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U.S. DEPARTMENT OF HOMELAND SECURITY
U.S. CUSTOMS AND BORDER PROTECTION
FORT FAIRFIELD, MAINE

RESPONDENT

AND

NATIONAL TREASURY EMPLOYEES UNION

CHARGING PARTY

Case No. BN-CA-15-0110

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For the General Counsel

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For the Respondent

John Ziv
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

The subject of bidding on work assignments has been a focus of labor-management negotiations ever since the National Treasury Employees Union was certified in early 2007 to represent employees of the U.S. Customs and Border Protection component of the recently created Department of Homeland Security. The parties began negotiating a nationwide collective bargaining agreement (CBA) almost immediately, but they didn't come to terms on a complete agreement until May of 2011. As an interim measure, however, they were able to implement a memorandum of understanding (MOU) in October of 2008, which put into immediate effect two articles on which the parties had agreed: an article titled "Bid, Rotation and Placement" (BR&P) and another titled "Alternative Work Schedule" (AWS). These articles were subsequently incorporated into the 2011 CBA, which expired in May 2014. The Agency and the Union were, at the time of the hearing, engaged in negotiations for a new CBA; meanwhile, the parties continue to observe the terms of the 2011 agreement while reserving each party's right to unilaterally discontinue provisions on permissive subjects.

The BR&P article provides for an annual bidding process, in which employees can express their preferences for a particular “work unit” or for a shift or schedule within a work unit, and management will assign qualified employees by seniority. As the CBA currently operates, however, a work unit is the smallest organizational level on which employees can bid, and at many of the smaller ports in the Agency all Customs and Border Patrol Officers (CBPOs) are in a single work unit. The Union spent considerable effort in the 2007-08 negotiations trying to enable officers to bid on lower-level assignments, such as subports, airports, specific airlines, and cargo inspection, but it was unsuccessful in negotiating anything other than work unit, shift, and schedule preferences.

In 2013, and again in 2014, NTEU Chapter 141, representing employees at the Area Port of Fort Fairfield, Maine, sought and obtained authorization from the NTEU national office to demand bargaining on its own system for enabling officers to be assigned, once a year, to one of the three geographic work locations within the area. The Agency refused to bargain on both occasions, insisting that the subject was covered by the national CBA, that in the national negotiations the Union had waived its right to bargain further on the issue, and that the proposals excessively interfered with management’s rights. The 2013 dispute was taken to arbitration, where an arbitrator agreed with the Agency that the proposals excessively interfered with management’s ability to perform its core functions. In response to the arbitrator’s decision, the Union modified its proposals in 2014 and again demanded bargaining, which the Agency again refused. This time, the Union responded to the rejection of its demand by filing an unfair labor practice charge.

According to the Union, the Agency, and the FLRA’s General Counsel, the issues before me are essentially the same as those before the arbitrator: Are the Union’s 2014 proposals to allow officers to bid on preferred port assignments within the Port of Fort Fairfield “covered by” the CBA? Did NTEU waive the right to negotiate such preferred assignments in the negotiations leading up to the 2011 CBA? And are the proposals nonnegotiable infringements on management’s rights under § 7106 of the Statute? But unlike the Union’s 2013 proposals, its 2014 proposals were submitted after the national CBA had expired. It makes no logical sense, nor does it serve any useful labor-management purpose, therefore, to allow a party to use an expired agreement to prevent negotiations on a mandatory subject. Therefore, the covered-by and waiver defenses asserted by the Agency are not applicable to the current dispute. However, the 2014 proposals define the qualifications an officer needs in order to bid to be assigned to a specific port, thereby preventing management from determining for itself whether officers are qualified for those assignments and further preventing management from requiring a rotation of all assignments. For this and other reasons, the 2014 proposals are nonnegotiable.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101–7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On December 23, 2014, the National Treasury Employees Union (NTEU or the Union) filed an unfair labor practice (ULP) charge against the U.S. Department of Homeland Security, U.S. Customs and Border Protection, Fort Fairfield, Maine (the Agency or the Respondent). GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Boston Region issued a Complaint and Notice of Hearing on April 22, 2015, on behalf of the FLRA's General Counsel (GC), alleging that the Agency violated § 7116(a)(1) and (5) of the Statute by refusing to negotiate with NTEU, Chapter 141 (Chapter 141) over the mandatory subject of port assignments. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on May 19, 2015, denying that it violated the Statute. GC Ex. 1(d).

A hearing was held in this matter on October 15 and 16, 2015, in Boston, Massachusetts. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and examine witnesses. The GC and Respondent filed post-hearing briefs, which I have fully considered.

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

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The NTEU is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of employees appropriate for bargaining at the U.S. Department of Homeland Security, U.S. Customs and Border Protection (CBP). Chapter 141 is an agent of NTEU for the purpose of representing bargaining unit employees at the Area Port of Fort Fairfield, Maine. GC Exs. 1(c) & 1(d). CBP and NTEU are parties to a nationwide CBA (Jt. Ex. 1) that was effective from May 11, 2011, to May 11, 2014; they continue to observe the terms of that agreement while a new agreement is negotiated. Tr. 104-06, 246-48.¹

The origins of this dispute can be traced to term bargaining over the CBA, which began in May 2007, shortly after NTEU won an election to represent a consolidated unit of employees from the various predecessor agencies of CBP. Tr. 217-18, 303. Because ground rules negotiations reached an impasse, which was resolved by the Federal Service Impasses Panel, substantive negotiations did not begin until approximately May of 2008. Tr. 218-19. At that time, Michael Wenzler, who was then CBP's Director of Labor Relations and a member of management's bargaining team, became its chief negotiator. Tr. 215, 218-19. NTEU's lead negotiator was Frank Ferris, who was then Executive Vice President of the Union, and he was assisted by Jonathan Levine, Assistant Counsel for Negotiations. Tr. 102-03. Early in the substantive negotiations, both parties recognized the possibility of

¹ Although Article 48 of the CBA provides for automatic renewal in some circumstances, the record indicates that this did not happen here. Tr. 105, 246. NTEU has notified CBP that it has rescinded its agreement on a permissive issue relating to one portion of Article 29. Tr. 106. Otherwise, neither party has rescinded any portion of the CBA.

reaching agreement on Bid, Rotation and Placement and on alternative work schedules, and of implementing those articles in advance of a comprehensive CBA, so they focused their discussions in 2008 on those two areas. Tr. 104, 303. This resulted in the adoption of an MOU on October 29, 2008, implementing the provisions on BR&P and AWS that later became Articles 13 and 14 of the 2011-2014 CBA. Jt. Ex. 4.

I will briefly describe aspects of the bargaining history relevant to this case. Most of the testimony regarding this history was given by Wenzler, because Union witnesses testified only very briefly about this.

According to Wenzler, substantive bargaining began in 2008 with NTEU proposing that officers be allowed to bid on being permanently assigned to specific ports of entry, specific posts of duty, and even specific tasks. Tr. 304-05, 307. CBP rejected these proposals, based on its belief that they would be too difficult to administer while ensuring that the Agency's work was accomplished effectively. Tr. 305-06. Wenzler elaborated:

Our position in the negotiations was the lowest level that we could [go] down to in order to fairly and accurately and efficiently plan and manage the work at a particular geographic location, was . . . the scope of the authority of the port director. And that that port director was responsible for the construct of the work, including how employees were assigned among geographic locations. And so we maintained that it was not practical to go any further below that level.

Tr. 306.

Wenzler testified that on September 17, 2008, NTEU "agreed conceptually" for the first time with management's proposed language that a work unit would be defined as the smallest unit of the organization, and that officers would not be able to bid to be assigned to more "specific" assignments, such as an assignment to inspect certain types of cargo at an airport. *See* Tr. 315, 319. Then NTEU proposed to let local parties agree to provide for bidding such "specific" assignments. Tr. 315-16. Wenzler stated that CBP rejected this proposal as well, in part because "[w]e did not want, given the deference we wanted our port directors to have in structuring their work and ensuring the mission was accomplished, to have to contend with engagement on such a detailed level of work assignments. We wanted those port directors to clearly be free to establish their work units . . ." ² Tr. 316.

