74 FLRA No. 26

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 0906
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
EASTERN KANSAS HEALTH CARE SYSTEM
TOPEKA VA MEDICAL CENTER
TOPEKA, KANSAS
(Agency)

0-NG-3645

_____

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

December 17, 2024

_____

Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko and Anne Wagner, Members
(Member Kiko dissenting)

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).[1] The dispute concerns one proposal that would require the Agency to either (1) install and maintain, in an employee break room, a new water-filtration system that includes a hands-free ice-dispensing component, or (2) supplement an existing water-filtration system with a machine that provides hands-free ice dispensing.

For the following reasons, we find the proposal concerns bargaining-unit employees' conditions of employment. In so finding, we: (1) reaffirm the test, set forth in *Antilles Consolidated Education Ass'n* (*Antilles*),[2] for assessing whether a matter concerns bargaining-unit employees' conditions of employment; and (2) reverse *U.S. DHS, U.S. CBP, El Paso, Texas* (*El Paso III*)[3] and its progeny, to the extent those decisions conflict with this decision. We also find the Agency has not demonstrated the proposal is: contrary to a government-wide regulation; outside the duty to bargain on the ground that the Agency allegedly has not *changed* conditions of employment; contrary to management's rights under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute); or contrary to an Agency-wide regulation for which there is a compelling need. Therefore, we conclude the Agency has not demonstrated the proposal is outside the duty to bargain.

II. Background

The Union asked the Agency to address a lack of access to drinking water for bargaining-unit employees in the Agency's mental-health clinic, which is a locked, controlled-access, outpatient mental-health clinic. Specifically, the Union sought the installation of an ice and water machine in the employee break room. After attempts to informally resolve the issue were unsuccessful, the Union submitted a formal demand to bargain. The parties requested assistance from the Federal Service Impasses Panel (FSIP) with mediation. In the meantime, the Agency installed a reverse-osmosis water filter in the employee break room, but no mechanism that provides ice. When mediation failed, the parties requested further FSIP assistance. The Agency subsequently asserted the issue was nonnegotiable, so FSIP dismissed the parties' dispute for lack of jurisdiction. The Union then filed this petition for review (petition) with the Authority.

Subsequently, an Authority representative conducted a post-petition conference with the parties under § 2424.23 of the Authority's Regulations.[4] The Agency filed a statement-of-position form (statement), and separately filed a statement-of-position brief (statement brief) the same day. The Union filed a response to the statement and statement brief.[5] The Agency did not file a reply to the response.

[1] 5 U.S.C. § 7105(a)(2)(E).
[2] 22 FLRA 235, 236-37 (1986).
[3] 72 FLRA 7 (2021) (Member DuBester dissenting in part).
[4] 5 C.F.R. § 2424.23. We note that the Authority's negotiability Regulations have been amended, but the amended Regulations apply only in cases where the petitions were filed on or after October 12, 2023. *See* Negotiability Proceedings, 88 Fed. Reg. 62445, 62445 (Sept. 12, 2023). As the petition in this case was filed before that date, we apply the prior Regulations throughout this decision.
[5] The Union argues we should not consider the statement or statement brief because the Union is unaware of any regulation that allows the Agency to file two separate documents, and because the Agency is allegedly trying to cause confusion. Resp. at 4. However, as the Agency timely submitted both documents on the same day, we find it appropriate to treat them as one filing and consider all of the arguments contained in both documents.

III. The Proposal

A. Wording

> Eastern Kansas Health Care System-Topeka VAMC shall expeditiously obtain, install, and maintain a filtered-water and ice-machine for the Mental Health Clinic employee break room, Bldg. 2, Room B132. In light of the agency's recent installation of a reverse-osmosis water filtration and dispensing system in B2/B132, the agency shall in the alternative, and in addition to the current RO system, obtain, install, and maintain a refrigerator-freezer in B2/B132 which contains an operating filtered ice-dispensing feature in the external side of the refrigerator-freezer door.[6]

B. Meaning

The parties agreed the proposal would require the Agency to either install a new water-filtration system that includes a hands-free ice-dispensing component, or supplement the current reverse-osmosis water-filtration system with a machine that provides hands-free ice dispensing.[7] The parties clarified that "expeditiously" does not refer to a set amount of time, but rather means "without any undue delay, taking into account any outside issues that might delay receipt of the desired ice and water machine, like supply-chain disruptions."[8]

C. Analysis and Conclusions

The Agency argues the proposal is outside the duty to bargain for five reasons, which we discuss separately below.

1. The Agency does not support its assertion that the proposal is contrary to a government-wide regulation.

The Agency asserts the proposal is contrary to a government-wide regulation.[9] However, the Agency does not cite to a government-wide regulation or provide any arguments beyond this mere assertion. The Authority's Regulations applicable in this case provide that an agency "has the burden of raising and supporting arguments that the proposal . . . is outside the duty to bargain or contrary to law."[10] Further, an agency is "required in [its] statement of position to . . . set forth its understanding of the proposal . . . and supply all arguments and authorities in support of its position."[11] A party's "[f]ailure to raise and support an argument will . . . be deemed a waiver of such argument."[12] Consistent with these principles, we reject, as unsupported, the Agency's assertion that the proposal is contrary to a government-wide regulation.

2. The proposal concerns bargaining-unit employees' conditions of employment.

The Agency argues the proposal is outside the duty to bargain because it does not concern bargaining-unit employees' conditions of employment.[13] Section 7102(2) of the Statute gives bargaining-unit employees the right "to engage in collective bargaining with respect to *conditions of employment*" through their chosen exclusive representative.[14] Section § 7103(a)(12) of the Statute defines "collective bargaining," in pertinent part, as the parties' mutual obligation to bargain "with respect to the *conditions of employment* affecting [bargaining-unit] employees."[15] Relatedly, § 7114(b)(2) of the Statute provides that the parties' "duty . . . to negotiate in good faith . . . shall include the obligation . . . to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any *condition of employment*."[16]

With certain exclusions not relevant here, § 7103(a)(14) of the Statute defines "conditions of employment" as "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, *affecting working conditions*."[17] Although "the phrase 'conditions of employment' is not a model of precision,"[18] the Authority has a well-established test for assessing whether a matter concerns bargaining-unit employees' conditions of employment. Specifically, nearly forty years ago – in *Antilles*[19] – the Authority stated that it would assess: (1) "[w]hether the matter proposed to

