behind an opening . . . due to attrition." Tr. 47. Billingsley explained that the bidding referenced in Proposal 9 meant seniority-based bidding. Tr. 258. Stancil testified that Proposal 9 would bar management from determining "what skill sets we need for what skill positions, what qualifications are needed." Tr. 163. Similarly, Auten argued that even though Proposal 9 limited bidding to "equally qualified" employees, the Union made clear that bidding was "all based on seniority." Tr. 222.

With regard to vacancies, Billingsley testified that Proposal 9 is "predicated upon management determining that [there is a] vacancy[]" and would allow management to leave positions unfilled. Tr. 261. Auten countered that if a case manager left a work group with only one case manager position, Proposal 9 would effectively require the Agency to reassign another case manager to fill the void, or to hire another case manager. Tr. 230.

Billingsley explained that Proposal 10 would allow for seniority-based bidding on the "special assignment" post, and that the proposal would let employees "know that . . . if they were assigned there, either by choice or by . . . their lack of seniority, that they would have [only] a 9-month tour." Tr. 48-49. Similarly, Call stated that Proposal 10 would help employees by limiting their "exposure" to the "special assignment" post. Tr. 142.

Stancil objected to Proposal 10 because it would put an employee in the "special assignment" position without the skill or experience to work at every post, thus "render[ing] that position useless." Tr. 195. Auten objected to the fact that Proposal 10 would limit assignments to nine months, taking away management's discretion without regard to "what was going on in the institution." Tr. 244-45.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Respondent violated § 7116(a)(1) and (5) of the Statute by reassigning employees within Unit Management without completing bargaining over the impact and implementation of the change. With regard to threshold matters, the GC asserts that the Agency's actions changed conditions of employment and that these changes had greater than de minimis effects. The GC contends that the Respondent has the burden of showing that the proposals, specifically, Proposals 1, 2, 9, and 10, were outside the duty to bargain.[8] *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003) (*PBGC*).

---

[8] Reading the GC's brief, it is unclear whether the GC is referring to Proposal 1 or to Proposal 1-A. At one point, the GC refers to the proposal as pertaining to "equally qualified" employees, a term used in Proposal 1, not Proposal 1-A. GC Br. at 21. At another point, the GC refers to the proposal as providing for quarterly reassignments under Article 18, which is provided for by Proposal 1-A, not Proposal 1. GC Br. at 11. This is especially confusing since the GC acknowledges that the Union submitted both proposals to management. GC Br. at 11 (citing GC Exs. 10(a)-(e)).

With respect to the Respondent's claim that the proposals are covered by Article 18(d) of the Master Agreement, the GC asserts that Article 18(d) pertains to employees in Correctional Services, not employees in Unit Management. GC Br. at 20.

With respect to negotiability, the GC asserts that proposals requiring selection based on seniority do not affect management's rights to assign work and assign employees where management has already determined, or retains authority to determine, that the employees are equally qualified for the assignments. *AFGE, Local 1164*, 60 FLRA 785, 787 (2005) (*Local 1164*); *NAGE, Local R14-52*, 44 FLRA 738, 741-42 (1992). The GC contends that Proposals 1 and 2 are negotiable because they "only apply to 'equally qualified' employees." GC Br. at 21. Similarly, the GC argues that Proposals 9 and 10 are negotiable because they "simply provide 'equally qualified' . . . employees with the opportunity to request reassignment . . . ." *Id.* With specific regard to Proposal 9, the GC further asserts that the proposal does not prevent management from timely considering applicants for a vacant position. *AFGE, HUD Council of Locals 222, Local 2910*, 54 FLRA 171, 178-79 (1998); *Laurel Bay Teachers Ass'n OEA/NEA*, 49 FLRA 679, 687-88 (1994).

Generally, the GC argues that the Union submitted the proposals because it was "concerned that without . . . procedures and arrangements in place," employees' "performance appraisals, awards, promotions, and training opportunities would be adversely affected." GC Br. at 14-15. In this connection, the GC asserts that Proposals 1 and 2 were intended to prevent high-seniority employees from being in the same work group and having to bid against each other for shifts and days off. *Id.* at 13-14. Further, the GC asserts that Proposal 9 was intended to provide employees with "procedures and arrangements . . . when a Unit Management . . . position became vacant due to attrition," and that Proposal 10 was intended to provide employees the opportunity to bid on the "special assignment" position as well as limit their time serving in it. *Id.* at 14.