² Ultimately, on some aspects of the bidding process, the parties did agree to allow for variation at the local level "by mutual agreement." *See, e.g.*, Article 13, Section 2.C, Jt. Ex. 1 at 34; Article 13, Section 3.A(4), (6), and (7), Jt. Ex. 1 at 36. But "mutual agreement" was defined in such a way that it "does not confer or infer any right or obligation to engage in bargaining." Article 13, Section 1.D, Jt. Ex. 1 at 32. The provision states in full:

Mutual agreement refers to the ability of the local parties (e.g., a NTEU Chapter President and Port Director) to vary from the procedures set forth in this policy only if both parties agree to do so voluntarily. A "by mutual agreement" provision does not confer or infer any right or obligation to engage in bargaining, or to submit any disagreement over a proposed variation to

Wenzler was asked at the hearing whether the parties discussed bidding on assignments within work units. He testified that the parties “spent a good deal of time discussing . . . the Port of Buffalo,” which has officers rotating through multiple ports of entry that are part of a single work unit. Tr. 235. Levine, however, testified that NTEU “never made a proposal regarding area ports[]” because in many locations, such as in Minnesota, ports of entry are up to 150 miles apart and employees would not want to regularly rotate between them. Tr. 114. “[W]e would lose a lot of members if we put that in the [national] contract,” Levine stated. *Id.* Levine added that NTEU “never bargained or put any proposals on the table about bidding to sub-ports within an area port.” Tr. 109. Levine and Wenzler both testified that the CBP and NTEU did not specifically discuss operations or bidding at Fort Fairfield, Maine. Tr. 113-14, 319.

On September 26, 2008, Wenzler stated, a breakthrough in negotiations occurred, as the Union adopted the format of management’s proposal on bidding and rotation and agreed that officers could bid annually on “work units within the area of responsibility of the port director,” a term the parties had not yet defined. Tr. 327-29; R. Ex. 6 at 1. Wenzler testified that NTEU had an interest in allowing officers to be reassigned to other ports (Tr. 329), and Levine explained in this regard that NTEU had an interest in facilitating officer reassignments, such as for officers who “wanted to get out of San Ysidro” and transfer to nearby San Diego. Tr. 116. Wenzler testified that NTEU “[e]ssentially . . . agreed to forego bidding to specific ports of entry . . . provided that we addressed their concerns in San Diego” Tr. 329. NTEU’s September 26, 2008, proposal notes in this regard that implementation of BR&P was “contingent upon resolution of the special assignment problems” in San Diego and other large port areas. R. Ex. 6 at 1.

Around this time, Wenzler testified, the parties committed to early implementation of an agreement on BR&P and AWS and to then negotiate the remainder of the CBA. Tr. 328. In this regard, Wenzler and Levine both testified that management and the Union viewed early implementation of these two articles as a way to boost employee morale. Tr. 110, 339.

On October 28, 2008, Wenzler testified, NTEU formally agreed to CBP’s proposed definition of a work unit, “effectively withdrawing all of their proposals on [bidding to] smaller units.” Tr. 330-31, 342-43. The parties signed the MOU the next day.³ Negotiations on the rest of the CBA continued for more than two additional years, until it was executed on

grievance, arbitration or any other impasse dispute procedures. Such agreements must be placed in writing and signed by the parties, and will be binding until such time as either party provides written notice to the other of its intent to withdraw. Withdrawals will be effective at the beginning of the annual bid cycle (i.e., August 1st) following receipt of the notice.

Id.

³ In addition to the articles on BR&P and AWS, the MOU included some specific arrangements for new hires and reassignments at San Ysidro and San Diego, and a commitment to continue negotiations for reassigning employees between ports within the same commuting area that have different port directors. MOU ¶¶ 5, 6, Jt. Ex. 4 at 1, 2.

May 11, 2011. Article 13⁴ of the CBA is, for our purposes, identical to the article on BR&P that the parties agreed to in the 2008 MOU. Tr. 117-18, 228-29. Modifications to a few unrelated articles of the 2011 agreement were negotiated in 2013. Tr. 104.

Article 13 provides in its introductory paragraph that officers and agricultural specialists will have “an annual opportunity to bid on specific assignments or work units within the area of responsibility of their Port Director.” Jt. Ex. 1 at 32. Through the bidding process, twenty-five percent of the officers in each work unit are rotated to new assignments each year. *Id.* at 34, 37. Article 13, Section 1.A. defines a “bid” as an employee’s request to be assigned “to a specific work unit,” and “bidding” as the process of submitting a request “for assignment to a work unit or higher level unit . . .” *Id.* at 32. Employees can submit up to four prioritized assignment preferences, and management selects in order of seniority from those qualified employees who have bids for each assignment. *Id.* at 36, 37. Article 13, Section 1.F. defines qualifications as “the knowledges, skills and abilities for particular assignments and for the composition of particular work units.” *Id.* at 33.

Article 13 does not permit bidding on assignments to anything smaller than a work unit. Tr. 123-24, 166-67, 371-74. As relevant here, Article 13, Section 1.J. defines a work unit as “the smallest organizational component, operational or equivalent level to which groups of employees are normally assigned and for which qualifications for positions are defined and applied. Such units are specific to the configuration of each Port. Examples of work units are: airport, seaport, cargo, and passenger . . .” Jt. Ex. 1 at 34.

With this history in mind, the dispute in the current case arose at the Area Port of Fort Fairfield, a port of entry (or port) on the land border with New Brunswick, Canada. The area port’s employees are stationed at the Fort Fairfield headquarters and at Limestone and Easton, Maine. Limestone is a port of entry located about fifteen miles north of Fort Fairfield, and Easton is a sub-port about fifteen miles south of Fort Fairfield. Tr. 67, 150, 152, 181-82. For clarity purposes, I will refer to the individual ports as Fort Fairfield, Limestone, and Easton, and I will refer to the overall area port as Fairfield.

David Wentworth is the Port Director at Fairfield; he has served in that capacity for eight and a half years. Tr. 149. Wentworth oversees two supervisors and twenty-four officers. Tr. 151. Officer tenure at Fairfield ranges from six to thirty years of service. *Id.* Fairfield consists of a single work unit. Tr. 175. Officers at Fairfield are responsible for inspecting travelers’ documents as they cross the border and ensuring that the cargo of commercial vehicles is properly manifested and that vehicles do not contain prohibited items. Tr. 65-66. Officers also engage in enforcement actions, such as denying entry into the United States and seizing illicit drugs and weapons. Tr. 179. Wentworth testified that CBP enforces laws for over forty different agencies. Tr. 151-52.

⁴ All references to Article 13 are to Article 13, Part A, which applies to CBPOs and CBP agricultural specialists. Jt. Ex. 1 at 32.

Of the three ports of entry, Fort Fairfield is by far the busiest. It operates twenty-four hours a day, seven days a week. Tr. 70. Each day, about 300 to 500 passenger vehicles, and about sixty cargo trucks, pass through Fort Fairfield, and the vast majority of enforcement actions at Fairfield occur there. Tr. 152, 179. It is usually staffed by three officers per shift, though during some shifts there can be as many as eight officers on duty. Tr. 70, 73-74. Officers at Fort Fairfield are responsible for inspecting aircraft at two airports, one in Presque Isle, Maine, where officers are needed about two or three times a week, and another in Caribou, Maine, where officers are needed only a couple of times a year. Tr. 69, 177, 197. An airport assignment usually takes about two hours to complete. Tr. 69.

Limestone also operates twenty-four hours a day, seven days a week. Tr. 70. About 100 vehicles and a handful of trucks pass through Limestone each day, but it has little to no traffic between 10:00 p.m. and 5:00 a.m. Tr. 152, 198. Limestone is staffed by at least two officers each shift, which is the minimum staffing level for a port of entry. Tr. 43, 153. Easton operates from 8:00 a.m. to 4:00 p.m., seven days a week, and is staffed by two officers. Tr. 70. Easton averages eleven vehicles a day, but there are days when no vehicles pass through. Tr. 152, 199.

Unlike large ports, Fairfield has no specialized work units, so that the officers in all three ports of entry are assigned to a single work unit. Tr. 72, 123, 161, 175. And because Article 13 of the CBA does not allow officers to bid on assignments within a work unit, officers cannot use the bidding system to be assigned to a particular port of entry. Tr. 123, 138. They can, however, use the procedure set forth in Article 13, Section 4 to bid annually on shifts and days off.⁵ Tr. 134, 166.

Fairfield Port Director Wentworth has developed a rotation system for ensuring that all CBPOs work on two of the three shifts and at all of the locations within the area port. Each officer has a starting "line" on the rotation chart, which assigns him to certain shifts and locations for a two-week period; he then moves to the next line every two weeks and works the shifts and assignments for that line. Tr. 70-72, 155-56, 163-66. For instance, in the first week he may work on the day shift, three days at Easton and two days at Fort Fairfield; the next week he may work on the evening shift, two days at Limestone and three days at Fort Fairfield; then he would move to the next line in the rotation. Tr. 156. By rotating all the officers through the lines on the schedule, management achieves a balance of assignments and shifts and exposes each officer to all types of work that occurs in the area port. Tr. 156-57.