---

[6] Pet. at 4; Post-Petition Conference Record (Record) at 2.
[7] Pet. at 4; Record at 2.
[8] Record at 2.
[9] Statement Br. at 3.
[10] 5 C.F.R. § 2424.32(b).
[11] *Id.* § 2424.24(a).
[12] *Id.* § 2424.32(c)(1).
[13] Statement Br. at 3.
[14] 5 U.S.C. § 7102(2) (emphasis added).
[15] *Id.* § 7103(a)(12) (emphasis added).
[16] *Id.* § 7114(b)(2) (emphasis added).
[17] *Id.* § 7103(a)(14) (emphasis added).
[18] *DOD v. FLRA*, 685 F.2d 641, 647 (D.C. Cir. 1982).
[19] 22 FLRA 235. We note that this test applies not only in the negotiability context, but in other contexts as well, such as in unfair-labor-practice cases. *Veterans Admin. Med. Ctr., Leavenworth, Kan.*, 40 FLRA 592, 597 (1991) (*VAMC Leavenworth*) ("[T]he fact that the case before us is an unfair[-]labor[-]practice proceeding, not a negotiability dispute, makes no difference in the applicable analysis.").

be bargained pertains to *bargaining[-]unit employees*";[20] and (2) "[t]he nature and extent of the effect of the matter proposed to be bargained on *working conditions* of those employees."[21]

In *Antilles*, the Authority did not expressly define the term "working conditions." However, it *effectively* defined that term by finding the second part of the test – concerning "working conditions" – would assess "whether the record establishes that there is a direct connection between the [bargaining] proposal and the *work situation or employment relationship* of bargaining[-]unit employees."[22] For decades, the Authority treated the term "working conditions" as interchangeable with "work situation or employment relationship" – sometimes framing the second part of the *Antilles* test as concerning "working conditions,"[23] sometimes framing it as concerning the "work situation or employment relationship,"[24] and sometimes treating "working conditions" interchangeably with "work situation or employment relationship" in the same case.[25]

[20] 22 FLRA at 236 (emphasis added).
[21] *Id.* at 237 (emphasis added).
[22] *Id.* (emphasis added).
[23] *See, e.g.*, *AFGE, AFL-CIO, Loc. 2782*, 49 FLRA 470, 478 (1994) (Member Armendariz concurring); *NAGE, Fed. Union of Scientists & Eng'rs, Loc. R1-144*, 42 FLRA 1285, 1290 (1991); *U.S. DOL, Wash., D.C.*, 38 FLRA 899, 908 (1990) (*DOL*); *NTEU*, 32 FLRA 544, 548 (1988); *AFSCME, Loc. 3097*, 31 FLRA 322, 324 (1988); *NAGE, Loc. R14-32*, 26 FLRA 593, 595 (1987); *NFFE, Loc. 1153*, 26 FLRA 505, 508 (1987) (Chairman Calhoun dissenting in part on other grounds); *Dep't of the Army, Fort Greely, Alaska*, 23 FLRA 858, 863 (1986); *Dep't of the Air Force, Eielson Air Force Base, Alaska*, 23 FLRA 605, 609 (1986); *AFGE, AFL-CIO, Loc. 2022*, 23 FLRA 59, 60 (1986).
[24] *See, e.g.*, *AFGE, Loc. 400*, 66 FLRA 68, 69 (2011); *NTEU*, 58 FLRA 611, 613 (2003) (Chairman Cabaniss concurring); *NFFE, Loc. 1214, Fed. Dist. 1, IAMAW*, 58 FLRA 601, 602 (2003); *SSA*, 55 FLRA 970, 980 (1999) (Member Cabaniss dissenting) (*SSA*); *U.S. Dep't of Com., Pat. & Trademark Off.*, 53 FLRA 858, 862 n.5 (1997); *POPA*, 53 FLRA 625, 694 (1997); *AFGE, Loc. 3824*, 52 FLRA 332, 334 (1996); *Dep't of VA Med. Ctr., St. Louis, Mo.*, 50 FLRA 378, 380 (1995); *AFGE, Loc. 1786*, 49 FLRA 534, 539 (1994); *Antilles Consol. Educ. Ass'n*, 46 FLRA 625, 629 (1992); *NAGE, Locs. R14-22 & R14-89*, 45 FLRA 949, 952 (1992) (Member Talkin dissenting in part on other grounds); *AFGE, Loc. 1923*, 44 FLRA 1405, 1425 (1992); *NFFE, Loc. 1482*, 44 FLRA 637, 661 (1992); *IFPTE, Loc. 11*, 44 FLRA 302, 308 (1992); *Dep't of VA, Veterans Admin. Med. Ctr., Veterans Canteen Serv., Lexington, Ky.*, 44 FLRA 179, 189 (1992) (*VAMC Lexington*); *AFGE, Loc. 2077*, 43 FLRA 344, 349 (1991); *Fed. Emps. Metal Trades Council*, 41 FLRA 107, 113 (1991); *AFGE, Nat'l Veterans Admin. Council*, 41 FLRA 73, 76 (1991); *VAMC Leavenworth*, 40 FLRA at 596; *NAGE, Loc. R4-26*, 40 FLRA 118, 121 (1991); *U.S. DOL, Wash., D.C.*, 38 FLRA 1374, 1379 (1991); *NAGE, Loc. R1-134*, 38 FLRA 589, 593 (1990); *U.S. Dep't of HHS, SSA, Region X, Seattle, Wash.*, 37 FLRA 880, 886 (1990); *Nat'l Weather Serv. Emps. Org.*, 37 FLRA 392, 397 (1990); *U.S. Dep't of the Army, Aviation Sys. Command, St. Louis, Mo.*, 36 FLRA 418, 421 (1990); *AFGE, AFL-CIO, Loc. 3006*, 34 FLRA 816, 819 (1990). *Cf. AFGE, Loc. 1547*, 64 FLRA 635, 637 (2010) (*Local 1547*) (Member Beck dissenting) ("An activity may concern a condition of employment not only when it directly relates to the employment relationship, but also when it directly relates to the *work situation* of unit employees."); *AFGE, AFL-CIO, Nat'l Border Patrol Council & Nat'l INS Council*, 42 FLRA 599, 634 (1991) ("In deciding whether a matter involves a condition of employment of bargaining[-]unit employees, the Authority considers whether the record establishes that there is a direct connection between the matter and the work situation or employment relationship of . . . unit employees.").
[25] *See, e.g.*, *U.S. Dep't of the Air Force, 355th MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 90 (2009) (*Davis-Monthan AFB*) (characterizing *Antilles* as "stating that, in examining whether a bargaining proposal [a]ffects 'working conditions' of employees, the Authority examines the 'work situation or employment relationship' of employees"); *AFGE, Loc. 1812*, 59 FLRA 447, 448 (2003) (Chairman Cabaniss concurring) (framing the second *Antilles* factor as "[t]he nature and extent of the effect of the matter proposed to be bargained on *working conditions* of [unit] employees" and stating, "[m]ore particularly, as stated in *Antilles*, 'the question is whether the record establishes that there is a direct connection between the proposal and the work situation or employment relationship of bargaining[-]unit employees") (quoting *Antilles*, 22 FLRA at 236-37); *AFGE, Dep't of Educ. Council of AFGE Locs.*, 35 FLRA 56, 60 (1990) (finding certain training directly related to bargaining-unit employees' "work situation" and, thus, "concern[ed] personnel policies, practices[,] and working conditions within the meaning of [§] 7103(a)(14)"); *Int'l Bhd. of Teamsters, Truck Drivers, Warehousemen & Helpers of Jacksonville, Loc. Union 512*, 32 FLRA 1200, 1202-03 (2011) (framing the second *Antilles* factor as involving "working conditions," then stating "[t]he proposals . . . meet the second factor of the *Antilles* test; that is, whether there is a direct connection between a proposal and the work situation or employment relationship of bargaining[-]unit employees"); *IFPTE, Loc. 11*, 32 FLRA 380, 387 (1988) ("In evaluating the nature and extent of effect of proposals on unit employees' working conditions, we must consider whether there is a 'direct connection between a proposal and the work situation or employment relationship of bargaining[-]unit employees.'") (quoting *Antilles*, 22 FLRA at 237); *POPA*, 29 FLRA 1389, 1396 (1987) (in finding proposal "[d]irectly [a]ffect[ed] [w]orking [c]onditions," Authority found "development of performance appraisal plans directly affects the employment relationship" of bargaining-unit employees); *Overseas Educ. Ass'n, Inc.*, 27 FLRA 492, 542 (1987), *aff'd sub nom. Overseas Educ. Ass'n v. FLRA*, 858 F.2d 769 (D.C. Cir. 1988) (finding second *Antilles* factor met because there was "a direct connection between the proposal and the work situation or employment relationship of bargaining[-]unit employees"); *Fed. Emps. Metal Trades Council, AFL-CIO*, 25 FLRA 465, 469 (1987) (in finding proposals "relate[d] principally to matters affecting working conditions of bargaining[-]unit employees," the Authority found there was "a direct connection between the[] proposals and the work situation of bargaining[-]unit employees").