Respondent

The Respondent contends that the Union's proposals were outside the duty to bargain and that it therefore did not violate the Statute by implementing the reassignments. It argues that all four proposals affected management's rights and were not appropriate arrangements. R. Br. at 5-6.

With regard to Proposal 1,[9] Respondent contends that the proposal would require bidding based exclusively on seniority, affecting management's right to assign work. *Local 1164*, 60 FLRA at 787; *NAGE, Local R1-109*, 38 FLRA 211 (1990). In addition, the Respondent claims that Proposal 1 would prevent management from assigning employees based on GS-level, thereby affecting management's right to determine the grades of employees. R. Br. at 12.

[9] The Respondent argues that Proposal 1 is "not appropriately before" me, because it was superseded by Proposal 1-A; but it addresses both Proposals 1 and 1-A in its brief, since there was "significant testimony" on the proposals. R. Br. at 7-8 n.2.

The Respondent argues that Proposal 1-A "eliminate[s] management's right to determine the qualifications and skill sets needed for a particular unit or assignment," thus affecting management's right to assign work. *Id.* at 15. It also claims that assigning employees to posts for which they are not qualified, and rotating employees every quarter, would lead to unhappy inmates, thus affecting management's right to determine its internal security practices. Additionally, Proposal 1-A is covered by the Master Agreement, to the extent it incorporates Article 18(d). *Id.* at 16. In this regard, the Respondent cites Billingsley's claim that Article 18(d) applies "to every person that works" at FCI Milan. *Id.* (quoting Tr. 264.) Citing *Fed. Bureau of Prisons v. FLRA*, 654 F.3d 91 (D.C. Cir. 2011) (*BOP v. FLRA*), it argues that Article 18 "covers and preempts challenges to all specific outcomes of the assignment process." R. Br. at 16.

The Respondent contends that Proposal 2 is "an extension of Proposal 1[]" and affects management's right to assign work in the same ways as Proposals 1 and 1-A do. R. Br. at 17-18. It also alleges that the quarterly rotations provided for in Proposal 2 would affect management's ability to accomplish the agency mission and determine its internal security practices. In addition, "to the extent the proposal requested a roster in accordance with Article 18," the Respondent asserts that Proposal 2 is covered by the Master Agreement. *Id.* at 17.

Similarly, the Respondent claims that the seniority-based bidding in Proposal 9 affects management's right to assign work, and that Proposal 9 requires the Agency to fill vacancies and therefore affects management's right to determine its budget. *Id.* at 18-19.

With regard to Proposal 10, the Respondent claims that the proposal bars the Agency from ensuring that the employee on "special assignment" has the skills needed at all of the housing units, and thus "would significantly impact management's right to determine the qualifications needed" for that position. *Id.* at 20. Proposal 10's nine-month limit on employees holding the position would also affect management's right to assign work.

ANALYSIS AND CONCLUSIONS

Prior to implementing a change in conditions of employment, an agency is required to provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain, if the change will have more than a de minimis effect on conditions of employment. *U.S. Dep't of the Air Force, AFMC, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 173 (2009). The extent to which an agency is required to bargain depends on the nature of the change. *Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 852 (1999) (*Bastrop*). If an agency's decision constitutes an exercise of a management right under § 7106(a) of the Statute, the decision itself may not be negotiable, but the agency may nonetheless be required to negotiate over the impact and implementation of that decision. *Bastrop*, 55 FLRA at 854. An agency may claim, as an affirmative defense, that it had no duty to bargain over proposals because they were "covered by" the parties' collective bargaining agreement. *U.S. Dep't of the Treasury, IRS*, 63 FLRA 616, 618 n.2 (2009) (*IRS*).