Officers seeking to work more regularly at a specific location can usually do so via a swap system. Under that system, two officers jointly ask management to trade scheduled assignments. Swap requests are common, and management usually approves them, unless they seem to be causing a problem. Tr. 72-73, 157-59, 182-83, 204-05.

⁵ Article 13, Section 4 states, in pertinent part: "Concurrent with the bid procedure, employees will be permitted to express a preference for available shifts or schedules within each work unit or assignment." Jt. Ex. 1 at 37.

In early 2013, officials of Chapter 141 sought permission from the national office of NTEU to initiate midterm bargaining with CPB on a Union proposal to enable officers at Fairfield to select a preferred port within the work unit and to be permanently assigned to that port. Tr. 20-21, 79-80. The chapter submitted draft proposals to NTEU Assistant Counsel Jonathan Levine, who in turn submitted the proposals to Agency officials for midterm bargaining under Article 26, Section 4 of the CBA and delegated responsibility for bargaining on those proposals to Chapter 141 President Alan Mulherin. Tr. 21.

Chapter 141 hoped that permanent port assignments would ease the difficulties of commuting for officers. Mulherin testified that if he were assigned to Limestone, it would take him only seven minutes to drive to work; by contrast, it would take him twenty-five minutes to drive to the CBP facility at Fort Fairfield, and forty-five minutes to drive to Easton. Tr. 78. Similar problems are faced by other officers who live closer to one facility or another. Tr. 76, 79. Commutes can be even longer for officers driving at night or when the road is covered with ice, snow, animals, or farm equipment, all of which are common in this part of Maine. Tr. 76-77. Officers commuting to Easton must drive on a two-mile dirt road, which is “subject to some rutting, potholes, [and is] very difficult to travel in the springtime, especially when the frost is coming out of the ground and the road has heaved.” Tr. 78.

After briefing Agency officials in June of 2013 regarding its request to bargain, Chapter 141 submitted formal proposals to management on July 27, 2013. Tr. 81; Jt. Ex. 3. The Agency refused to bargain, alleging that the proposals were nonnegotiable and were covered by the CBA. Tr. 21. NTEU then filed a grievance, which went to arbitration before Arbitrator Ann Gosline. Jt. Ex. 2. In an award dated September 30, 2014, Arbitrator Gosline ruled that the issue of permanent assignment of officers to preferred ports was not specifically covered by Article 13 of the CBA and that NTEU did not waive its right to bargain on this issue. *Id.* at 23-25. However, the arbitrator denied the grievance and ruled that the proposals were not negotiable, because they would “excessively interfere with the Agency’s ability to perform its core functions.” *Id.* at 20, 27.

Subsequently, Mulherin and John Ziv, an NTEU National Field Representative, decided to revise the 2013 proposals and submit a new package. Ziv understood the Agency’s primary objection to the 2013 proposals to be that officers would not get sufficient exposure to the work of the three sub-ports; accordingly, the Union sought to modify its new proposals “to provide greater opportunity for employees . . . to experience work in [all three] locations . . .” Tr. 38-39. Mulherin understood management as objecting to the concept of “permanent work assignments” in the 2013 proposals, so the Union’s revised package attempted to “soften that language a bit and make it port selection based upon seniority . . .” Tr. 94. The two men drafted the following:

Proposed

1. Officers may indicate port preferences in descending order of preference. Officers who do not indicate a preference will be assigned to Ft. Fairfield as their “home” port.

2. All qualified officers will be listed by seniority for their preferred port. An officer shall be considered qualified when s/he has completed his/her formal FLETC training, all required post-Academy training, and has been placed into the schedule rotation as a qualified officer. Management will identify any additional qualifications unique to the Ft. Fairfield Area Port that would impact upon the assignment of officers to any port.

3. All qualified officers will be assigned to a port based on the availability of positions at that port, the officer's expressed preferences, and seniority. When an officer is assigned to a port on this basis, he/she will ordinarily be assigned to that port for a period of one (1) year. Officer[s] assigned to Fort Fairfield shall remain in Fort Fairfield except when required to provide relief or fill-in shifts at Limestone or Easton. Management will, concurrent with each annual port selection cycle, determine the number of slots and shifts in each port needed to provide a minimum of 24/7, two (2) officer coverage for Fort Fairfield and Limestone, and 8/7, two (2) officer coverage for Easton. Should the number of slots and/or shifts change for any port, additional or fewer qualified officers will be assigned to that port based on preferences and seniority.

4. Qualified officers whose selected and assigned port is either Easton or Limestone will work at that port. The exception shall be that the officer may be required to work one (1) shift every four weeks in one or both of the other two ports. The purpose of this rotation is to insure that all officers are capable of working at all of the ports in the Ft. Fairfield area port. For purposes of meeting this requirement, an overtime assignment to a port other than the one to which the officer has selected and been assigned shall meet the port proficiency assignment requirement. Limestone and Easton port officers will not be assigned as leave or TDY relief officers in other ports.

5. Officers[] assigned to Ft. Fairfield during any particular week may be assigned to provide relief at Easton or Limestone on straight time. In such cases, management shall first seek volunteers to fill the required shifts. Volunteers will be assigned in descending seniority order. If no volunteers exist, assignments shall be made in reverse seniority order.

6. Officers[] assigned to Ft. Fairfield may periodically be assigned to either Easton or Limestone to fill in for Limestone or Easton officers who are out of their port due to the rotation, training assignments, TDY assignments, or the like. Such officers may be assigned to either or both ports or in combination with assignments to Ft. Fairfield during the "fill-in" period. Relief assignments in Easton and Limestone due to leave and TDY will be assigned to Ft. Fairfield home port officers in the same manner.

7. Overtime will continue to be assigned as per the existing practice and the CBA.

8. Nothing in this agreement is contrary to the terms of the NCBA.

GC Ex. 2.

After drafting the new proposals, Ziv and Mulherin sent them to Levine at NTEU's national office. Tr. 19. On November 3, 2014, Levine forwarded the proposals to Donald Stakes, who is responsible for labor relations at CBP's national office. Tr. 38; GC Ex. 2. Levine advised Stakes that "NTEU National" requested bargaining on the matter, and that NTEU was delegating its right to bargain to Chapter 141. GC Ex. 2 at 1. On November 14, 2014, a CBP labor relations representative responded to Mulherin:

You have requested to bargain over port assignments at Fort Fairfield, Limestone and Easton In a recent arbitration decision dated September 30, 2014 (attached hereto), Arbitrator Ann Gosline found that the union's proposal to allow CBPOs assigned to the Port of Fort Fairfield, Maine to be permanently assigned to outlying ports based on the officers' preferences and seniority excessively interfered with the Agency's ability to perform its core functions. Accordingly, the agency is under no obligation to bargain this issue with the NTEU.

GC Ex. 4 at 2.

Mulherin disagreed with the Agency's invocation of the arbitration award as a basis for rejecting the Union's new proposals, so he emailed the Agency representative on December 4, 2014, and asked her for clarification. GC Ex. 4 at 1. Mulherin noted that the new proposals were "quite far removed" from the proposals Arbitrator Gosline had considered, and he asked the Agency to specify which of the new proposals it considered nonnegotiable, and why. *Id.* The Agency did not respond to Mulherin's email. Tr. 88.

Subsequently, NTEU filed a negotiability appeal with the Authority. Tr. 52. An FLRA official advised Ziv that CBP was claiming that the proposals were outside the duty to bargain, but was not claiming that the proposals were nonnegotiable. Tr. 52-53. This was confirmed in an email from CBP to the FLRA dated December 19, 2014. GC Ex. 3. Based on the Agency's position, NTEU agreed to a dismissal of the negotiability appeal "without prejudice, meaning . . . that we could re-file without having to go through all the paperwork again if it turned out that we were back at a negotiability issue down the road." Tr. 55. When the Agency failed to respond further to the Union's bargaining request, NTEU filed the ULP charge in this case. GC Ex. 1(a).

At the hearing, witnesses elaborated on a number of issues, including the meaning of the proposals. Ziv testified that the proposals would allow an officer to bid to be assigned to a single port of entry at Fairfield for a “particular period of time,” adding that “the only thing that we’re proposing here is that if I’m assigned to Limestone, I go to Limestone every week instead of going to Fort Fairfield on Monday, Limestone on Tuesday, and Easton on Wednesday.” Tr. 42, 60.

With regard to Proposal 1, Ziv stated that “home” port meant the port of entry where an officer would work “most of the time.” Tr. 59. Mulherin similarly testified that by referring to a home port, Chapter 141 was “seeking to do . . . an appropriate arrangement whereby officers would then be able to, based upon seniority, select a port of entry that they would like to be permanent[ly] assigned to.” Tr. 94-95. Asked whether this would restrict management, Mulherin indicated that it would, stating:

To the extent that an officer selected the port of entry at Easton, that officer would, for the selection period, be assigned there. He or she would work there . . . 10 days out of the pay period. So management would not then be free to simply assign that officer to Limestone and Fort Fairfield.