Further, at various points, the Authority stated that "there is no substantive difference between '*conditions of employment*' and 'working conditions' as those terms are practically applied."[26] In that regard, the Authority determined that, "when faced with issues involving 'working conditions,' [the Authority and the courts] have accorded the term a broad interpretation that encapsulates a wide range of subjects that is effectively synonymous with 'conditions of employment.'"[27] The United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) found the Authority's determination "reasonable."[28]

Then, in *U.S. DHS, U.S. CBP, El Paso, Texas* (*El Paso I*),[29] a majority of the Authority held that the terms "conditions of employment" and "working conditions" are "related, but . . . not synonymous."[30] Noting that § 7103(a)(14) of the Statute contains both of those distinct terms, the Authority relied on canons of statutory construction that "'Congress acts intentionally' when it 'inclu[des] or exclu[des]' particular words in a statute," and that "two different terms used in the same context cannot mean the same thing and therefore must mean something different."[31] In an attempt to give the two terms different meanings, the Authority looked to the United States Supreme Court's decision in *Fort Stewart Schools v. FLRA* (*Fort Stewart*).[32] The Authority characterized *Fort Stewart* as holding "that while the term 'conditions of employment' is susceptible to multiple interpretations, the term 'working conditions,' as used in § 7103(a)(14), 'more naturally refers . . . *only* to the "circumstances" or "state of affairs" attendant to one's *performance* of a job.'"[33] The Authority further stated that, "[i]n acknowledging the distinction between those terms, the [Supreme] Court cited with approval the . . . [D.C.] Circuit, which had earlier held that 'working conditions' are 'the day-to-day circumstances under which an employee *performs his or her job*.'"[34] The Authority did not address the longstanding *Antilles* precedent that effectively defined "working conditions" as the "work situation or employment relationship."

In *U.S. DHS, U.S. CBP, El Paso, Texas* (*El Paso II*),[35] the Authority resolved the union's motion for reconsideration of *El Paso I*. The union claimed, among other things, that *El Paso I* was based on a misreading of *Fort Stewart*.[36] A majority of the Authority rejected that claim, stating that the conclusion in *El Paso I* was "based on the plain wording of § 7103(a)(14) – not *Fort Stewart*."[37] The Authority explained that, "[w]hen referring to *Fort Stewart*, [the Authority had] found it persuasive that the Court had previously recognized that 'conditions of employment' and 'working conditions' are susceptible to *distinct* interpretations."[38] The Authority concluded that *Fort Stewart* "*does* support the conclusion that 'conditions of employment' and 'working conditions' are *not* synonymous terms."[39] The Authority denied the union's motion.[40]