An agency can satisfy its obligation to bargain by reaching agreement with the union, or bargaining in good faith to impasse over negotiable proposals submitted by the union. *PBGC*, 59 FLRA at 50. This obligation is predicated on the union's submission of negotiable proposals. An agency may refuse to bargain where it contends that the proposals submitted by the union are nonnegotiable. However, the agency acts at its peril if it then implements the proposed change in conditions of employment. If *all* pending union proposals are nonnegotiable, then the agency will not be found to have violated the Statute by implementing the change without bargaining over them. However, if *any* pending union proposals are negotiable, then the agency will be found to have violated the Statute. *Id.* In an unfair labor practice case, the respondent has the burden of demonstrating that all proposals on the table were nonnegotiable. *Id.*

In our case, it is undisputed that the reassignment of Unit Management staff in December 2011 changed conditions of employment, and that the changes had a greater than de minimis effect on bargaining unit employees. Similarly, it is undisputed that the Agency provided the Union with notice of the proposed changes and an opportunity to bargain over their impact and implementation. The Union, in turn, submitted impact and implementation proposals to the Agency; the parties engaged in negotiations; and they reached agreement on six of the Union's proposals. The Agency refused to negotiate over Proposals 1, 1A, 2, 9, and 10, however, and it implemented the reassignments after declaring those proposals nonnegotiable. [10] I must determine whether its refusal to negotiate was correct.

Proposals 1-A and 2 Are Not Covered By Article 18(d) of the Master Agreement.

The Respondent claims that Proposals 1-A and 2 are covered by the Master Agreement. The "covered by" doctrine excuses parties from bargaining when they have already bargained and reached agreement concerning the matter at issue. *IRS*, 63 FLRA at 617. To assess whether a particular matter is covered by a collective bargaining agreement, we apply a two-pronged test. *Nat'l Air Traffic Controllers Ass'n*, 66 FLRA 213, 216 (2011). Under the first prong, we examine whether the subject matter is expressly contained in the agreement. An exact congruence of language is not required; instead, the matter is "covered" if a reasonable reader would conclude that the contract provision settles the matter in dispute. *Id.*

If the agreement does not expressly contain the matter, then, under the second prong of the doctrine we consider whether the subject is inseparably bound up with, and thus plainly an aspect of, a subject covered by the agreement. *NTEU, Chapter 160*, 67 FLRA 482, 485 (2014). In doing so, we consider the parties' intent and bargaining history. *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 126 (2011). A matter must be more than tangentially related to a contract provision to be covered by the agreement. *Id.* Rather, the

[10] For several reasons – Billingsley's assertion that Proposals 1 and 1-A were both in play; the Respondent's decision to address Proposal 1; the GC's reliance on the wording of Proposal 1; and Proposal 2's incorporation of Proposal 1 – I will address the negotiability of Proposals 1 and 1-A, along with Proposals 2, 9, and 10.

party asserting the "covered by" argument must demonstrate that the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the collective bargaining agreement that the negotiations that resulted in that provision of the agreement are presumed to have foreclosed further bargaining over the matter. *Id.* By contrast, a contract provision that specifically contemplates additional bargaining provides no basis for a covered-by defense. *U.S. Dep't of Hous. & Urban Dev.*, 66 FLRA 106, 109 (2011); *U.S. Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 56 FLRA 9, 12-13 (2000).

The Master Agreement provides a detailed description of the roster creation process in Article 18(d), but that section expressly applies only to Correctional Services.[11] GC Ex. 14 at 39, 41. Because Proposals 1-A and 2 apply to Unit Management employees, the proposals are not "expressly contained" in Article 18(d).

With regard to the second prong of the test, the wording of Article 18(f) is intentionally vague, leaving it to the parties to fill in the gaps concerning the roster creation process in departments other than Correctional Services. GC Ex. 14 at 41; Tr. 66, 83, 91; *cf. U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Otisville, N.Y.*, 58 FLRA 307, 309 (2003) (denying exceptions to an award finding Article 18(f) required negotiations over certain matters). The conscious ambiguity of Article 18(f) is especially clear when its lack of specificity is compared to the many specific procedures set forth in Article 18(d) for Correctional Services employees. By stating that "[i]t is recommended that the procedures in Section d. be utilized[,]" Article 18(f) clearly leaves it to the parties locally to determine, through bargaining, whether to utilize some, all, or none of the Article 18(d) procedures. The Union requested, in Proposals 1-A and 2, the same procedures that are "recommended" in Article 18(f). These proposals, therefore, do not satisfy the second prong of the covered-by test.