Tr. 95.

Ziv testified that the third sentence of Proposal 2 – “Management will identify any additional qualifications unique to Ft. Fairfield Area Port that would impact upon the assignment of officers to any port.” – meant that:

. . . if the Agency were to determine that a particular set of qualifications were either missing or were required at, say, for a particular officer, the Agency could say we need you at this location because you either lack qualifications or you have qualifications that are uniquely necessary here. And we put that language into the article, into this proposal because of something that Mr. Wentworth said in his testimony at the arbitration, when he said some of the junior officers don’t have all the skills they need. So the only limitation on that, which I guess you could consider an appropriate arrangement, is that the Agency would have to identify the types of skills or requirements that made it necessary for a particular officer to be assigned to a particular location regardless of his or her seniority or other qualifications.

Tr. 47.

Mulherin similarly testified that the third sentence of Proposal 2 meant that “if . . . management felt as though an officer was not qualified in a particular area, for a particular shift, for a particular port, then they would be able to limit that officer’s ability to select to that port of entry.” Tr. 100. Regarding Proposal 4, Mulherin testified that it provides that officers assigned to Easton or Limestone “may be required to work one shift every four weeks in one or both of the other two ports,” and that officers could be assigned to work

overtime at any port of entry. Tr. 95-96. Concerning Proposal 6, Ziv indicated that management would be able to assign Fort Fairfield officers to other ports to fill in for other officers taking leave. Tr. 44. And with regard to Proposal 7, Mulherin testified that the Union wanted to “express to management that we wished to continue” the current method by which the Agency offers overtime work. Tr. 98.

Witnesses also discussed the impact that the proposals might have on management’s rights. With respect to whether officers are equally qualified to work at all of Fairfield’s ports of entry, Ziv testified, “I can’t speak to the individual qualifications of the officers. They are all supposed to be able to do any and all of the functions that may be necessary, whatever the Agency determines. Whether each individual officer can do them all, I do not know.” Tr. 62. Mulherin and Wentworth similarly testified that all officers at Fairfield are expected to be able to perform the work required of all assignments at Fairfield. Tr. 75, 100, 176.

Wentworth indicated, however, that officers’ skills vary significantly, and that it would be easy for officers to lose skills if they worked away from Fort Fairfield. In this regard, he testified that an officer who works the midnight shift at Limestone or the day shift at Easton “learn[s] nothing because you just sit there for eight hours a day and do nothing. And when I do need [him or her], that person is not up to the standard.” Tr. 176. Similarly, Wentworth stated that an officer who is assigned to work only at Easton would be “no better than a security guard because there’s really no traffic. There’s really no enforcement actions. Nothing really happens there. It’s always repeat traffic. So would the officer be able to operate at another port? I would say no if they spent too much time at that particular port.” Tr. 156-57.

To support this point, Wentworth testified that some officers who have used swaps to avoid spending significant time at Fort Fairfield have in fact lost skills. He stated:

Just recently . . . we denied one officer for a swap request because the officer tried to get out of responding to an aircraft arrival. The officer stated that I don’t do those, so I don’t know how to do it. I’m like you’ve been here for how many years and you don’t know how to do it? Well, I spent a lot of time in Limestone. So I mean that right there told me that person needs to spend more time in Fort Fairfield to be at least exposed to that so they could operate in any of our environments.

Tr. 158. Wentworth added that that officer “had to be retrained by a supervisor in order to work properly” at Fort Fairfield. *Id.* Wentworth continued:

The other example is Easton. Again, we have hardly any traffic through there. And we had an officer that was doing an awful lot of swapping. When the officer was required to come to Fort Fairfield because somebody would not do

a swap with him, he was barely functioning in Fort Fairfield to do minor things. So right now we are unofficially telling him that we're not going to approve all of your swaps and he is spending some additional time at Fort Fairfield and becoming more operational.

Tr. 158-59. Asked what management does when an officer's skills need improvement, Wentworth stated:

We need to take the time to retrain that officer or to ensure that we oversee them closer than we currently are, because . . . we're stretched out a little bit as far as supervision goes. So spending more time in Fort Fairfield would allow us to observe the officer more and see what work[] needs to be done with that officer to bring them up to an operational standard.

Tr. 175. Wentworth added that a supervisor is currently "giving assignments to officers that lack certain skill sets[]" due to too much time away from Fort Fairfield. "It's almost like homework, to be able to do a case in test system, and then he will rate that and see what the officer needs . . ." Tr. 160.

Wentworth acknowledged that he has not determined an exact minimum amount of time at a port of entry an officer would need to maintain his or her skills. Tr. 191, 196. He insisted, though, that "[w]e need to have [an] officer exposed to the different locations as many times as possible." Tr. 196. Wentworth also asserted that the proposals would still be "very limiting" in terms of management's ability to reassign officers when others are out sick or on leave. Tr. 184-85. "We need the flexibility to move people around," he stated. Tr. 185.

With regard to specific proposals, Wenzler asserted that Proposal 3 would "bind management to a course of action that we would not be able to undo." Tr. 369-70. "It says, 'Officers assigned shall remain [at their preferred port] . . . which prevents management from doing something else. . . . It sets a minimum officer coverage for Easton.'" Tr. 368-70. With respect to Proposal 5, Wenzler asserted that it conflicts with management's right to determine whether a relief assignment should be performed on a straight time or overtime basis. Tr. 255-56.

Witnesses for both sides relied on portions of Article 26 of the CBA to support their positions regarding the scope of the Agency's bargaining obligation. Section 4 of Article 26 states:

The Union, in accordance with law and the terms of this Agreement has the right to initiate bargaining on its own and engage in mid-term bargaining over proposed changes in conditions of employment with the exception of the following areas:

A. Matters specifically addressed in this Agreement or another negotiated agreement between the parties. . . .

B. Matters where there is a clear and unequivocal waiver of the right to bargain by the Union, including those issues clearly and unmistakably bargained away as part of the legal implementation of other conditions of employment including the negotiation of this Agreement.

Jt. Ex. 1 at 104-05. The Union and the GC argued that Section 4.A. narrows the scope of management's covered-by defense, and the Agency argued that under Section 4.B. the Union waived its right to bargain on preferred port assignments by its withdrawal of similar proposals during term negotiations in 2007 and 2008.

Levine testified that Article 26, Section 4.A. permits the Agency to use only the first prong of the Authority's two-pronged covered-by doctrine. Levine noted in this regard that the provision's reference to matters "specifically addressed" by the contract is intended to mean the same thing as matters "expressly contained" under the first prong of the Authority's covered-by doctrine. The Union felt that the second prong of the doctrine was "too ambiguous and it would be . . . a litigation breeder." Tr. 126-27. When Wenzler was asked about the intent behind Article 26's reference to matters "specifically addressed" in the CBA, he stated that it was meant to preclude bargaining on "topics contained in this agreement." Tr. 260. Moreover, he insisted that the Union's 2014 proposals are "specifically addressed" in the CBA. *Id.*

Levine stated that Article 26, Section 4.B. of the CBA was added in exchange for eliminating the second prong of the covered-by doctrine, "in an attempt to convince CBP that they would be protected in terms of their interest on not having to bargain the same matter over and over." Tr. 127-28. According to Levine, NTEU would waive its bargaining rights if, for example, "CBP gave notice about a change in the uniform and . . . NTEU had said if you'll give us shorts then we agree we won't bargain anything about firearms, that would be bargaining away our right to bargain firearms just to get shorts." Tr. 130.

In relation to the waiver provision of Section 4.B. of Article 26, Levine insisted that NTEU did not waive the right to bargain over the subject of preferred port assignments. Tr. 118. He was not asked to elaborate on this assertion. Wenzler, however, testified that NTEU agreed to CBP's definition of a work unit as a "concession[]" for agreement on [AWS]" and "in exchange for our commitments" to discuss NTEU's interest in enabling officers to be reassigned to nearby ports under different port directors – an interest that centered on the desire to be able to transfer from San Ysidro to San Diego, as well as within the Los Angeles and Miami areas. Tr. 342-43. Further, Wenzler stated that NTEU's "concessions were aimed at getting [the BR&P and AWS articles] implemented before the contract." Tr. 344. Wenzler asserted that NTEU had won its election over AFGE "by a relatively small margin," and that NTEU was "concerned that AFGE might take the opportunity to come in and file a representation petition," which could be prevented if an agreement between CBP and NTEU was in place. Tr. 337. Wenzler added that:

Ferris wanted a contract, and so his interest and his discussions with me outside of the bargaining room consistently raised the idea of having an interim agreement. It was his opinion that all he needed in order to have . . . a binding collective bargaining agreement was a grievance procedure that included arbitration.