Subsequently, the union appealed *El Paso I* to the D.C. Circuit, which reversed the Authority and vacated *El Paso I*.[41] The court found that, "[b]eyond stating" the terms "conditions of employment" and "working conditions" are "not synonymous, . . . the Authority fail[ed] to explain the differences between the terms or how the alleged differences matter under the language of § 7103(a)(14)."[42] The court noted *El Paso I* quoted *Fort Stewart* "for the proposition that 'while the term "conditions of employment" is susceptible to multiple interpretations, the term "working conditions," as used in § 7103(a)(14), "more naturally refers . . . only to the 'circumstances' or 'state of affairs' attendant' to one's performance of a job."[43] The court then stated: "But the [Supreme] Court clarified that 'here it is not in isolation, but forms part of a paragraph whose structure, as a whole, lends support to the Authority's broader reading.'"[44] The court further stated that, "[b]y omitting the phrase 'in isolation' and the [Supreme] Court's subsequent clarification, the Authority misread[] *Fort Stewart* to imply that 'working conditions' has a free-standing definition when, in fact, the point being made in *Fort Stewart* is the opposite."[45] Additionally, the court noted it previously upheld, as "reasonable," the

[26] *Davis-Monthan AFB*, 64 FLRA at 90 (emphasis added); *U.S. DHS, CBP*, 64 FLRA 989, 995 (2010) (*CBP*); *Local 1547*, 64 FLRA at 638; *see also U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr. Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166, 175 n.10 (2009) (*Kirtland AFB*) (Member Beck concurring) (noting Authority had found "no substantive difference" between the two concepts); *SSA*, 55 FLRA at 980 n.7, 982 n.12 (finding "no basis" for creating a distinction between "conditions of employment" within the duty to bargain and "working conditions" outside the definition of "conditions of employment" and, thus, outside the duty to bargain).

[27] *Davis-Monthan AFB*, 64 FLRA at 90.

[28] *U.S. DHS, CBP v. FLRA*, 647 F.3d 359, 365 (D.C. Cir. 2011).

[29] 70 FLRA 501 (2018) (Member DuBester dissenting).

[30] *Id.* at 503.

[31] *Id.* (alteration in original).

[32] 495 U.S. 641 (1990).

[33] 70 FLRA at 503 (quoting *Fort Stewart*, 495 U.S. at 641).

[34] *Id.*

[35] 71 FLRA 49 (2019) (Member DuBester dissenting).

[36] *Id.* at 50.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 51.

[41] *AFGE, AFL-CIO, Loc. 1929 v. FLRA*, 961 F.3d 452, 461 (D.C. Cir. 2020) (*Local 1929*).

[42] 961 F.3d at 458 (internal quotation omitted).

[43] *Id.* (quoting *El Paso I*, 70 FLRA at 503 (quoting *Fort Stewart*, 495 U.S. at 645)).

[44] *Id.* (quoting *Fort Stewart*, 495 U.S. at 646).

[45] *Id.* at 459.

Authority's interpretation that there is no substantive difference between the terms "conditions of employment" and "working conditions" as those terms are practically applied.[46] The court remanded the matter to the Authority.[47]

On remand, in *El Paso III*,[48] the Authority again addressed the meaning of "working conditions." "Because Congress left 'working conditions' undefined in the Statute," the Authority found "Congress intended 'working conditions' to have a definition consistent with case law developed by the Federal Labor Relations Council (the Council) under Executive Order [(E.O.)] 11,941."[49] The Authority again found that "working conditions" must have a separate meaning from "conditions of employment."[50] The Authority "define[d] 'working conditions' as the circumstances or state of affairs attendant to one's performance of a job."[51] Thus, the Authority concluded that, to determine whether an agency has a duty to bargain when it makes a "change to a personnel policy, practice, or matter," the Authority must determine whether the change "affects the circumstances or state of affairs attendant to one's performance of a job."[52] Again, the Authority did not address well-established *Antilles* precedent effectively defining "working conditions" as "work situation or employment relationship." However, the Authority stated: "While not addressed in this decision, we believe that it is time for the Authority to reexamine *Antilles*."[53]

Immediately on *El Paso III*'s heels, the Authority issued a decision again signaling that *Antilles* might be reexamined.[54] Then, in *NLRB*[55] – a decision on exceptions from an arbitrator's award – the Authority demonstrated that it intended to apply the *El Paso III* definition of "working conditions" narrowly. Specifically, the Authority found the agency's elimination of a health-service unit did not affect employees' working conditions, because the arbitration award under review did not "demonstrate that the elimination of the health service units affected the circumstances attendant to the grievants' performance of their jobs."[56] The union in *NLRB* "cite[d] cases where the Authority found that the price of agency-provided dining services is a condition of employment, held that elimination of agency-provided water bottles changes a condition of employment, and determined that the availability of agency-provided daycare facilities is a condition of employment."[57] The Authority determined that "none of the [cited] cases applied the new standard for determining whether a change affects an employee's working conditions – the circumstances or state of affairs attendant to one's performance of a job."[58] The Authority also stated those cases "d[id] not demonstrate that the change[s] affected the performance of an employee's day-to-day job," so the Authority would "no longer follow the test set forth in" those cases.[59]

However, for at least four reasons, we believe a reexamination of *El Paso III* and its limited progeny – and a reaffirmance of the longstanding *Antilles* test – is warranted. First, the definition of "working conditions" that the Authority again adopted in *El Paso III* – "the circumstances or state of affairs attendant to one's performance of a job" – was precisely the one the D.C. Circuit said was based on a "misread[ing]" of *Fort Stewart*.[60] Second, none of the Council decisions the Authority cited in *El Paso III* adopted such a definition,[61] and the Authority did not cite any other support for that definition. Third, *El Paso III* ignored the decades of precedent, discussed above, that effectively defined "working conditions" as "work situation or employment relationship." We note this definition is consistent with a common definition of "[c]onditions" as "the circumstances affecting the way in which people live or work, esp[ecially] with regard to their safety or well-being: *harsh working and living conditions*."[62] Fourth, the Authority applied its *El Paso III* definition narrowly to reverse longstanding precedent and remove matters from the duty to bargain – contrary to courts' repeated

