64 FLRA No. 77

PROFESSIONAL AIRWAYS
SYSTEMS SPECIALISTS
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

0-NG-2857

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

January 29, 2010

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

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor Management-Relations Statute (the Statute) and concerns the negotiability of three proposals. [2] The Agency filed a statement of position (SOP), and the Union filed a response.

For the reasons that follow, we find that Proposals 1 and 3 are within the duty to bargain and Proposal 2 is outside the duty to bargain.

II. Background

According to the parties, for approximately twenty years, the Agency certified Agency employees working at its facilities in Puerto Rico as eligible for enrollment of their dependent children in the Department of Defense Dependent Schools (DoDDS) system in Puerto Rico. [3] Record of Post-Petition Conference (Record) at 1. The Agency states that the Department of Defense (DoD) never "looked behind" the Agency's certifications. *Id.* The parties agree that, in 2004, after an Agency review of the certification process, the Agency declined to certify employees who had been born in Puerto Rico, and whose children had been born in Puerto Rico, as eligible for enrollment of their children in DoDDS because such employees did not have "documented return rights." [4] *Id.* at 2-3.

The Union filed an unfair labor practice (ULP) charge, which was resolved by a settlement agreement (the ULP settlement agreement) with the Agency. Among other things, the settlement agreement obligated the Agency to: (1) allow all children enrolled in the DoDDS system to complete the 2004-05 school year; and (2) bargain over its decision to no longer certify the children of certain Agency employees for enrollment in that system. *Id.* at 2. The proposals in dispute in this case resulted from bargaining pursuant to the ULP settlement agreement. [5] *Id.*

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

2. In its petition for review the Union stated that there is "one proposal in dispute with three (3) sections." Petition at 3. For purposes of this decision and for reasons expressed in Section III, the sections of the proposal are numbered chronologically as Proposals 1, 2, and 3.

3. The parties did not define the term "certify." Based on the record as a whole, however, we conclude that the term means a designation by the Agency that employees' dependent children are eligible to enroll in the DoDDS system. We note that the parties refer to "certify[ing] employees" and "certify[ing] the [dependents]" of employees interchangeably. Record of Post-Petition Conference at 2.

4. The Union does not dispute the Agency's explanation that the term "documented return rights" refers to the right of an employee born in the Continental United States to return from Puerto Rico to the United States after the completion of an assignment. Record at 2.

5. During the post-petition conference, the parties stated that an unrelated grievance was pending. Record at 1. The Union was requested to submit a copy of the grievance with its submission. A review of the record revealed that the grievance appeared to be related to the issues involved in the case. Accordingly, the Authority issued a show cause order directing the Union to show cause why the petition should not be dismissed on that ground. In its response to the show cause order, the Union stated that it had withdrawn the grievance. As such, a bargaining obligation dispute does not exist, and there is no impediment to resolution of the petition in this case.

III. Preliminary Matter

The Union requests that the Authority "sever" Sections 14(a), 15(a), and 16 because each of those sections can operate independently. The Union also requests severance of the subsections of Section 16 because each of those subsections also can operate independently. Petition for Review (Petition) at 8; Response at 15. According to the Union, Section 16 concerns eligibility criteria for unit employees, and those criteria are not dependent upon one another. The Agency does not object to the Union's severance request. *See* SOP at 14.

Under § 2424.25(d) of the Authority's Regulations, a union "must support its [severance] request with an explanation of how the severed portion(s) of the proposal . . . may stand alone, and how such severed portion(s) would operate." 5 C.F.R. § 2424.25(d). If the severance request meets the Authority's regulatory requirements, then the Authority severs the proposal and rules on the negotiability of its separate components. *See, e.g., AFGE, Local 3354*, 54 FLRA 807, 811 (1998). In the instant case, in the absence of any objection by the Agency, and because the Union has demonstrated that Sections 14(a), 15(a), and 16 each may operate independently, we grant the Union's request as to those sections, and have numbered them as Proposals 1, 2, and 3, respectively. As to the Union's further request with respect to Proposal 3, because the Union has demonstrated that the disputed subsections can each operate independently and the separate subsections have been specifically addressed by the parties, we grant the Union's request as to those subsections as well. *See, e.g., AFGE, Local 3157*, 44 FLRA 1570, 1570 n.1 (1992); *Overseas Educ. Ass'n, Inc.*, 27 FLRA 492 (1987), *aff'd as to other matters sub nom. Overseas Educ. Ass'n v. FLRA*, 858 F.2d 769 (D.C. Cir. 1988).

IV. Proposal 1

> Section 14. Certification
>
> a. The FAA shall certify the dependent children of all bargaining unit employees currently assigned to any FAA facility outside the CONUS in accordance with Title 10 USC Sec. 2164 and [Department of Defense Instruction (DODI)] 1342.26 as eligible to attend the . . . (DoD) School System for as long as the bargaining unit employee is assigned to a facility outside the CONUS.

A. Positions of the Parties

1. Agency

The Agency contends that Proposal 1 is contrary to DODI 1342.26, Section 6.2.2.2, which sets forth eligibility requirements for children to enroll in the DoDDS system. [6] The Agency asserts that the Union interprets this proposal to mean that *all* unit employees assigned to Agency facilities outside the Continental United States (CONUS) meet DoD's eligibility requirements. SOP at 2, 3. The Agency asserts that this interpretation is contrary to DODI 1342.26, Section 6.2.2.2 because "children of all bargaining unit employees assigned to the Agency's facilities outside the [CONUS] are not eligible to participate in the [DoDDS] system." *Id.* at 2.