BOP v. FLRA does not compel a contrary conclusion. In that case, the D.C. Circuit adopted the Agency's position that Article 18 covers and preempts all disputes about particular rosters issued pursuant to the procedures in Article 18(d). 654 F.3d at 95. Although the court stated more broadly that Article 18 "covers and preempts challenges to all specific outcomes to the assignment process," the court was referring "specifically" to "sections (d) and (g)," not to Article 18(f). *Id.* As such, and as Article 18(f) expressly contemplates additional bargaining between the parties regarding roster procedures outside the Correctional Services department, the Respondent's reliance on *BOP v. FLRA* is misplaced. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst. Williamsburg, Salters, S.C.*, Case No. AT-CA-11-0462 (Nov. 25, 2014) (no exceptions filed) (applying similar logic to require negotiation of compressed work schedules under Article 18(b)).

---

[11] Billingsley's claim that Article 18(d) "applies to every person that works" at FCI Milan is plainly wrong. Tr. 264. Article 18(d) applies only to "rosters for Correctional Services," while Article 18(f) applies to rosters "outside the Correctional Services department . . . ." GC Ex. 14 at 39, 41.

The Respondent has shown that all of the proposals are nonnegotiable.

Having found that the Agency had an obligation to bargain, I now consider whether the disputed proposals submitted by the Union are negotiable, including whether they are negotiable as "procedures" under § 7106(b)(2) of the Statute, or as "appropriate arrangements" under § 7106(b)(3). *U.S. Dep't of the Navy, Naval Aviation Depot, Jacksonville, Fla.*, 63 FLRA 365, 370, 380 (2009); *see also U.S. Dep't of Transp.*, 40 FLRA 690, 712 (1991), *remanded on other grounds sub nom. Prof'l Airways Sys. Specialists Div., Dist. No. 1-MEBA/NMU, AFL-CIO v. FLRA*, 966 F.2d 702 (D.C. Cir. 1992).

The rights to assign work and to assign employees under § 7106(a)(2) of the Statute include the rights to establish the qualifications and skills needed for positions and to judge whether particular employees meet those qualifications and skills. *AFGE, Local 3935*, 59 FLRA 481, 482 (2003) (*Local 3935*). In this regard, an agency may require employees to possess specific knowledge, skills, and abilities needed to do the work of a position, as well as certain job-related individual characteristics such as judgment and reliability. Although employees may be equally qualified for a particular position, agencies may consider other factors, such as experience and length of service relative to other team members, when making specific assignments and reassignments. *Id.* at 483. Consideration of such job-related individual characteristics is inherent in management's rights to assign work and assign employees under the Statute. A proposal preventing management from determining that employees are equally qualified for a work assignment affects management's rights to assign work and assign employees. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Hous., Tex.*, 59 FLRA 744, 745 (2004); *AFGE, Local 1138, Council 214*, 51 FLRA 1725, 1731 (1996). In addition, proposals that limit the duration of work assignments affect the exercise of management's rights to assign work and to assign employees. *AFGE, Council of Locals No. 163*, 51 FLRA 1504, 1513 (1996) (*Council 163*).

With respect to § 7106(b)(2) of the Statute, proposals requiring selection based on seniority are negotiable when management has already determined, or retains the authority to determine, that the employees are equally qualified for the work assignments. However, proposals that do not leave management with discretion to determine whether employees are equally qualified for a given assignment are not negotiable under § 7106(b)(2) of the Statute. *See Local 3935*, 59 FLRA at 482-83; *U.S. Dep't of Hous. & Urban Dev.*, 58 FLRA 33, 35 (2002).

All of the proposals (including Proposal 2, which incorporates Proposal 1) would significantly restrict the Agency from determining whether employees are equally qualified for specific work assignments. As Call admitted, the proposals envision assignments that will be based on "seniority and seniority alone . . . ." Tr. 134-35. Proposals 1, 1-A, 2, 9, and 10 purport to limit seniority-based bidding to employees who are "equally qualified," and Proposal 1-A similarly would allow management to make distinctions that are "non-arbitrary." However, the Union insisted at the bargaining table that employees with the same title are, by definition, equally qualified – that "a case manager is a case manager is a

case manager. " Tr. 267. Accordingly, the Union indicated that management would have no basis for making distinctions between employees holding the same title. Because the proposals prevent management from determining whether employees are equally qualified for work assignments, the proposals are not negotiable as procedures under § 7106(b)(2) of the Statute.