Tr. 337-38.

Wenzler further asserted that after NTEU initially proposed in 2007 allowing officers to bid on “a particular . . . post of duty within a port,” NTEU “withdrew that incrementally throughout the bargaining process for various concessions.” Tr. 355. Asked whether NTEU explained specifically why they withdrew the proposal, Wenzler replied, “Not in that level of detail, no.” Tr. 356. He continued:

I don’t know the reasons that [NTEU] abandoned a specific proposal. . . . All that I know is they had the proposal, they withdrew the proposal thereby indicating that they were no longer going to pursue that, and they signed an agreement, and [that] the benefit of that agreement, as a whole, outweighed their proposal. So by signing that agreement they chose not to do what they proposed.

Id.

POSITIONS OF THE PARTIES

General Counsel

In asserting that the Respondent violated § 7116(a)(1) and (5) of the Statute when it refused to bargain over Chapter 141’s proposals, the General Counsel contends that the proposals were negotiable and that the Agency’s justifications for its refusal to bargain were without merit.

On the question of negotiability, the GC asserts that the Union’s proposals, seeking to establish a bidding system for port preferences at Fairfield, pertain to bargaining unit employees and affects their working conditions. GC Br. at 40. Moreover, the Union’s request to bargain was made at the appropriate level, by NTEU national, which then delegated responsibility for handling the bargaining to Chapter 141. *See U.S. Food & Drug Admin., Ne. & Mid-Atl. Regions*, 53 FLRA 1269, 1274 (1998). GC Br. at 41. Next, the GC argues that the Authority has previously held similar proposals negotiable and cites *AFGE, Local 1164*, 60 FLRA 785, 787 (2005) (*AFGE, Local 1164*); *U.S. Dep’t of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 770 (1990) (*Customs*) in support. In *Customs*, union proposals concerning the length of assignment rotations did not interfere with management’s rights to determine what work would be performed, or when, by equally qualified employees; similarly here, the GC insists that all Fairfield employees are equally

qualified and that the Union is merely seeking to negotiate over the length of time they will work in an assignment before rotating. GC Br. at 51-52. The Agency's concern that the proposals would prevent it from ensuring that officers maintain adequate skills in each location is unfounded, as management already addresses such problems created by the swapping of assignments. *Id.* at 52.

More fundamentally, the GC claims that the Agency failed to raise a negotiability defense in a timely manner. *Id.* at 49 (citing *U.S. Dep't of Justice, Immigration & Naturalization Serv.*, 55 FLRA 892, 901 (1999) (*DOJ*)). In this regard, the GC argues that although the Agency based its refusal to bargain on Arbitrator Gosline's award, it said nothing about the Union's 2014 proposals at issue in this case, which were submitted after Arbitrator Gosline issued her award and differed from the 2013 proposals rejected by the arbitrator. GC Br. at 49-50. Then, when the proposals were before the Authority as part of a negotiability dispute, the Agency denied that it was arguing that the proposals were nonnegotiable. Having denied the proposals were nonnegotiable at that stage of the case, the GC argues that the Agency should not be permitted to raise that issue now. *Id.*

Moving to the Respondent's defenses of its refusal to bargain, the General Counsel argues that the covered-by defense is inapplicable here, because the CBA has expired. *Id.* at 48-49. The GC relies on *dicta* from a decision I issued in *U.S. Dep't of the Air Force, Luke AFB, Ariz.*, 66 FLRA 159 (2011) (*Luke AFB*). In that case, the Authority found it unnecessary to address my ruling on the effect of a contract's expiration on the covered-by defense, since the proposals at issue were not covered by the CBA. *Id.* at 161. The GC also argues that even if the covered-by defense is considered on its merits, the Union's proposals are not covered by the CBA. GC Br. at 42-45. According to the GC, Article 26, Section 4 of the CBA limits the Respondent to the first prong of the covered-by doctrine. *Id.* at 42. Applying that first prong, the GC insists that Article 13 of the CBA addresses only the bidding process for work assignments at the level of work units or larger, not for work assignments within a work unit as in the current case. Moreover, the proposals do not seek to change the definition of a work unit or otherwise modify the CBA. Any similarities between the proposals and the CBA are superficial, and are insufficient to establish that the proposals are "specifically addressed" by a provision in the CBA, as required by Article 26, Section 4.

Finally, the General Counsel contends that NTEU did not clearly and unmistakably waive the right to bargain over port preferences and assignments by its actions in the negotiations for the 2011 CBA. *Id.* at 45-46. Case law requires that in order to show waiver by bargaining, CBP must show "more than mere discussion during prior negotiations . . . a matter must be fully discussed and consciously explored during negotiations and the union must have consciously yielded or otherwise clearly and unmistakably waived its interest in the matter." *Headquarters, 127th Tactical Fighter Wing, Mich. Air Nat'l Guard, Selfridge Air Nat'l Guard Base, Mich.*, 46 FLRA 582, 584-85 (1992). But in the 2008-2011 negotiations in this case, the GC insists there was no evidence that the parties explored "the subject of port preferences or assignments within the Fort Fairfield Area Port[.]" nor was there any explanation of why NTEU allegedly modified its proposals relating to Article 13. GC Br. at 46.

Respondent

The Respondent sets forth three grounds for refusing to bargain with Chapter 141 over the Union's proposals: that the proposals improperly interfere with management's rights under § 7106(a); that both the general subject and the specific details of the proposals were expressly covered by or contained in the CBA; and that NTEU in 2008 clearly and unmistakably waived its right to bargain further on the very issues detailed in Chapter 141's 2014 proposals.

In arguing that Chapter 141's proposals are nonnegotiable, the Agency asserts that the proposals establish a process by which officers "determine to which geographical location they will be assigned on any given day and how responsibilities will be distributed among CBPOs assigned to the Fort Fairfield work unit." R. Br. at 23. This violates management's rights to assign work, determine the personnel by which Agency operations shall be conducted, and determine its organization, as explained by the Authority in *U.S. Dep't of the Navy, Supervisor of Shipbuilding, Conversion & Repair, Gulf Coast, Pascagoula, Miss.*, 62 FLRA 328 (2007); *AFGE, Local 3129, SSA Gen. Comm.*, 58 FLRA 273 (2002) (*SSA Gen. Comm.*); *Nat'l Treasury Employees Union*, 3 FLRA 768-69 (1980).

In support of its position that the Union's proposals are covered by the CBA,⁶ the Respondent argues that the subject matter of the proposals is specifically addressed⁷ in Article 13 of the CBA, which constitutes "the sole mechanism for employees to express a preference as to their work assignments." R. Br. at 14. Because the Union's proposals also "are aimed at providing CBPOs the opportunity to express a preference as to their work assignments[,]" they violate the covered-by doctrine. *Id.* at 15-16. The Agency argues that if the parties had intended to allow officers to bid on assignments within a work unit, they would have agreed to a provision similar to Article 13, Section 4, which allows officers to bid on shifts available in their work unit. The parties discussed allowing officers to bid on assignments within a work unit, according to Agency witnesses, but they ultimately determined not to allow for such bidding. *Id.* at 16-17.

With respect to the specifics of the Union's proposals, the Agency argues that Proposal 2 is covered by Article 13, Section 1.F., because they both set forth procedures for determining officers' qualifications, and they do so in conflicting ways. *Id.* at 18. The Respondent contends that Proposal 3 is covered by Article 13, Section 3.A.(10), because both the proposal and the contract provision contain different procedures for processing bids. *Id.* at 18. Proposal 3 is covered by Article 34, Section 14.A., because the proposal is "aimed at establishing how employees are assigned to shifts," and the contract provision pertains to soliciting volunteers to staff new shifts. *Id.* Proposal 5 is covered by Article 38, because the

⁶ The Respondent does not address the significance, if any, of the fact that the CBA has expired.

⁷ The Respondent agrees with the GC and the Union that Article 26, Section 4.A. limits the parties to the first prong of the covered-by test. Respondent argues, however, that under the first prong, the Union's proposals are covered by the CBA. R. Br. at 14.

proposal conflicts with the contract's reassignment procedures. *Id.* at 18-19. And Proposal 6 is covered by Article 16, Section 5.E., because it "would appear to allow [officers] to seek reimbursement" for mileage in excess of their normal commute. *Id.* at 19.