In particular, according to the Agency, under the regulation, "[e]ligible employees must be subject by policy and practice to transfer or reassignment to a location where English is the language of instruction in schools normally attended by dependent children of Federal personnel." *Id.* at 3. The Agency asserts that this requirement means that "children of those individuals who are natives of Puerto Rico or Guam, have been continuously stationed there, and do not have documented return rights[, or] a mobility agreement[,] are not eligible to enroll in [DoDDS system]." *Id.* The Agency states that DoD's intention regarding the eligibility requirements is contained in a memorandum of agreement (MOA) between the FAA and DoD. [7]

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6. Neither party provided a copy of DODI 1342.26. However, the Agency asserts, and the Union does not dispute, that DODI 1342.26, Section 6.2.2.2 allows for the enrollment of:

> Full-time civilian employees of the Federal Government, not residing in permanent quarters on a military installation residing in a territory, possession or commonwealth, who are subject by policy and practice to transfer or reassignment to a location where English is the language of instruction in the schools normally attended by dependent children of Federal personnel.

SOP at 10-11. Accordingly, we apply this wording in resolving the petition.

7. The Agency states that the MOA lists three categories of employees whose dependents are eligible for the program: Category I — Employees with return-rights agreements to facilities or offices in the CONUS; Category II — Employees subject to transfer from Puerto Rico; Category III — Employees at facilities that were subject to being closed under which circumstances the employees would be reassigned to the CONUS. SOP at 3, Attach., "MOA."

The Agency further asserts that it has included the eligibility requirements contained in DODI 1342.6 in FAA Human Resources Policy Bulletin # 37. [8] *Id.* at 3-4. The Agency contends that this policy "regulates the enrollment of dependents of FAA bargaining and non-bargaining unit employees in DoD schools." *Id.* at 4. The Agency notes that one of the eligibility criteria listed in Section 2 of Policy Bulletin # 37 is that the bargaining unit "[e]mployee must be assigned to a position in Puerto Rico or Guam and have documented return rights to a position in the [CONUS]." *Id.*, Attach., entitled "Policy Bulletin # 37" at 1.

The Agency asserts that Proposal 1 is inconsistent with Policy Bulletin # 37, which, according to the Agency, is an Agency regulation for which there is a compelling need pursuant to § 2424.11 of the Authority's Regulations. [9] According to the Agency, the eligibility requirements in Policy Bulletin # 37 are in accordance with DODI 1342.26 and, in order to certify a unit employee and the employee's dependents as eligible for enrollment in the DoDDS system, the "FAA must comply with the terms set forth in DODI 1342.26." *Id.* at 4. The Agency claims that it has "no jurisdiction over the operation and/or eligibility requirements" set forth in the DoD instruction. *Id.*

The Agency also contends that Proposal 1 is contrary to its right to contract out under § 7106(a)(2)(B) of the Statute. *Id.* at 4-5. The Agency explains that it has decided to contract out the education of employees' dependents to the contractor, DoD, and that Proposal 1 effectively dictates the terms of its contract with DoD. In support, the Agency cites *NTEU*, 32 FLRA 544 (1988). The Agency further contends that Proposal 1 is not an appropriate arrangement because it excessively interferes with its right to determine to whom, and under what terms, it may contract out, to DoD or any other qualified vendor, the function of providing dependents' education.

2. Union

The Union asserts that it "is not attempting to dictate the operation and/or eligibility requirements under the DoD regulations." Petition at 5. The Union states that the "proposal simply recognizes that all current bargaining employees assigned to FAA facilities outside [the CONUS] meet DoD's eligibility requirements." *Id.* The Union also states that the proposal "does not add, change, or alter any eligibility standards that are outside of the control of the [Agency]." *Id.*

8. Policy Bulletin # 37 provides, in pertinent part:

> ELIGIBILITY FOR ENROLLMENT IN DEPARTMENT OF DEFENSE (DOD) DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS (DDESS)
>
> . . . .
>
> 1. Purpose. This document provides eligibility requirements for participation of FAA employees' dependents in the DOD Domestic Dependents Elementary and Secondary Schools (DDESS) program . . . .
>
> 2. Eligibility Criteria. Employees who meet one or more of the following criteria are eligible to enroll their dependent children in the DDESS program if they choose to do so.
>
> - Employee is assigned to a position in Puerto Rico or Guam and has documented return rights to a position in the Continental United States (CONUS).
> - Employee is assigned to a position in Puerto Rico or Guam and has a written mobility agreement that could require the employee's potential involuntary reassignment to a position in the CONUS.
> - Employee is assigned to a position in Puerto Rico or Guam that has been officially designated by management as under consideration for closure, with the potential involuntary reassignment of current employees to a position in the CONUS.
>
> . . . .

9. The criteria for determining whether there is a compelling need for agency rules and regulations are set out at 5 C.F.R. § 2424.50, which provides, in pertinent part:

> A compelling need exists for an agency rule or regulation . . . 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 . . . in a manner that is consistent with the requirements of an effective and efficient government.
>
> (b) The rule or regulation is necessary to ensure the maintenance of basic merit principles.
>
> (c) The rule or regulation implements a mandate to the agency . . . under law or other outside authority, which implementation is essentially nondiscretionary in nature.

The Union states that the Agency's interpretation of the DoD policy as precluding enrollment of dependents of certain natives of Puerto Rico or Guam in the DoDDS system "goes well beyond DoD's own eligibility requirements." Response at 3. The Union states that, as reflected by the Agency's Human Resources Policy Manual (FAA, HRPM), employees, including unit employees in Puerto Rico, are subject to being transferred and reassigned to any location at any time. [10] According to the Union, this constitutes an FAA policy and practice of transferring and reassigning employees in Puerto Rico to locations where English is the language of instruction in schools.