[46] *Id.* at 458 & n.2.
[47] *Id.* at 461.
[48] 72 FLRA 7.
[49] *Id.* at 10.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at 10 n.35.
[54] *DOD, DOD Educ. Activity*, 72 FLRA 15, 16 n.13 (2021) (Member DuBester dissenting) (stating that "[t]he *Antilles* test likewise will merit a plain-wording reformation to clearly differentiate between the terms 'conditions of employment' and 'working conditions'").
[55] 72 FLRA 226 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part).
[56] *Id.* at 229.
[57] *Id.* at 228 (citing *Local 1547*, 64 FLRA at 637-38; *DOL*, 38 FLRA at 909 (1990); *AFGE, AFL-CIO*, 2 FLRA 603, 606-08 (1980)).
[58] *Id.*
[59] *Id.* at 228-29.
[60] *Local 1929*, 961 F.3d at 459.
[61] *See IAMAW, Loc. Lodge 1859*, 6 FLRC 254, 261 (1978); *Phila. Metal Trades Council, AFL-CIO*, 1 FLRC 457, 461 (1973); *Fed. Emps. Metal Trades Council of Charleston*, 1 FLRC 416, 417 (1973); *AFGE, Loc. 2595*, 1 FLRC 72, 74-75 (1973).
[62] *New Oxford Am. Dictionary* (3d ed. 2010).

recognition that the duty to bargain over "conditions of employment" is a broad one.[63]

We also reaffirm that "there is no substantive difference between '*conditions of employment*' and 'working conditions' as those terms are practically applied."[64] As noted above, the D.C. Circuit has found this interpretation "reasonable."[65] Moreover, we note that the interpretive "canon against surplusage" – previously cited by the Authority to insist that "conditions of employment" and "working conditions" must be distinct concepts – is "not an absolute rule."[66]

For the above reasons, we reaffirm the *Antilles* test, and we reverse *El Paso III* and its progeny – including *NLRB* – to the extent those decisions are inconsistent with this decision.

Applying *Antilles* to the proposal at issue here, there is no dispute that the proposal pertains to bargaining-unit employees.[67] Therefore, the first factor of the *Antilles* test is met.

As for the second factor of the *Antilles* test, the Union argues the following with respect to the need for an ice dispenser in the bargaining-unit employees' break room: (1) the area in which those employees work is locked, with restricted access, "because of the not[-]infrequent occurrence of disruptive and/or imminently suicidal [v]eteran-patients";[68] (2) the Agency requires the employees to remain in the Clinic "when staffing drops to the minimum level established by management" and when the employees "need to monitor disruptive and/or suicidal [v]eteran-patients in certain situations";[69] (3) the employees are "regularly"[70] required to remain in the Clinic due to frequent employee illness, scheduled leave and/or days off, and reductions in "allowable and/or filled number[s] of Full-Time Equivalent positions in [the Clinic] over the past few years,"[71] combined with the fact that "management cannot always cover for the missing staff";[72] (4) based on these factors, the employees are unable to leave the area "for as long as five hours" in some cases,"[73] which "adversely impacts, with some frequency and regularity, [their] ability to take breaks, lunches, and personal breaks (including for hydration)";[74] (5) although the Agency claims it takes only fifty-one seconds for employees to get to an ice machine on another floor outside the Clinic,[75] "that still means a minimum of four to five minutes that [an employee] would have to be off the unit to get ice";[76] (6) "[l]eaving disruptive and/or imminently suicidal [v]eteran-patients unattended or insufficiently attended for that period is more than long enough for major violence and/or completed suicide to occur";[77] and (7) "[s]ome persons may have health conditions which require the ready availability of ice to cool down when, as periodically happens in older buildings such as [the building at issue here], building temperatures spike to a high level."[78]

Regarding the need for the ice dispenser to be *hands-free*, the Union contends that: (1) the ice dispenser would be in a "common area authorized for use by all

[63] *See, e.g.*, *EEOC v. FLRA*, 744 F.2d 842, 845 (D.C. Cir. 1984) (stating that "[t]he term 'conditions of employment' is expansively defined" in § 7103(a)(14) of the Statute); *id.* at 850 n.18 (stating that "the Authority has consistently adopted, with this court's sanction, a *broad interpretation* of the phrase 'conditions of employment'"); *Libr. of Cong.*, 699 F.2d 1280, 1284 (D.C. Cir. 1983) (stating that "[t]he term 'conditions of employment' is . . . broadly defined"); *id.* at 1285 (stating that "[t]he statutory framework . . . may be envisioned as imposing a broadly defined duty to bargain over conditions of employment that is subject only to the express statutory exceptions"); *id.* (finding "Congress manifestly established a generalized obligation on an agency to bargain with the exclusive representative of the agency's employees"); *id.* (finding "the Authority's more expansive interpretation of the scope of the [agency's] duty to bargain is fully consistent with the [Statute's] basic purposes and schema"); *id.* at 1286 (holding that, "apart from the express exceptions, Congress intended the bargaining obligation to be construed broadly"); *DOD*, 685 F.2d at 648 n.3 (noting the Authority "has shown consistency in giving a broad reading to the 'condition[s] of employment' language," and the Authority's "admittedly broad reading of the [S]tatute with regard to conditions of employment is reasonable"). *Cf. GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 76 (2014) (Member Pizzella dissenting) (describing the "troubling implication" that interpreting "conditions of employment" too narrowly could have for purposes of the discrimination provision of § 7116(a)(2) of the Statute).

[64] *Davis-Monthan AFB*, 64 FLRA at 90 (emphasis added); *U.S. DHS, CBP*, 64 FLRA at 995; *Local 1547*, 64 FLRA at 638; *see also Kirtland AFB*, 64 FLRA at 175 n.10; *SSA*, 55 FLRA at 980 n.7, 982 n.12.

[65] *Local 1929*, 961 F.3d at 458 & n.2; *U.S. DHS, CBP*, 647 F.3d at 365.

[66] *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 385 (2013).

[67] Statement Br. at 3 (conceding that the proposal satisfies the first factor of *Antilles*).

[68] Resp. at 2.

[69] *Id.* at 5.

[70] *Id.* at 2.

[71] *Id.* at 3.

[72] *Id.*

[73] *Id.* at 2.

[74] *Id.* at 5.

[75] Statement Br. at 3.

[76] Resp. at 5.

[77] *Id.* at 3.