With regard to the question of waiver, the Agency contends that during the negotiations for a term CBA in 2007 and 2008 (which culminated first in the MOU implementing the BR&P and AWS systems in 2008 and a full CBA in 2011), NTEU first submitted, and later withdrew, proposals allowing officers to bid on being assigned to specific posts of duty. After management held firm in its opposition to bidding on anything smaller than a work unit, the Union agreed to CBP's definition of a work unit, which led to further compromises on both sides on details of the BR&P and AWS articles, and to the early implementation of those agreements. *Id.* at 19-21.

ANALYSIS AND CONCLUSIONS

Exclusion of Exhibits

At the hearing, I rejected two exhibits offered into evidence by the Respondent, Respondent's Exhibits 2 and 3, because the Union was not properly served those documents in the Respondent's Supplemental Prehearing Disclosure. Tr. 263-302. The Respondent objected to that ruling and has renewed its objection in its brief. Tr. 300; R. Br. at 24.

The two rejected exhibits consisted of email communications between the NTEU and CBP negotiators in 2007 and 2008 and an excerpt from the Union's initial 2007 bargaining proposals relating to bidding and rotation. These documents had not been included by Respondent's counsel in her initial prehearing disclosure, filed on June 30, 2015 (GC Ex. 1L), but were part of Respondent's Supplemental Prehearing Disclosure, filed on July 9, 2015. R. Ex. 1.⁸ As noted in the certificate of service for the supplemental disclosure, Respondent served the GC and NTEU by email. *Id.* at 4. Although counsel for the General Counsel received the supplemental disclosure, Mr. Ziv, the Union's representative, stated that he never received those documents and was not aware of the Respondent's intention of using those documents as evidence until one or two days before the hearing. Tr. 264, 272, 276. Further, while Respondent's counsel had previously sent the Union a variety of pleadings in the case, without objection from the Union, the Union never explicitly agreed to be served by email. Tr. 276.

Section 2423.23 of the Authority's Regulations, entitled "Prehearing disclosure," provides that parties shall exchange, in accordance with the service requirements of 5 C.F.R. § 2429.27(b), "[c]opies of documents, with an index, proposed to be offered into evidence." 5 C.F.R. § 2423.23. Section 2429.27(a) of the Authority's Regulations similarly states that "any party filing a document as provided in this subchapter is responsible for serving a copy

⁸ I admitted Respondent's Exhibit 1 into evidence, so that the record would be clear as to the time and manner of service of Respondent's Supplemental Prehearing Disclosure. Tr. 299-301. It includes an index of the documents Respondent sought to offer, but it does not include the actual documents – Respondent's Exhibits 2 and 3 – that I have rejected.

upon all counsel of record or other designated representative(s) of parties. . . .” 5 C.F.R. § 2429.27(a). A party may serve documents by certified mail, first-class mail, commercial delivery, in-person delivery, and facsimile; service of documents by email is also permitted, “but only when the receiving party has agreed to be served by email.” 5 C.F.R. § 2429.27(b). Section 2423.24(e) of the Regulations provides that the Administrative Law Judge “may, in the Judge’s discretion . . . impose sanctions upon the parties as necessary and appropriate to ensure that a party’s failure to fully comply with subpart B or C of this part is not condoned. . . .” 5 C.F.R. § 2423.24(e). Such sanctions include the power to prohibit a party from introducing evidence. 5 C.F.R. § 2423.24(e)(1).

As an initial matter, I credit Ziv’s assertion that he did not receive the supplemental disclosure from Respondent’s counsel, and did not see the supplemental disclosure until immediately before the hearing. Tr. 273, 276. I do not doubt that Respondent’s counsel emailed Ziv the supplemental disclosure on July 9, 2015, but Ziv was not expecting to receive any supplemental disclosure, and it is understandable that Ziv overlooked this email, likely one of innumerable documents that he receives on a weekly basis in his role as a national field representative.

Moreover, Ziv did not expressly agree to be served by email, and there is no basis for finding that by replying to a motion Respondent’s counsel sent by email in June 2015, Ziv “agreed” to be served by email within the meaning of § 2429.27(b). On the other occasions that Ziv accepted email service of pleadings, Respondent’s counsel had notified him in advance that she would be sending the documents; in this instance, however, Ziv was not made aware of the supplemental prehearing disclosure, and he was not expecting anything. Tr. 284-85. In light of the specific language of the Regulation, it would be inappropriate to infer agreement to email service from Ziv’s actions here. Accordingly, the Respondent did not serve NTEU with its supplemental disclosure in compliance with the Regulation. The question then becomes whether the improper service should result in the exclusion of Respondent’s Exhibits 2 and 3 from evidence.

The Respondent asserts that noncompliance with the Regulations “may be overlooked where the other party is not prejudiced by the procedural error.” R. Br. at 24-25 (citing *Dep’t of the Army, Harry Diamond Laboratories, Adelphi, Md.*, 9 FLRA 575 n.1 (1982)). I agree. Indeed, in many cases I have overlooked procedural deficiencies regarding service of documents or other aspects of prehearing procedures, particularly when there is little or no prejudice to the other parties because of the deficiencies. But unlike the *Harry Diamond* case, the Union was significantly prejudiced by the Respondent’s error here, and this prejudice warrants the rejection of the two exhibits.

The documents contained in Respondent’s Exhibits 2 and 3 – NTEU’s initial proposal on BR&P from June of 2007, and emails between CBP’s and NTEU’s bargaining representatives in October of 2008, just before the MOU on BR&P was negotiated – involve the bargaining history of the 2008 MOU, and they form part of the Agency’s argument that NTEU waived its right to bargain later on port assignments. It would be unfair to admit such potentially important documents when the Union did not have a sufficient amount of time to review them and to consult with the General Counsel in preparation for the hearing. While

the GC did receive the documents from the Respondent, this did not mitigate the harm, because GC's counsel was unaware that Ziv had not received them, and the GC was not in a position (without the Union's assistance) to place those proposed exhibits in the full context of the NTEU-CBP bargaining history of 2007-2011. If Ziv and Levine had had adequate time to review the proposed exhibits between July and October, their familiarity with the bargaining history would have allowed them to determine whether other documents (out of the "piles and piles" of documents from the parties' several-year bargaining history⁹) might counteract those offered by the Respondent.

As I noted at the time, the purpose of a hearing is to enable the judge to determine the truth about the events in dispute – in this case, that means whether NTEU demanded the right to bid on work assignment preferences in the 2007-08 negotiations and subsequently dropped that demand in order to obtain other benefits in the 2008 MOU. But the hearing must also afford all parties a fair opportunity to litigate their positions. Tr. 298. While admitting Respondent's Exhibits 2 and 3 might give us a clearer window into the intent of the negotiators, it might also distort the truth, since the Union did not have an equal opportunity to offer countervailing documents. Thus, admitting the documents would compromise fairness without illuminating the truth. Finally, I note that the Respondent's witness, Mr. Wenzler, was able to testify personally about all of the same facts and issues concerning the history of the 2007-08 bargaining that Respondent sought to present in its two rejected exhibits. While it would have been helpful to have that testimony corroborated by documentary evidence, I believe that the Respondent was able nonetheless to make its points persuasively regarding the history of the negotiations.

For these reasons, Respondent's Exhibits 2 and 3 were properly excluded.

The Respondent Did Not Violate the Statute by Refusing to
Bargain Over the Union's Proposals

The Respondent admits that it refused to bargain over the Union's November 3, 2014, proposals, which were submitted about six months after the nationwide CBA expired. It asserts three defenses for its actions: that the Union's proposals were covered by specific provisions of the CBA; that NTEU waived the right to bargain over such issues by virtue of its agreement to the bid and rotation provisions of the 2008 MOU and 2011 CBA; and that the proposals themselves were not negotiable. I agree with the Respondent on the final issue, and I will recommend dismissal of the complaint on that basis; but I will not address the merits of either the covered-by or the waiver defense, because the Agency could not raise those defenses to foreclose bargaining after the CBA expired.

A union can compel bargaining on negotiable local issues that arise after an agreement expires by making a request to bargain at the appropriate level of representation. *U.S. Patent & Trademark Office*, 57 FLRA 185, 192 (2001) (*PTO*) (citing *AFGE Nat'l Border Patrol Council, Local 2366 v. FLRA*, 114 F.3d 1214, 1219 (D.C. Cir. 1997))

⁹ Tr. 294.

(*AFGE v. FLRA*). In such circumstances, if a union submits negotiable proposals concerning conditions of employment, and the proposals are not precluded for some other reason, an agency's refusal to bargain violates § 7116(a)(1) and (5) of the Statute. See *PTO*, 57 FLRA at 192, 196-97; *Pension Benefit Guar. Corp.*, 59 FLRA 48, 50 (2003) (*PBGC*).