Further, according to the Union, the Agency "creates an arbitrary interpretation of th[e] DoD eligibility directive by relying partly on an undated and unsigned [MOA] that is not applicable to . . . unit employees." *Id.* The Union asserts that the MOA referred to by the Agency is "unsigned, undated and inapplicable." *Id.* The Union asserts that Section 3 of the MOA defines the term of the agreement from October 1, 1994, through June 15, 1995, and that the MOA sets forth "a specific price for specific students attending the 1994-1995 school year." *Id.* Therefore, the Union asserts that the MOA is no longer in effect. *Id.*

The Union also asserts that Policy Bulletin # 37 will not apply to unit employees until completion of the current negotiations. The Union explains that, under the ULP settlement agreement, the parties are required to bargain in good faith, and the ULP settlement agreement pre-dates the execution of Policy Bulletin # 37. Thus, the Union asserts that Policy Bulletin # 37 does not apply to unit employees, and the Union disputes the Agency's assertion that Proposal 1 is inconsistent with an Agency regulation for which there is a compelling need. Moreover, the Union contends that the Agency's assertion that Policy Bulletin # 37 merely reflects established eligibility requirements contained in DODI 1342.26 is "simply incorrect[,]" and claims that the Agency's eligibility criteria "are not contained in any DoD policy." *Id.* at 4.

Finally, the Union contends that Proposal 1 does not affect the Agency's ability to contract out work functions. The Union asserts that the "ability to attend the DoD[DS] System is a workplace benefit that the parties have the ability to negotiate." *Id.*

B. Analysis and Conclusions

1. Meaning of the Proposal

In interpreting a disputed proposal, the Authority looks to its plain wording and any union statement of intent. If the union's explanation is consistent with the plain wording, then the Authority adopts that explanation for the purpose of construing what the proposal means and, based on its meaning, deciding whether it is within the duty to bargain. *See, e.g., AFGE, Local 1900*, 51 FLRA 133, 138-39 (1995). When a proposal is silent as to a particular matter, a union's statement clarifying the matter will be adopted if it is otherwise consistent with the wording of the proposal. *See, e.g., Nat'l Educ. Ass'n, Overseas Educ. Ass'n, Laurel Bay Teachers Ass'n*, 51 FLRA 733, 737 (1996) (*Laurel Bay*). When a union's statement is not consistent with the wording of the proposal, however, the Authority does not adopt it for the purpose of determining whether the proposal is within the duty to bargain. *See, e.g., IFPTE, Local 3*, 51 FLRA 451, 459 (1995).

In this case, the Agency asserts that the Union interprets Proposal 1 to mean that all bargaining unit employees assigned to Agency facilities outside the CONUS meet DoD's eligibility requirements. However, during the post-petition conference that occurred after the filing of the petition, the Union explained that it interprets Proposal 1 as applying only to bargaining-unit employees working at Agency facilities in Puerto Rico and that Proposal 1 "does not mandate that DoDDS accept a dependent child for enrollment in its schools if DoDDS determine[s] that the child is not eligible under applicable criteria." Record at 2. The Union further asserted that, in providing that "dependent children of unit employees be certified by the Agency for as long as the employees are assigned to Agency facilities in Puerto Rico, the Union intends that, if employees are assigned there during their children's entire school year, then the Agency would certify [the dependent children] for enrollment." *Id.* In addition, during the post-petition conference, the parties agreed that 10 U.S.C. § 2164(a), (b), and (c)(2), and DODI 1342.26, Section 6.2.2 apply to this case. *Id.*

10. The relevant text of Number 10 of FAA, HRPM provides:

> 10. Administrative Reassignment: To the extent delegated within their Lines of Business, managers may reassign employees involuntarily without loss in grade or base pay from one position to another, within or outside the local commuting area when such action is considered to be in the best interest of the FAA.

Response, Attach. 1 at 5.

Proposal 1 is silent as to whether it pertains to all bargaining-unit employees assigned to Agency facilities outside the CONUS or whether it pertains to only unit employees working at Agency facilities in Puerto Rico. As the Union's explanation that the proposal pertains only to bargaining-unit employees working at Agency facilities in Puerto Rico is not inconsistent with the proposal's plain wording, we adopt the Union's explanation and find that the proposal is limited to bargaining-unit employees working at Agency facilities in Puerto Rico.

As for the issue of whether the proposal would require the Agency to certify dependents of employees who do not, in the Agency's view, meet applicable eligibility requirements, we note that, in its petition, the Union states that Proposal 1 "recognizes that all current bargaining [unit] employees assigned to FAA facilities outside [the CONUS] meet DoD's eligibility requirements." Petition at 5. This statement, as the Agency argues, supports a conclusion that the proposal would require the Agency to certify all unit employees outside the CONUS as eligible for purposes of enrolling their dependents in the DoDDS system, regardless of whether they meet DoD's eligibility requirements. However, as noted above, the Union has clarified that this proposal is not intended to "mandate that DoDDS accept a dependent child for enrollment in its schools if DoDDS determine[s] that the child is not eligible under applicable criteria." Record at 2. Under this clarification, the proposal recognizes that bargaining-unit employees must meet DoD's eligibility requirements in order for their dependents to be certified for enrollment in the DoDDS system. This clarification is consistent with the plain wording of the proposal, which provides that the Agency shall certify the subject dependent children as eligible to attend a DoD school "in accordance with 10 U.S.C. § 2164 and DODI 1342.26." Petition at 3-4. Accordingly, we interpret Proposal 1 as requiring Agency certification of employees' dependent children only if, in the Agency's view, such employees meet the applicable criteria for certification of their dependents.[11]

2. Proposal 1 is not inconsistent with DODI 1342.26.

Under § 7117(b) of the Statute, an agency regulation does not bar negotiation over an otherwise negotiable proposal unless the agency can demonstrate a compelling need for the regulation under § 2424.50 of the Authority's Regulations. *See AFGE, Local 2139, Nat'l Council of Field Labor Locals*, 61 FLRA 654, 656 (2006).