In determining whether a proposal is an appropriate arrangement under § 7106(b)(3) of the Statute, the Authority follows the analysis set forth in *NAGE, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). Under this analysis, the Authority first determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. *Id.* at 31. In order for a proposal to be an arrangement, there must be adverse effects or reasonably foreseeable adverse effects on employees that flow from the exercise of management's rights. *Id.* An arrangement must be sufficiently tailored to compensate employees suffering adverse effects attributable to the exercise of management's rights. *Local 3935*, 59 FLRA at 483. If the proposal is an arrangement, then it must be determined whether it is appropriate, or whether it is inappropriate because it excessively interferes with the relevant management rights, weighing the benefits afforded to employees against the intrusion on the exercise of management's rights. *See KANG*, 21 FLRA at 31-33. Proposals depriving an agency of all discretion in exercising management rights have been found by the Authority to excessively interfere with those rights. *See, e.g., AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 937 (2012); *AFGE, Local 1547*, 64 FLRA 813, 815-16 (2010); *Tidewater Va. Fed. Emps. Metal Trades Council, AFL-CIO*, 31 FLRA 131, 141 (1988) (*Tidewater*).

The Agency's plan to reassign employees within Unit Management could result in long-serving employees being assigned to the same unit, forcing some of them to work weekends and late nights, and preventing swapping between those employees and newer employees. The proposals were designed to help employees avoid those harms. Tr. 112-13. More generally, the proposals are designed to help employees avoid being assigned to posts they do not like. *See* Tr. 48-49, 142. As such, and as the proposals are tailored to apply only to employees in Unit Management, the proposals are arrangements.

With regard to whether the proposals are appropriate arrangements, it is certainly true that the proposals would provide a number of benefits to employees. Most obviously, all of the proposals would allow employees a say in where they would be assigned. *Cf. Nat'l Treasury Employees Union*, 62 FLRA 267, 273 (2007) (proposal benefits officers by allowing them exercise their personal choice to have facial hair). This freedom would enable employees to gain marketable experience in different assignments and housing units, and even build connections outside the Agency. Tr. 124-25; *see also* Tr. 174-75. Further, Proposals 1, 1-A, 2 and 9 would give employees more options with regard to vacations and days off. Tr. 112-13. In addition, Proposal 10 enabled employees who did not want to work on "special assignment" to limit their "exposure" there to nine months. Tr. 48-49, 142.

These benefits, however, would come at a high cost to management's rights. All of the proposals would bar the Agency from making distinctions between case managers' skills and qualifications, no matter what ill effects might come as a result. For example, Proposals 1, 1-A, 2, and 9 would prevent management from assigning a case manager with enough skill and experience to tackle the large amount of complex paperwork at the G Unit, even if that could result in inmates not graduating in time from the program. The proposals would also prevent management from assigning to the A Unit a case manager who is good at interacting with mentors outside the Agency, or from assigning to the B Unit a case manager who is skilled at communicating with inmates who have just entered FCI Milan. Similarly, Proposal 10 would bar management from ensuring that the employee on "special assignment" would be capable of working effectively at every housing unit at the prison. The inflexibility in these proposals is especially troubling, given that the department was recently judged to be "falling short" in some of its tasks. Tr. 151.

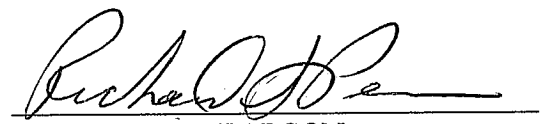
Moreover, the quarterly bidding provided for in Proposals 1-A and 2 would result in case managers spending only three months at an assignment, barely enough time for them to become familiar with their case loads. *Cf. AFGE, AFL-CIO, Local 683*, 30 FLRA 497, 500 (1987) (proposed rotation schedule excessively interfered with management right to determine internal security). Also, Proposal 10 would bar management from assigning a case manager to the "special assignment" post for more than nine months, no matter what the needs of management are at the time. *See Council 163*, 51 FLRA at 1516-17; *Tidewater*, 31 FLRA at 139-41.

These heavy burdens outweigh the benefits to employees. Accordingly, I find that Proposals 1, 1-A, 2, 9, and 10 are not negotiable as appropriate arrangements under § 7106(b)(3) of the Statute as they excessively interfere with management's rights to assign work and employees under § 7106(a)(2) of the Statute.[12]

ORDER

It is ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, D.C., April 29, 2015



RICHARD A. PEARSON
Administrative Law Judge

[12] Accordingly, it is unnecessary to address the effect of the proposals on the additional management rights cited by the Respondent.