[78] *Id.*

employees supported by the common area";[79] (2) "[v]eterans sometimes achieve access to the employee break room and could help themselves to ice even with their hands";[80] (3) "[a]s COVID-19 has taught . . . us, and medical professionals have long known, illness can often easily be transmitted person-to-person via inanimate objects and surfaces – especially if proper hygiene is not observed";[81] (4) "[u]sing a scoop and ice bucket, as the [A]gency wants, would mean many hands, including some carrying illness, touching the same objects and spreading sickness";[82] (5) "[t]he alternative of using appropriate [personal protective equipment] and cleansing/sterilization of an ice scoop or bucket between uses would involve more time, less efficiency, and less certainty of uninfected ice and equipment";[83] and (6) hands-free dispensing of ice is "in accordance with Centers for Disease Control [and Prevention] recommendations."[84]

The Agency generally does not dispute the Union's contentions but, with respect to staffing and coverage issues, asserts that: (1) "the break and lunch issue is not an *everyday* occurrence, and very much depends on the amount of walk-in traffic and unexpected illness";[85] and (2) the Clinic "is fully staffed, as far as . . . bargaining[-]unit employees go, but those unpredictable items are what impact breaks and meals and are not always within [managers'] control[,] which is why [n]urse [m]anagers cover for breaks, meals, etc. as they are able."[86] The Agency also asserts that "employees have access to a freezer, which can be utilized should an employee want to bring in their own ice."[87]

However, the Union is not arguing that the issues arise every day, that there are unfilled bargaining-unit full-time equivalents, or that nurse managers do not provide coverage "as they are able."[88] Rather, the Union argues that the coverage issues occur "regularly,"[89] and it clearly spells out various health and safety implications of not having hands-free ice available in the break room. Further, the Agency's claim that employees may bring in their own ice does not rebut the Union's stated health concerns regarding multiple people being able to handle ice. Additionally, the Agency does not dispute the Union's specific claims regarding how having a hands-free ice dispenser in the break room would further bargaining-unit employees' health and safety.

For these reasons, we find the record establishes a direct connection between the proposal's subject matter and bargaining-unit employees' "working conditions," i.e., their "work situation or employment relationship." We note, in this regard, that the Authority previously has found a direct connection between break-room appliances/machines and employees' work situations.[90] These decisions lend further support to finding the second *Antilles* factor met.[91]

As the proposal meets both *Antilles* factors, we find it concerns bargaining-unit employees' conditions of employment.

3. The Agency's claim that it has not changed conditions of employment is unavailing in the circumstances of this case.

The Agency argues it has no obligation to bargain because it did not *change* any conditions of employment.[92] However, the Authority has held parties have a duty to bargain over supplemental agreements where they have a national agreement that allows for such supplemental agreements.[93] In its response, the Union asserts the parties' national collective-bargaining agreement (CBA) establishes a duty to bargain over the proposal.[94] Article 32, Section 2 of the CBA provides: "Other topics appropriate for local bargaining include, but are not limited to, access to microwaves, refrigerators, storage, coffee pots, and furniture."[95] According to the Union, this extends to allow bargaining over water-dispensing and ice-dispensing machines.[96]

[79] *Id.* at 2.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 2-3.
[85] Statement Br. at 2 (emphasis added).
[86] *Id.*
[87] *Id.* at 3.
[88] *Id.* at 2.
[89] Resp. at 2.
[90] *VAMC Lexington*, 44 FLRA at 189 (finding direct connection between employees' work situation and availability of vending machines in break room, particularly a vending machine that provided ice); *Dep't of Treasury, IRS (Wash., D.C.)*, 27 FLRA 322, 325 (1987) (finding conditions of employment to include the availability of a refrigerator).
[91] *See also NAGE, Loc. R1-144*, 43 FLRA 1331, 1346 (1992) (finding proposal requiring access to chilled water concerned a condition of employment).
[92] Statement Br. at 2-3. Where a proposal raises both a negotiability dispute and a bargaining-obligation dispute, the Authority may resolve both disputes in a negotiability case. *AFGE, Loc. 1748, Nat'l Council of Field Labor Locs.*, 73 FLRA 233, 233 (2022).
[93] *U.S. DOJ, Fed. BOP, Metro. Det. Ctr. Brooklyn, N.Y.*, 69 FLRA 44, 46 (2015) (finding agency had duty to bargain with local where the agreement expressly allowed supplement agreements on the issue at the local level).
[94] Resp. at 2.
[95] *Id.*
[96] *Id.*

As noted above, the Agency did not file a reply and, therefore, does not dispute the Union's asserted meaning. Section 2424.32(c)(ii)(2) of the Authority's Regulations provides that a party's "[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion."[97] Consistent with this regulation, we find the Agency has conceded that the parties' CBA creates a duty to bargain over access to water-dispensing and ice-dispensing machines.[98] As such, any alleged failure to make a change is irrelevant to whether the Agency has a duty to bargain, and we reject the Agency's argument.

4. The Agency has not demonstrated the proposal is contrary to management rights under § 7106 of the Statute.

The Agency further argues the proposal is contrary to management's rights "to determine the mission, budget, organization, number of employees, and internal security practices of the agency."[99] A proposal that affects a management right under § 7106(a) of the Statute is nevertheless within the duty to bargain if it is an appropriate arrangement under § 7106(b)(3) of the Statute.[100] The Union asserts in its response that the proposal is an appropriate arrangement under § 7106(b)(3),[101] and, as noted above, the Agency did not file a reply. Nor did it argue, in its statement, that the proposal is not an appropriate arrangement.[102]

Again, § 2424.32(c)(ii)(2) of the Authority's Regulations provides that a party's "[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion."[103] Therefore, even assuming, without deciding, that the proposal affects the cited management rights,[104] we find the Agency has conceded that the proposal is an appropriate arrangement.[105] As such, the Agency does not demonstrate the proposal is outside the duty to bargain on management-rights grounds.