The Agency asserts that Proposal 1 is inconsistent with DODI, 1342.26, Section 6.2.2.2, which, according to the Agency, provides, in pertinent part, for enrollment in the DoDDS system of dependents of:

> "Full-time civilian employees of the Federal Government, not residing in permanent quarters on a military installation residing in a territory, possession or commonwealth, who are subject by policy and practice to transfer or reassignment to a location where English is the language of instruction in the schools normally attended by dependent children of Federal personnel."

SOP at 10-11.

As worded, DODI 1342.26, Section 6.2.2.2, requires space in the DoDDS system to be allotted to dependents of full-time civilian employees of the Federal Government residing in a territory, such as Puerto Rico, who are subject to transfer or reassignment to a location where English is the language of instruction in the schools normally attended by dependent children of Federal personnel. The parties disagree over whether all unit employees are subject to such transfer or reassignment. *See* SOP at 3; Response at 3. However, it is not necessary to resolve this dispute. This is because, consistent with the meaning adopted above, Proposal 1 requires the Agency to certify employees' dependent children as eligible for enrollment in the DoDDS system *only* if such employees meet the applicable criteria for certification. Proposal 1 does not mandate that the Agency certify, or the DoDDS system accept, a dependent child for enrollment if it is determined that the child is ineligible under applicable criteria set forth in 10 U.S.C. § 2164 and DODI 1342.26. Accordingly, Proposal 1 does not require the Agency to certify employees' dependents in a manner that is inconsistent with the DOD instruction. As the proposal is not inconsistent with the instruction, and there is no claim that such instruction is an agency regulation for which a compelling need exists, the Agency has not demonstrated that Proposal 1 is inconsistent with DODI 1342.26.

11. That a proposal may simply restate existing obligations does not affect its negotiability. Further, parties frequently include in their collective bargaining agreements provisions that mirror, or are intended to be interpreted in the same manner as, provisions of law and regulation. *See, e.g., U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 351, 354 (2009) (*DOJ*) (citations omitted).

3. The Agency's reliance on Policy Bulletin # 37 does not provide a basis for finding that Proposal 1 conflicts with an Agency regulation for which there is a compelling need.

In order to show that a proposal is outside the duty to bargain because it conflicts with an agency regulation for which there is a compelling need, an agency must: (1) identify a specific agency-wide or primary national subdivision-wide regulation; (2) show that there is a conflict between its regulation and the proposal; and (3) demonstrate that its regulation is supported by a compelling need with reference to the Authority's standards set forth in § 2424.50 of its Regulations. *See NAGE, Local R4-1*, 56 FLRA 214, 215 (2000).

The Agency does not address the criteria for determining compelling need under § 2424.50 of the Authority's Regulations. Instead, the Agency's sole argument that Proposal 1 conflicts with Policy Bulletin #37 is that it conflicts with DODI 1342.26, which, according to the Agency, contains the three eligibility criteria set forth in the Policy Bulletin. However, the wording of DODI 1342.26 that the Agency quotes in its SOP does not set forth any of the three eligibility criteria that are set forth in Section 2 of the Policy Bulletin, and the Agency has not provided a copy of DODI 1342.26. Consistent with our finding that Proposal 1 is not inconsistent with DODI 1342.26, and as the Agency has raised no other arguments, we find that the Agency's reliance on Policy Bulletin # 37 provides no basis for finding that Proposal 1 conflicts with an Agency regulation for which there is a compelling need.

4. Proposal 1 does not affect the Agency's right to contract out under § 7106(a)(2)(B) of the Statute.

The Authority has held that proposals that establish substantive criteria governing the exercise of a management right under § 7106(a) of the Statute affect the exercise of that right. *See, e.g., AFGE, Local 1345*, 48 FLRA 168, 204 (1993) (proposal that established a requirement that an agency conduct a cost study before deciding to contract out work imposed a substantive limitation on the agency's exercise of its right to contract out). Contrary to the Agency's assertion, Proposal 1 does not establish conditions for the Agency to contract out the education of employees' dependents, nor does it dictate the terms of the Agency's contract with DoD. Rather, the proposal involves the certification of bargaining unit employees' dependents only after the Agency has made its determination to contract out.

The Agency's reliance on *NTEU,* 32 FLRA 544 is misplaced. The proposals in that decision, unlike Proposal 1 here, established conditions under which the agency would contract for services of certain instructors. Moreover, the Authority also found that the proposals in *NTEU* were outside the duty to bargain because the proposals did not concern the conditions of employment of unit employees — an argument not made in this case. *NTEU,* 32 FLRA at 550.

As Proposal 1 does not establish substantive criteria that govern the Agency's exercise of its right to contract out, it does not affect the Agency's exercise of that right.

Based on the above, we find that Proposal 1 is within the duty to bargain.