The proposals at issue in this case pertain to the location in which Fairfield officers perform their duties; as such, they concern conditions of employment. See *U.S. Dep't of the Air Force, Air Force Materiel Command, Space & Missile Sys. Ctr., Detachment 12, Kirtland AFB, N.M.*, 64 FLRA 166, 176 (2009) (quoting *Library of Cong. v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983)); see also *Env'tl. Prot. Agency*, 25 FLRA 787, 789-90 (1987). Further, it is clear here that bargaining was requested at the appropriate level of representation. NTEU, the exclusive representative for the nationwide unit, submitted the proposals to CBP at the national level and then assigned Chapter 141 President Mulherin to handle the negotiations for NTEU. Tr. 20, 358-59; GC Ex. 2 at 1.

Accordingly, I consider whether the Respondent had an obligation to bargain over the proposals and whether the proposals were negotiable under § 7106 of the Statute. I note that the GC's witnesses referred to the proposals as components of a single process, one that would accomplish a single goal – to allow officers to be assigned, via a seniority-based bidding process, to a specific port of entry for a specific period of time. Tr. 39, 42, 60. As such, and as the GC's witnesses did not claim the proposals were intended to operate independently, I will consider the proposals as a whole, unless I state otherwise. See *AFGE, Local 1164*, 60 FLRA at 787 (applying same analysis to proposals that were “inextricably intertwined”); *Ass'n of Civilian Technicians, N.Y. State Council*, 56 FLRA 444, 447 (2000) (parts of a proposal are not considered separately when the parties do not so request, or when the parts are inseparably linked).

The Covered-By Defense is Inapplicable

In *Luke AFB*, I analyzed at length the ambiguous – even contradictory – state of the case law regarding the use of the covered-by doctrine after a CBA has expired. 66 FLRA at 168-70. Prior to that decision, the Authority had expressed deep skepticism that an expired CBA can be used, “in general,” to excuse a party from bargaining, but it had carefully avoided ruling on that precise issue. *Prof'l Airways Sys. Specialists*, 56 FLRA 798, 804 & n.11 (2000). Notwithstanding that skepticism, the Authority nonetheless held, in *U.S. Border Patrol Livermore Sector, Dublin, Cal.*, 58 FLRA 231, 233 & n.7 (2002) (Chairman Cabaniss concurring, and then-Member Pope dissenting on other grounds) (*Livermore*), that in the absence of a proper request to renegotiate the terms of an expired agreement, an agency “could rely on a contractual ‘covered by’ defense to the same extent that it could during the term of the contract.”¹⁰ I suggested in *Luke AFB* that the Authority's reluctance to rule on the issue may be due to the varied factual contexts in which the covered-by defense may be raised and that the answer to the question may differ, depending

¹⁰ The Authority continued to cite *Livermore* for this principle as recently as *Nat'l Treasury Employees Union*, 64 FLRA 982, 986 n.5 (2010).

on the nature of the situation.¹¹ 66 FLRA at 169. I ruled in *Luke AFB* that the covered-by defense could not be used to deny a union's post-expiration request to bargain over a mandatory subject, but I also found that the union's proposal was not covered by the CBA. *Id.* at 170-71. When the Authority reviewed exceptions to my decision, it affirmed the decision on the latter basis and said that it was therefore unnecessary to decide whether the covered-by defense applied to an expired CBA. *Id.* at 160 n.5 & 161 n.6.

A recent decision of the Authority may have finally resolved the issue, however. *Nat'l Treasury Employees Union*, 68 FLRA 334 (2015), was a negotiability appeal concerning several union proposals that were made during the parties' negotiations for a new term CBA. The agency contended that one of the proposals was covered by their prior CBA. The Authority held: ". . . [T]he covered-by doctrine deals only with an agency's statutory duty to bargain during the term of a collective-bargaining agreement, and, as relevant here, the doctrine is inapplicable to resolve duty-to-bargain issues that arise during term negotiations." *Id.* at 338 n.58. It is possible that this case breaks no new ground, in that it should have been clear from *PTO*, 57 FLRA at 192, and *AFGE v. FLRA*, 114 F.3d at 1218-19, that the covered-by doctrine is inapplicable to term negotiations to replace an expired CBA. It is less clear that the Authority would reach the same result and preclude an agency from relying on a contractual right to act unilaterally, when no proper request to bargain has been made (as in *Livermore*). But we are not faced with that situation.

The *PTO* case and the recent *NTEU* decision are sufficient to resolve, and reject, the Respondent's covered-by defense in our case. The nationwide 2011-2014 CBA has expired, and the parties are engaged in negotiations for a new one. Meanwhile, the national NTEU has requested bargaining on a new proposal affecting only the employees represented by Chapter 141. As the Authority explained in *PTO*, bargaining after the expiration of a CBA is required not only for negotiations on "a full, term agreement[,] but also on union-initiated proposals on specific subjects such as performance appraisals. 57 FLRA at 192. This is equally true, in our case, of the Union's proposals for port preferences at Fairfield. If the proposals are negotiable (a question I have not yet addressed), the Agency cannot shed its obligation to bargain by arguing the proposals are "covered" by the expired CBA.

¹¹ The contradictory nature of the issue is based on the conceptual problems of continuing to observe the terms of a CBA that has expired. As discussed by the Authority in *Fed. Aviation Admin., Nw. Mountain Region, Seattle, Wash.*, 14 FLRA 644, 647-49 (1984), the parties continue to be bound by those provisions of a CBA representing mandatory subjects of bargaining, but they are free to unilaterally terminate their agreement to permissive subjects in the contract. This rule is based on the same underlying purpose – fostering stability in federal labor-management relations – as the covered-by doctrine. See *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1016-18 (1993) (*SSA*). The crucial factor is that once a CBA has expired, either party is free to renegotiate the entire agreement or any portion of the agreement. *PTO*, 57 FLRA at 191-92; *AFGE v. FLRA*, 114 F.3d at 1219. But in the absence of a proper request to renegotiate all or part of the agreement, the parties are entitled to continue applying its provisions, including those provisions that authorize one party to act unilaterally. That was the situation posed in *Livermore*, which motivated the Authority to uphold the use of the covered-by defense at the same time as it questioned the applicability of the defense in other situations. 58 FLRA at 233 & nn.7-8.

The Respondent's Waiver Defense is Also Inapplicable

The Respondent also argues that during the negotiations leading up to the 2008 MOU and the 2011-2014 CBA, NTEU waived its right to bargain further over bidding on port assignments and geographic preferences. The Authority has long held that bargaining waiver is a defense to a refusal to bargain. In *Internal Revenue Serv.*, 29 FLRA 162 (1987), the covered-by and waiver defenses were articulated together, as the Authority held:

[T]he duty to bargain in good faith imposed by the Statute requires an agency to bargain during the term of a collective bargaining agreement on negotiable union proposals concerning matters which are not contained in the agreement unless the union has waived its right to bargain about the subject matter involved.

Id. at 166. When the Authority redefined the covered-by doctrine in *SSA*, it noted the criticism by some courts that it had sometimes “collapsed” the covered-by test into the waiver test, when they are actually separate and distinct principles. *SSA*, 47 FLRA at 1016; *see also U.S. Dep’t of the Treasury, IRS*, 56 FLRA 906, 912-13 (2000). Although they are separate concepts, it is clear from the Authority’s language that both covered-by and waiver are exceptions to an agency’s duty “to bargain during the term of a collective bargaining agreement” 29 FLRA at 162. By their very nature, the covered-by and waiver defenses rely on the existence of a CBA to limit an agency’s duty to bargain.

It makes even less sense logically to apply the waiver defense after expiration of the CBA than to apply the covered-by test. As I noted in the previous section, the covered-by test may have limited viability when neither party is requesting to renegotiate all or part of the CBA, and when an agency raises the covered-by defense simply to explain why it exercised a right it has under the CBA. But the same cannot be said about the waiver defense. Bargaining waiver will only be asserted, as it was by the Respondent in this case, as a reason to refuse to bargain over a subject initiated by the union. In effect, the Respondent is arguing, “When the Union agreed to Article 13 of the CBA in 2008 and 2011, it waived the right to negotiate a better deal forever.” This defies logic or the meaning of collective bargaining. When a party signs a provision in a CBA that waives a right, it waives that right only for the term of the agreement. Once the agreement has expired, as it has in this case, it is free to negotiate for better terms in a new agreement, and that is what NTEU and Chapter 141 did here. Once the CBA expired, CBP was obligated to bargain with NTEU on mandatory, negotiable subjects. *AFGE v. FLRA*, 114 F.3d at 1218; *PTO*, 57 FLRA at 191-92. Accordingly, the Respondent may not argue that NTEU waived the right to negotiate a new bidding and assignment system for Fairfield employees.