5. The Agency has not demonstrated that the proposal is contrary to an Agency-wide regulation.

The Agency argues the proposal is outside the duty to bargain because it conflicts with an Agency-wide regulation in two regards.[106] To establish that an agency-wide regulation relieves an agency of its duty to bargain, the agency must: (1) identify a specific agency-wide regulation; (2) show that there is a conflict between its regulation and the proposal; and (3) demonstrate that is regulation is supported by a compelling need within the meaning of § 2424.50 of the Authority's Regulations.[107] The version of § 2424.50 applicable in this case provides:

> A compelling need exists for an agency rule or regulation concerning any condition of employment when the agency demonstrates that the rule or regulation meets one or more of the following illustrative criteria:
>
> (a) The rule or regulation is essential, as distinguished from helpful or desirable, to the accomplishment of the mission or the execution of functions of the agency . . . in a manner that is consistent with the requirements of an effective and efficient government.[108]

The Agency asserts the proposal conflicts with § 1005 of an Agency-wide regulation titled "Department of VA, Use of Appropriated Funds to Purchase Kitchen Appliances" (the regulation).[109] As relevant here, § 1005 of the regulation provides: "Refrigerators may have a built-in ice maker where a health and safety need is justified[; however,] [t]he icemakers may not be located in-the-door, nor may the refrigerator have water dispensing capabilities."[110] The regulation also provides "[i]ce making machines separate from refrigerator ice makers may be purchased if refrigerator ice makers are not of sufficient capacity for the

[97] 5 C.F.R. § 2424.32(c)(ii)(2).
[98] *AFGE, Loc. 12*, 73 FLRA 603, 606 n.46 (2023) (finding agency conceded to union's assertion in negotiability dispute by failing to respond to the assertion).
[99] Statement Br. at 4-5 (quoting 5 U.S.C. § 7106(a)(1)) (internal quotation marks omitted).
[100] *NTEU*, 72 FLRA 752, 755 (2022).
[101] Resp. at 5-6.
[102] *See* Statement Form at 5-6 (leaving area for responding to appropriate-arrangement assertion empty); Statement Br. at 4-5 (arguing proposal affected management right, but not making any argument regarding § 7106(b)(3)).
[103] 5 C.F.R. § 2424.32(c)(ii)(2).
[104] *IFPTE, Loc. 4*, 73 FLRA 635, 636 (2023) (assuming, without deciding, that proposal affected a management right but finding it within the duty to bargain as an appropriate arrangement under § 7106(b)(3) of the Statute).
[105] *See, e.g.*, *Antilles Consol. Educ. Ass'n*, 73 FLRA 282, 284 (2022) (finding agency conceded proposal was appropriate arrangement by failing to respond to union's assertion); *NAIL, Loc. 5*, 67 FLRA 85, 89 (2012) (same).
[106] Statement Br. at 3-4.
[107] *AFGE, SSA Gen. Comm.*, 68 FLRA 407, 408 (2015) (Member Pizzella dissenting on other grounds).
[108] 5 C.F.R. § 2424.50(a).
[109] Statement Br. at 4; *see also* Statement, Ex. 9 at 4-5.
[110] Statement, Ex. 9 at 5.

number of employees served by the common area or are justified as a health and safety need of employees."[111]

Even assuming the Agency has met the first two prongs of the three-prong test set forth above, we find it fails to satisfy the third prong of that test. The entirety of the Agency's compelling-need argument is as follows:

> [T]he Agency has a compelling need for this regulation as the entire regulation is regarding the Agency's appropriate usage of appropriated funds to purchase kitchen appliances. This regulation is essential and is distinguished from simply being helpful or desirable as it is necessary for ensuring appropriate usage of appropriated funds for the purchasing of kitchen furnishings.[112]

Apart from its conclusory reasoning, the Agency provides no basis for concluding that, if agreed upon and implemented, the Union's proposal would affect the Agency's ability to accomplish its mission or perform its functions. Accordingly, we find the Agency has not established a compelling need for § 1005 of the regulation under § 2424.50(a).[113]

The Agency also argues the proposal conflicts with § 1001 of the regulation.[114] Section 1001 of the regulation, as relevant here, provides:

> In a June 25, 2004, decision, the Comptroller General (CG), modifying earlier CG decisions regarding the use of appropriated funds, concluded that appropriated funds may be used to purchase kitchen appliances ordinarily considered personal in nature, such as refrigerators, microwave ovens, coffee makers, and ice makers, when the primary benefit of their use is reasonably related to the efficient operation of an agency rather than an individual.[115]

According to the Agency, the proposal does *not* provide a primary benefit reasonably related to the efficient operation of the Agency, and therefore, is contrary to the regulation.[116] Contrary to the Agency's assertion, the 2004 CG decision referenced in the regulation supports a conclusion that there is a benefit to the Agency. The 2024 CG decision[117] provides that the use of appropriated funds to obtain kitchen equipment for employees to use "contributes to the efficient operations of the agency and the health of personnel, and is one of many small but important factors that can assist federal agencies in recruiting and retaining the best work force."[118] Because the proposal would provide a benefit to the Agency's efficient operation – as demonstrated by the very case cited in the Agency-wide regulation at issue – the Agency fails to demonstrate how the proposal conflicts with § 1001 of the regulation. Accordingly, we reject this argument.[119]

For the above reasons, we find the proposal is within the duty to bargain.

IV. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, bargain over the proposal.

---

[111] *Id.*
[112] Statement Form at 5.
[113] *Ass'n of Civilian Technicians, Mont. Air Chapter, No. 29*, 56 FLRA 674, 677 (2000) (generalized and conclusory reasoning is not enough to support a finding of compelling need).
[114] Statement Br. at 4.
[115] Statement, Ex. 9 at 2 (footnote omitted).
[116] Statement Br. at 4.
[117] We note that while CG decisions are not binding on the Authority, they serve as expert opinion that should be prudently considered. *U.S. Dep't of Com., Nat'l Oceanic & Atmospheric Admin., Nat'l Weather Serv.*, 68 FLRA 976, 979 (2015), *recons. denied*, 69 FLRA 256 (2016).
[118] *Use of Appropriated Funds to Purchase Kitchen Appliances*, B-302993, 2004 WL 1853469, at *4 (Comp. Gen. June 25, 2004).
[119] *Pro. Airways Sys. Specialists*, 64 FLRA 474, 478 (2010) (rejecting a contrary-to-agency-wide-regulation argument where the agency failed to demonstrate the proposal was inconsistent with the cited regulation).