V. Proposal 2

> Section 15. If the FAA deems any bargaining unit employee's dependent not certifiable or not eligible for certification, the FAA shall promptly offer the employee the following options:
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> a. The bargaining unit employee shall be offered an immediate transfer, at the FAA expense and/or with full PCS benefits, to a position of equal or higher pay and/or grade or band in an FAA facility of the employee's choice within the employee's current FAA Region or service area or at the employee's option to a position of equal or higher pay and/or grade or band in an FAA facility in any other FAA Region or service area[.] [12]

A. Positions of the Parties

1. Agency

The Agency contends that the proposal would require the Agency, upon determining that a dependent is not eligible for the DoDDS system, "to transfer the employee who is the sponsor of the dependent to a position of equal or higher pay and/or band in the Southern Region, or a service area in that region, as chosen by the

12. During the post-petition conference, the parties agreed that the term "PCS" refers to a "permanent change of station" benefits, whereby the Agency pays for an employee's move, in this case, from Puerto Rico back to the CONUS. Record at 2. The parties also agreed that Agency facilities in Puerto Rico are in the Agency's Southern Region and that the phrase "service area" means a specific facility location within a region. *Id.*

employee, or to any other region or service area of the employee's choice." SOP at 6 (quoting Record at 3). [13]

The Agency asserts that Proposal 2 affects its rights to hire, assign, direct, layoff, and retain employees under § 7106(a)(2)(A) of the Statute. According to the Agency, the proposal would allow an employee whose dependent is not qualified to enroll in the DoDDS system to reassign himself or herself to a position without regard to the Agency's needs. Additionally, the Agency asserts that the proposal "mandates that the employee be transferred to a position of equal or higher pay and/or grade[,]" and that the Authority has found a similar proposal to be outside the duty to bargain. *Id.* at 8 (citing *NFFE, Local 1650*, 12 FLRA 611 (1983)).

The Agency further contends that the proposal does not constitute an appropriate arrangement under § 7106(b)(3) of the Statute. According to the Agency, the proposal excessively interferes with management's right to assign, and reassign, employees to positions. The Agency asserts that the proposal dictates when and where an employee should be reassigned without regard to the Agency's needs, and that it forces the Agency to reassign and pay the moving expenses incurred in connection with that reassignment.

2. Union

The Union explains that, under Proposal 2, once the Agency decides not to certify dependent(s) for enrollment in the DoDDS system in Puerto Rico, the Agency would be required to transfer the employee who is the sponsor of the dependent(s) to a position of equal or higher pay and/or band in the Southern Region, or a service area in that region, as chosen by the employee, or to any other region or service area of the employee's choice.

The Union does not dispute the Agency's contention that the proposal affects management's rights to hire, assign, direct, layoff and retain employees under § 7106(a)(2)(A) of the Statute. However, the Union claims that the proposal constitutes an appropriate arrangement under § 7106(b)(3) of the Statute. The Union asserts that the proposal "narrowly applies only to those employees who do not meet the FAA certification requirements." Union Response at 7, 9. The Union also asserts that, considering that these "employees . . . will now be forced to move their children and pay all of the costs of another educational institution in order for their children to continue receiving a comparable education [to the one offered by DoD], the benefits to employees outweigh[] any intrusion on the exercise of management's rights." *Id.*

The Union states that employees were allowed to enroll their dependents in the DoDDS system for over twenty years. According to the Union, most of the children of FAA employees in Puerto Rico are currently enrolled in the DoDDS system, and an Agency determination that those children are ineligible for such enrollment will force employees to "uproot" their children and find comparable educational institutions. *Id.* at 9. The Union asserts that employees' attempt to find such institutions will impose a heavy financial burden, and that the proposal avoids such a burden by allowing employees to relocate to another area where their children will have multiple educational options. [14]

B. Analysis and Conclusions

1. Meaning of the Proposal

The Union explains that Proposal 2 requires the Agency, upon an Agency determination not to certify an employee's "dependent child or dependent children for enrollment in the DoDDS system in Puerto Rico, to transfer the . . . employee[] who is the sponsor of those children to a position of equal or higher pay and/or band, in the Southern Region, or a service area in that region, as chosen by the employee, or to any other region or service area of the employee's choice." Record at 2-3. The Agency agrees with the Union's explanation. As the Union's explanation is consistent with the wording of the proposal, we adopt this explanation for purposes of determining whether Proposal 2 is within the duty to bargain. *See Antilles Consolidated Educ. Ass'n*, 61 FLRA 327, 328 (2005) (citing *Laurel Bay*, 51 FLRA at 737).

13. In its SOP, the Agency states that there is "no" bargaining obligation dispute, while also claiming that it "does not have an obligation to bargain over developmental training delays because the subject is expressly covered by the CBA." SOP at 7. The Agency's latter claim is not supported by any argument or explanations and, consequently, we reject it as a bare assertion. *See, e.g., AFGE, Local 1164*, 55 FLRA 999, 1000 (1999); *NAGE, Local R1-109*, 54 FLRA 521, 528 (1998).

14. In its petition, the Union references an Attachment 4, which the Union states refers to a document from the Secretary of the Department of Transportation concerning the educational expenses of employees incurred for primary and secondary schooling of their dependent children. Petition at 7. This document was not contained in the petition.

2. Proposal 2 affects management's § 7106(a)(2)(A) rights.

The Union does not dispute the Agency's assertion that Proposal 2 affects its rights to hire, assign, direct, lay off, and retain employees under § 7106(a)(2)(A) of the Statute. Where a union concedes that a proposal affects management's rights under § 7106(a), the Authority will find that the proposal affects those rights. *See NATCA*, 61 FLRA 437, 439 (2006) (citing *Prof'l Airways Sys. Specialists*, 60 FLRA 609, 611-12 (2005)). Therefore, we find that Proposal 2 affects the disputed management rights under § 7106(a)(2)(A) of the Statute.

3. Proposal 2 does not constitute an appropriate arrangement under § 7106(b)(3) of the Statute.

In determining whether a proposal is an appropriate arrangement, the Authority applies the analysis set forth in *NAGE, Local R14-87*, 21 FLRA 24 (1986). Under that 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. *See AFGE, Local 32*, 59 FLRA 926, 928 (2004) (Member Pope concurring). The claimed arrangement must also be sufficiently "tailored" to compensate employees suffering adverse effects attributable to the exercise of management's rights. *See id.* If the Authority finds the proposal to be an arrangement, then the Authority determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with management's rights. *See NTEU*, 59 FLRA 978, 981 (2004). In doing so, the Authority weighs the benefits afforded to employees under the arrangement against the intrusion on the exercise of management's rights. *See id.*

Even assuming that this proposal constitutes an arrangement within the meaning of § 7106(b) (3), we find that it excessively interferes with management's right to assign employees and, therefore, is not appropriate within the meaning of that section. Proposal 2 would benefit an employee whose dependent child would not be certified for enrollment in the DoDDS system by affording that employee the opportunity to relocate, at no cost to the employee, to another area where their dependent could continue receiving a comparable education. However, the proposal permits no exception to the requirement that an employee be offered an "immediate transfer" to a position of equal or higher pay and or grade or band in an Agency facility of an "employee's choice[.]" Petition at 4. Thus, management would be required to transfer immediately an employee to a position in the region of the employee's choice regardless of whether the Agency intends to fill the position or whether the employee's qualifications satisfied the Agency's needs. Consequently, the proposal would place a significant limitation on management's right to assign employees to positions based on the Agency's needs. *See, e.g., NTEU*, 47 FLRA 370, 394-96 (1993), *rev'd as to other matters*, 25 F.3d 229 (4th Cir. 1994) (absolute requirement that agency reassign an employee to one of five work sites selected by the employee was not an appropriate arrangement because it excessively interfered with management's rights). Therefore, we find that Proposal 2 does not constitute an appropriate arrangement. [15]

For the foregoing reasons, we find that Proposal 2 is outside the Agency's duty to bargain.

VI. Proposal 3

> Section 16. Eligibility Criteria: Any future bargaining unit employees assigned to a facility outside the CONUS who meet one or more of the following criteria are eligible to enroll their dependent children in the DoD School System if they choose to do so:
>
> a. Employee is assigned to a position outside the CONUS and has documented "return rights" to a position in the CONUS.
>
> b. Employee assigned to a position outside the CONUS and has a written "mobility agreement" that could require that the employee be involuntarily reassigned to a position in the CONUS. (All employees assigned to position outside the CONUS will be required to sign a mobility agreement.)
>
> c. Employee assigned to a facility outside the CONUS that has been identified for closure, resulting in the potential involuntary reassignment of the employee to a position in the CONUS.
>
> d. Employee assigned to a facility outside the CONUS that is subject by policy and practice to transfer or reassignment to an area where English is the language of instruction in schools normally attended by children of Federal employees.

15. In view of this determination, it is unnecessary to determine whether the proposal also excessively interferes with the other management rights raised by the Agency.

e. Employee assigned to a facility outside the CONUS and the FAA has the right pursuant to Agency policy to transfer the employee without the employee's consent to an area where English is the language of instruction in schools normally attended by children of Federal employees.

f. All "Excepted Service" employees.

A. Positions of the Parties

1. Agency

The Agency asserts that Proposal 3 would effectively establish that all future unit employees assigned to its facilities outside the CONUS meet DoD's eligibility requirements. According to the Agency, as stated with respect to Proposal 1, some bargaining-unit employees assigned to the Agency's facilities outside the CONUS are not eligible under DODI 1342.26 to enroll their dependents in the DoDDS system. The Agency asserts that whether DoD will change the terms of its instruction for future bargaining unit employees "is not within the control of the [Agency]." SOP at 9. The Agency states that the effect of the proposal is to dictate the terms under which the Agency will be required to participate in the DoDDS system on behalf of future unit employees.

For the same reasons stated above in connection with Proposal 1, the Agency asserts that Proposal 3 is inconsistent with DODI 1342.26, Section 6.2.2.2 as well as Policy Bulletin #37, for which there is, according to the Agency, a compelling need. The Agency also claims, for the same reasons stated in connection with Proposal 1 that Proposal 3 affects its right to contract out under § 7106(a)(2)(B) of the Statute and that the proposal does not constitute an appropriate arrangement under § 7106(b)(3) because it excessively interferes with that right.

2. Union

The Union states that, "by specifying that the eligibility criteria set forth in Proposal 3 will apply to unit employees assigned to Puerto Rico in the future, it intends Proposal 3 not to apply to unit employees currently assigned to Puerto Rico." Record at 3. The Union also states that Proposal 3 is "not intended to mandate that [the] DoDDS system enroll dependent children of unit employees if they are not otherwise eligible under DoD criteria." *Id.* The Union asserts that, similar to Proposal 1, Proposal 3 seeks to establish which bargaining unit employees may qualify for a workplace benefit in compliance with DoD regulations. According to the Union, the proposal is not premised upon the DoD changing the eligibility criteria, as the Agency suggests.