Member Kiko, dissenting:

While I would also find the Union's proposal for an ice machine in the clinic concerns a condition of employment, I disagree with the majority's decision to once again abandon precedent that provides the labor-management community with valuable guidance.[1] In *U.S. DHS, U.S. CBP, El Paso, Texas* (*El Paso*)[2] and *NLRB*,[3] the Authority clarified a narrow but important distinction that should be plain to anyone reading the Federal Service Labor-Management Relations Statute (the Statute): conditions of employment and working conditions cannot be synonymous.[4]

In § 7103(a)(14), Congress defined "conditions of employment" as "policies, practices, and matters . . . affecting working conditions," but did not provide a definition for the term "working conditions."[5] Under this section's plain wording, "working conditions" are circumstances related to employees' work that can be affected, while "conditions of employment" are the policies, practices, and matters that affect those work circumstances.[6]

When engaged in statutory interpretation, courts strive to avoid interpretations that deprive Congress's words of their meaning.[7] However, the Authority held for the first time in 2009 that, since courts and the Authority had previously accorded "working conditions . . . a broad interpretation," going forward the term would be "effectively synonymous" with "conditions of employment."[8] Thus, the Authority adopted an effectively circular definition—i.e., a condition of employment is a policy, practice, or matter affecting a condition of employment.

As the Authority recognized in *El Paso*,[9] such an interpretation does not clarify the Statute's meaning; it obscures it.[10] Thus, drawing on pre-2009 Authority precedent[11] and case law from the Federal Labor Relations Council,[12] the Authority defined "working conditions" instead as the "circumstances or state of affairs attendant to one's performance of a job."[13] Contrary to the majority's claim, I believe this definition hews closer to the common definition of "conditions": "the circumstances affecting the way in which people live or work."[14] Under the definition the Authority articulated in *El Paso*, "working conditions" are employees' work-related circumstances—i.e., the circumstances in which employees work—while "conditions of employment" are the policies, practices and matters that affect those circumstances.[15]

Unfortunately, with today's decision, the

[1] *See, e.g.*, *U.S. DHS, U.S. CBP, Seattle, Wash.*, 74 FLRA 129, 137 (2024) (Member Kiko dissenting) (overturning—sua sponte and without a replacement—previous Authority guidance to arbitrators on how to efficiently evaluate requests for attorney fees in non-disciplinary cases).

[2] 72 FLRA 7 (2021) (Member DuBester dissenting in part).

[3] 72 FLRA 226 (2021) (Member Abbott concurring; Chairman DuBester dissenting in part).

[4] 5 U.S.C. § 7103(a)(14) ("'[C]onditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions.").

[5] *Id.*

[6] *See* 5 U.S.C. § 7103(a)(14).

[7] *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 26 (2012) ("[C]ourts avoid a reading [of a statute] that renders some words altogether redundant."); *see also Clackamas Gastroenterology Assocs., P.C. v. Deborah Wells*, 538 U.S. 440, 444 (2003) (noting the need to interpret the definition of "employee" in the Americans with Disabilities Act of 1990 to avoid what would otherwise be "'mere nominal definition' that is 'completely circular and explains nothing'" (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)).

[8] *U.S. Dep't of the Air Force, 355th MSG/CC Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 90 (2009) ("[T]here is no substantive difference between 'conditions of employment' and 'working conditions' as those terms are practically applied.").

[9] *El Paso*, 72 FLRA at 10 (finding that "the Authority erred in finding that 'working conditions' and 'conditions of employment' were synonymous").

[10] *See Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983) ("[T]he [Authority] was intended to develop specialized expertise in its field of labor relations and to use that expertise to give content to the [Statute's] principles and goals."); *AFGE, AFL-CIO, Council of Locs. No. 214 v. FLRA*, 798 F.2d 1525, 1528 (D.C. Cir. 1986) ("Congress has entrusted the [Authority] with the primary responsibility for administering and *interpreting* the [Statute]." (emphasis added)).

[11] *El Paso*, 72 FLRA at 10 n.37 (citing *AFGE, Loc. 1812*, 59 FLRA 447, 448 (2003) (Chairman Cabaniss concurring)); *see also Naval Amphibious Base, Little Creek, Norfolk, Va.*, 9 FLRA 774, 777-78 (1982) (finding that change to two employees' working conditions did not change their conditions of employment because the agency had not "established new, or changed existing, personnel policies, practices or matters affecting working conditions").

[12] *El Paso*, 72 FLRA at 10 n.36 (citing *IAMAW, Loc. Lodge 1859*, 6 FLRC 254, 261 (1978)).

[13] *Id.* at 10.

[14] Majority at 9 (quoting *New Oxford Am. Dictionary* (3d ed. 2010)).

[15] *El Paso*, 72 FLRA at 10.

majority returns to the Authority's previous circular definition, "reaffirm[ing] that 'there is no substantive difference between conditions of employment and working conditions as those terms are practically applied.'"[16] Because I believe *El Paso* and *NLRB* clarified an important distinction between two key terms in the Statute, I would apply those precedents here.

As the Union demonstrates that access to an ice machine in the locked clinic is a matter affecting the circumstances attendant to the bargaining-unit employees' performance of their work,[17] I would also find that the Union's proposal concerns a condition of employment.[18] However, because I disagree with the majority's decision to discard the *El Paso* interpretation of conditions of employment in favor of an inferior circular definition, I dissent.

[16] Majority at 10 (emphasis omitted) (internal quotation marks omitted).

[17] *See, e.g.*, Resp. at 5 (arguing Agency does not permit employees to leave clinic "when staffing drops to the minimum level established by management," particularly when the employees "need to monitor disruptive and/or suicidal [v]eteran-patients in certain situations"); *id.* at 4 ("Leaving disruptive and/or imminently suicidal [v]eteran-patients unattended or insufficiently attended for [the time it takes to retrieve ice from outside the clinic] is more than long enough for major violence and/or completed suicide to occur."); *id.* at 3 ("[S]ome persons may have health conditions which require the ready availability of ice to cool down when, as periodically happens in older buildings such as [the building at issue here], building temperatures spike to a high level."); Statement Br. at 2 (acknowledging periods where employees cannot leave clinic but arguing that such occasions are not "an everyday occurrence").

[18] *See El Paso*, 72 FLRA at 10 ("[T]o determine whether the [a]gency had a duty to bargain, we must ask whether the change to a personnel policy, practice, or matter affects the circumstances or state of affairs attendant to one's performance of a job.").