As to subsection (a), the Union states that it would require the Agency to certify as eligible to enroll in the DoDDS system the dependent children of any unit employee with "documented return rights," a term which is defined *supra*, note 4. Concerning subsection (b), the Union states that the phrase "mobility agreement" means "an agreement signed by employees that recognizes that they could be involuntarily transferred." *Id.* The Union states that "subsection (b) would require the Agency to certify as eligible for enrollment in [the] DoDDS [system] the dependent children of unit employees who have signed a mobility agreement." *Id.*

The Union explains that subsection (c) "would require the Agency to certify for enrollment in [the] DoDDS [system] dependent children of unit employees who are assigned to a facility that has been identified for closure and who are thus subject to a potential involuntary reassignment to a position in [the] CONUS." *Id.* With respect to subsection (d), the Union states that it applies only to full-time federal civilian employees and that it would require the Agency to certify as eligible for enrollment in [the] DoDDS system the dependent children of unit employees assigned to Puerto Rico who, under Agency policy or practice, are subject to reassignment to an area where English is the language of instruction in schools normally attended by children of Federal employees.

The Union states that subsection (e) is a "catch-all" provision designed to include any unit employees assigned to Puerto Rico who are not subject to a mobility agreement. The Union also states that subsection (f) is a "catch-all" provision designed to include any excepted-service employees in the unit who are not otherwise covered by the previous subsections. *Id.*

The Union notes that the Agency's objections to Proposal 3 are identical to its objections to Proposal 1. The Union contends that, likewise, its position concerning Proposal 3 is the "same" as its position for Proposal 1. Response at 11.

B. Analysis and Conclusions

1. Meaning of the Proposal

The Union states that, "by specifying that the eligibility criteria set forth in Proposal 3 will apply to unit employees assigned to Puerto Rico in the future, it intends Proposal 3 not to apply to unit employees currently assigned to Puerto Rico." Record at 3. While Proposal 3 is silent as to whether bargaining unit employees would have to meet DoD's eligibility requirements for enrollment of their dependents in the DoDDS system, the Union explained during the post-petition conference that Proposal 3 is "not intended to mandate that [the] DoDDS system enroll dependent children of unit employees if they are not otherwise eligible under DoD criteria." *Id.* The Union's explanation of how Proposal 3 is intended to operate is not inconsistent with the wording of the proposal. As to the specific sections, the Agency agrees with the Union's statement of meaning set forth above. As the Union's explanation of the meaning and effect of Proposal 3 is consistent with its plain wording, we adopt that explanation for purposes of determining whether the proposal is within the duty to bargain. *See, e.g., Laurel Bay*, 51 FLRA at 737.

2. Proposal 3 is not inconsistent with DODI 1342.26.

The Agency asserts that Proposal 3, like Proposal 1, is contrary to DODI 1342.26, Section 6.2.2.2, which, according to the Agency, allows employees who are subject to a particular type of transfer or reassignment to enroll their dependents in the DoDDS system. As set forth above, the parties disagree over whether all unit employees are subject to the particular type of transfer or reassignment set forth in DODI 1342.26, Section 6.2.2.2. *See* SOP at 3; Response at 3. As also set forth above, however, it is not necessary to resolve this dispute because, consistent with Proposal 3's wording and the Union's statement of intent, Proposal 3 is not intended to add, change, or alter any eligibility standards that are set forth in DODI 1342.26 or otherwise outside the control of the Agency. Rather, under the proposal, dependent children of unit employees could not be certified for enrollment in the DoDDS system if the unit employees do not meet the eligibility requirements of the DoD instruction. [16] Accordingly, Proposal 3, like Proposal 1 above, does not require the Agency to certify employees and their dependents in a manner that is inconsistent with the DoD instruction. [17]

16. As noted previously, that a proposal may simply restate existing obligations does not affect its negotiability, and parties frequently include in their collective bargaining agreements provisions that mirror, or are intended to be interpreted in the same manner as, provisions of law and regulation. *See, e.g., DOJ*, 63 FLRA at 354.

17. The dissent's reliance on *Patent Office Professionals Association*, 53 FLRA 625, 682-83 (1997) (*POPA*), for finding Proposal 3 outside the duty to bargain is misplaced. The proposals at issue in *POPA*, as explained by the union that proposed them, would have required the agency in that case to "seek *and obtain*" from other sources certain authority that the agency itself lacked. *Id.* at 683 (emphasis in original). As such, the proposals would have required the agency "to exercise authority it [did] not possess." *Id.* By contrast, Proposal 3 would not require the Agency to obtain from DoD, or to exercise, any authority that the Agency lacks. In this connection, it would not require the Agency to obtain from DoD the authority to enroll in the DoDDS system any children who otherwise are ineligible to enroll in that system. Rather, as explained by the Union, Proposal 3 merely would require the Agency to certify that certain children are eligible to enroll in that system; should DoD determine that they are ineligible, the proposal would not require the Agency to do anything more.

With regard to the dissent's statement that the proposal would "expand eligibility beyond that established by DoD[,]" the dissent does not discuss the terms of DODI 1342.26 or explain how the proposal expands upon it. Dissent at 1. According to the Agency, DODI 1342.26 Section 6.2.2.2 allows for the enrollment of: "Full-time civilian employees of the Federal Government, not residing in permanent quarters on a military installation residing in a territory, possession or commonwealth, who are subject by policy and practice to transfer or reassignment to a location where English is the language of instruction in the schools normally attended by dependent children of Federal personnel." SOP at 10-11. This wording sets forth only a general standard for enrollment; it neither sets forth specific criteria that employees must meet in order to be eligible nor states that employees who fail to meet the general standard are ineligible. To the extent that the dissent is relying on the categories listed in Policy Bulletin # 37, we already have found that our review of DODI 1342.26 does not reveal any of those categories; thus, Policy Bulletin # 37 is unavailing. *See supra*, slip op. at 8. We note that the dissent mischaracterizes the holding in *Association of Civilian Technicians, New York State Council*, 56 FLRA 444 (2000), by stating that the Authority held that the proposal in that case was "nonnegotiable … *because* it 'operated to increase the number of civilian technicians' beyond that provided for in a National Guard Instruction." Dissent at 1 (emphasis added). In this connection, the Authority found the proposal outside the duty to bargain because it was inconsistent with management rights — not because it was inconsistent with a National Guard Instruction. *See* 56 FLRA at 448-49.

3. The Agency's reliance on Policy Bulletin # 37 does not demonstrate that Proposal 3 conflicts with an Agency regulation for which there is a compelling need.

As with Proposal 1, the Agency claims that Proposal 3 is inconsistent with Policy Bulletin # 37, for which the Agency contends there is a compelling need. Also as with Proposal 1, the Agency's sole argument in this connection is that Proposal 3 conflicts with DODI 1342.26. As discussed above in connection with Proposal 1, the portion of DODI 1342.26 quoted in the SOP does not contain any of the eligibility requirements set forth in the Policy Bulletin, and the Agency has not provided a copy of DODI 1342.26. Consequently, consistent with our determination with respect to Proposal 1, the Agency's reliance on Policy Bulletin # 37 does not demonstrate that Proposal 3 conflicts with an Agency regulation for which there is a compelling need.

4. Proposal 3 does not affect the Agency's right to contract out under § 7106(a)(2)(B).

As with Proposal 1, the Agency contends that Proposal 3 is contrary to § 7106(a)(2)(B) of the Statute because the Agency has decided to contract out the education of Agency employees' dependents and Proposal 3 would in effect dictate the terms of the Agency's contract with DoD. As discussed in connection with Proposal 1, the Authority has held that proposals that establish substantive criteria governing the exercise of a management right under § 7106(a) of the Statute affect the exercise of the right. *See, e.g., AFGE, Local 1345*, 48 FLRA at 204.

Contrary to the Agency's assertion, Proposal 3 does not establish conditions under which the Agency must contract out the education of dependents, nor does the proposal dictate the terms of the Agency's contract with DoD. Rather, the proposal addresses the eligibility of employees to enroll their dependents in the DoDDS system only after the Agency has made its determination to contract out. Additionally, for the same reasons set forth in connection with Proposal 1, the Agency's reliance on *NTEU*, 32 FLRA 544 is misplaced. Accordingly, Proposal 3, like Proposal 1, does not affect the Agency's right to contract out under § 7106(a)(2)(B) of the Statute.

For the foregoing reasons, Proposal 3 is within the duty to bargain.

VII. Order

The Agency shall upon request, or as otherwise agreed to by the parties, negotiate over Proposals 1 and 3. [18] The petition for review as to Proposal 2 is dismissed.

18. Our interpretation of the meaning of the proposals, unless modified by the parties, would apply in other disputes, such as arbitration proceedings, where the construction of the proposal is at issue. See Ass'n of Civilian Technicians, Evergreen & Rainier Chapters, 57 FLRA 475, 477 n.11 (2001) (citing Nat'l Educ. Ass'n, Overseas Educ. Ass'n, Laurel Bay Teachers Ass'n, 51 FLRA 733, 741-42 (1996)). Also, in finding Proposals 1 and 3 to be within the duty to bargain, we make no findings as to their merits.

Member Beck, Concurring in Part and Dissenting in Part:

I agree with my colleagues that Proposal 1 is within the duty to bargain to the extent the proposal is conditioned upon the eligibility requirements of Department of Defense Instruction 1342.26. I also agree with the Majority that Proposal 2 is not within the duty to bargain because it excessively interferes with management rights under §7106(a)(2)(A) of the Statute.

Unlike the Majority, however, I conclude that Proposal 3 is outside the duty to bargain because it purports to make the Agency unilaterally responsible for determining what the eligibility criteria for DoD Schools will be in the future. Under this proposal, the Agency would promise that bargaining unit employees who meet certain criteria "are eligible to enroll their dependent children in the DoD school system." Petition at 4. However, determining eligibility for enrollment in DoD schools is plainly not a matter that is within the Agency's control; such eligibility determinations are within the control of DoD, which might alter the criteria for eligibility in the future. It is axiomatic that the Agency cannot be required to negotiate about a matter over which it has no control. *POPA*, 53 FLRA 625, 682-83 (1997).

Further, the Union asserts, and the Majority concludes, that the proposal does not expand eligibility beyond that established by DoD. Slip op. at 15. However, the plain wording of Proposal 3 expands eligibility to at least two additional categories of employees – "all excepted service employees" and those subject to transfer by "policy or practice." * Slip op. at 13. This proposal is, therefore, similar to a proposal the Authority found not to be negotiable in *Association of Civilian Technicians, New York State Council*, 56 FLRA 444, 446 (2000) because it "operate[d] to increase the number of civilian technicians" beyond that provided for in a National Guard Instruction. *ACT, N.Y. State Council.*

*. When a union's explanation is inconsistent with a proposal's "plain wording," the Authority does not adopt it for purposes of determining whether the proposal is within the duty to bargain. *AFGE Local 12*, 60 FLRA 533, 537 (2004); *ACT, N.Y. State Council*, 56 FLRA at 446.