Chapter 141's Proposals Are Nonnegotiable

The Respondent’s last line of defense is its claim that the proposals themselves are nonnegotiable, because they improperly interfere with statutory management rights. As an initial matter, however, the GC argues that when the Agency replied to the Union’s November 3, 2014, bargaining request, the Respondent failed to allege that Chapter 141’s

proposals were nonnegotiable, and should therefore be barred from raising a negotiability defense here. The Authority has held that the obligation to bargain includes, “at a minimum, the requirement that a party respond to a bargaining request,” and that “an agency may not relieve itself of liability by asserting for the first time in a ULP proceeding that the union’s proposals were nonnegotiable.” *PBGC*, 59 FLRA at 52 (citation, alteration & internal quotation marks omitted).

It is true that Chalmers’s response to Mulherin’s follow-up email concerning the bargaining request was not as clear as it could have been. GC Ex. 4 at 2. But given that the Agency contested the negotiability of the 2013 proposals, that Arbitrator Gosline found that those proposals were nonnegotiable, and that the 2014 proposals were modified versions of the 2013 proposals, it should have been apparent to Mulherin and Ziv that Chalmers was asserting that the 2014 proposals were nonnegotiable. Tr. 21, 35, 94. Indeed, Mulherin’s reply to Chalmers reflects his understanding that the Agency considered the proposals to be nonnegotiable (GC Ex. 4 at 1), and the Union filed a negotiability appeal with the Authority on that basis. Since the Agency effectively conveyed to the Union its position that the 2014 proposals were nonnegotiable, the Agency should not be barred from arguing that defense here.

DOJ does not compel a different conclusion. In that case, the agency did not respond at all to the union’s request to bargain and made no assertions regarding the negotiability of the union’s proposals until the ULP proceeding. 55 FLRA at 901-02. Here, however, CBP responded to Chapter 141’s proposals and effectively put Mulherin and Ziv on notice that it considered the proposals nonnegotiable. Accordingly, the GC’s reliance on *DOJ* is misplaced.

The GC also cites the Agency’s actions during the negotiability appeal as a basis for barring the Agency from asserting a negotiability defense. During the appeal, the Agency denied that it was challenging the negotiability of Chapter 141’s proposals, a representation that led Ziv to agree to the appeal’s dismissal. This may call into question the Agency’s sincerity, but it is not a basis for rejecting the defense. The Agency’s actions did not lull NTEU or Chapter 141 into inaction; rather, NTEU filed the ULP charge in this case days after Ziv agreed to the dismissal. Moreover, Ziv was well aware that the dismissal was without prejudice and that it was therefore possible that the Agency could raise a negotiability issue “down the road.” Tr. 55. Because the Agency’s actions did not cause NTEU to fail to assert its rights, I find that the Agency’s actions during the negotiability appeal did not prejudice NTEU.¹² Accordingly, I reject the GC’s request that I not consider the Respondent’s negotiability defense.

An agency’s obligation to bargain is predicated on the union’s submission of negotiable proposals, and an agency may refuse to bargain where it contends that the proposals submitted by the union are nonnegotiable. In an unfair labor practice case, the

¹² I recognize that by avoiding the Union’s negotiability appeal, the Agency has delayed a final reckoning before the Authority by several months, or more. But I am aware of no precedent for barring the Agency from arguing its defense.

respondent has the burden of demonstrating that all the proposals on the table are nonnegotiable. *PBGC*, 59 FLRA at 50; *see also PTO*, 57 FLRA at 192. When a union proposal relates to a right reserved to management under § 7106(a) of the Statute, its negotiability depends on whether it is a procedure for management to observe in exercising that right (§ 7106(b)(2)) or an appropriate arrangement for employees adversely affected by the exercise of that right (§ 7106(b)(3)).

The rights to assign work and employees under § 7106(a)(2) of the Statute include the rights to establish the qualifications and skills needed for positions and/or duties and to judge whether particular employees meet those qualifications and skills. *AFGE, Local 3935*, 59 FLRA 481, 482 (2003). In this regard, an agency may require employees to possess specific knowledge, skills, and abilities needed to do the work of a position, as well as certain job-related individual characteristics such as judgment and reliability. Although employees may be equally qualified for a particular position, agencies may consider other factors, such as experience and length of service relative to other team members, when making specific assignments and reassignments. *Id.* at 483. Consideration of such job-related individual characteristics is inherent in management's rights to assign work and assign employees under the Statute. A proposal preventing management from determining that employees are equally qualified for a work assignment affects management's rights to assign work and assign employees. *Id.* at 48 at 482-83; *AFGE, Local 1138, Council 214*, 51 FLRA 1725, 1731 (1996) (*Council 214*).

With respect to § 7106(b)(2) of the Statute, proposals for seniority-based assignments are negotiable procedures when management has already determined, or retains the authority to determine, that the employees are equally qualified for the work assignments. *See AFGE, Local 3935*, 59 FLRA at 482-83; *U.S. Dep't of Hous. & Urban Dev.*, 58 FLRA 33, 35 (2002). However, proposals that do not leave management with discretion to determine whether employees are equally qualified for a given assignment are not negotiable procedures. *AFGE, Local 3935*, 59 FLRA at 482-83. The right to assess whether employees are equally qualified extends beyond simply determining whether employees possess the minimum qualifications for a position, also including the consideration of job-related individual characteristics. *Council 214*, 51 FLRA at 1731.

In addition, proposals that limit the duration of work assignments affect the exercise of management's rights to assign work and employees. *AFGE, Council of Locals No. 163*, 51 FLRA 1504, 1513 (1996) (*Council 163*); *see also U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 57 FLRA 158, 159 (2001) (award limiting the duration of work assignments to three months affected management's right to assign work); *Pan. Canal Comm'n*, 54 FLRA 1161, 1173 (1998) (award requiring agency to rotate personnel in a vacant position for two weeks affected right to assign employees); *AFGE, Local 3172*, 49 FLRA 302, 308-09 (1994) (proposal prescribing a mandatory rotation period and limiting the duration of work assignments affected management's rights to assign employees and work).

Further, § 7106(b)(1) of the Statute makes bargainable at the election of the agency proposals that concern the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty. *NAGE, Local R14-23*, 54 FLRA 1302, 1306 (1998) (*NAGE*). The Authority has defined this to mean “the establishment of staffing patterns, or allocation of staff, for the purpose of an agency’s organization and the accomplishment of its work.” *Id.* The Authority has held that a proposal requiring management to maintain a specified number of positions at specific locations concerned the agency’s staffing pattern and, thus, the numbers, types, and grades of employees under § 7106(b)(1). *Id.*

The first question here is whether Proposal 2 establishes qualifications for officers to bid to be assigned to specific work locations within the larger area covered by Fairfield, and whether it prevents management from determining for itself whether officers are equally qualified for assignments. Proposal 2’s first sentence provides that officers wishing to bid to be assigned to a specific port must be “qualified officers.” GC Ex. 2. Proposal 2’s second and third sentences work to define what a qualified officer is. The second sentence is unambiguous. It requires that an officer who has had specified training and been placed into the schedule rotation “*shall* be considered qualified.” *Id.* (emphasis added). The third sentence (“Management will identify any additional qualifications unique to the Fort Fairfield Area Port that would impact upon the assignment of officers to any port.”) is less clear. The third sentence is less clear. Read literally, it does nothing more than allow management to “identify” additional qualifications. Read more broadly, the third sentence gives management some leeway, allowing it to add (though not subtract) qualifications, at least those that would “impact upon the assignment of officers.” Of course, the third sentence must be read in context. Whereas the second sentence unambiguously requires that management “*shall . . . consider[] qualified*” an officer who has had specified training and been placed into the schedule rotation, the third sentence is far less definite in describing what it provides. Whatever qualifications the third sentence permits management to “identify” or add, it does not expressly and unambiguously negate the requirement in the second sentence. As such, I find that the third sentence does not override the second sentence’s mandate that officers with specified training who have been placed into the schedule rotation “*shall* be considered qualified.”

By requiring that management “*shall . . . consider[] qualified*” an officer who has had specified training and been placed into the schedule rotation, Proposal 2 (and by extension, the entire set of proposals) prevents management from determining for itself the skills an officer needs to be qualified to bid on assignments and therefore affects management’s rights to assign work and employees. Further, by preventing management from comparing the skills of officers in the rotation, Proposal 2 effectively prevents management from determining whether officers are in fact equally qualified for certain assignments at Fairfield. For example, Proposal 2 requires management to find an officer qualified to bid on all assignments, even if that officer lacks basic skills, such as the skills necessary to perform airport inspections. *See* Tr. 158-59. Because Proposal 2 effectively prevents management

from determining for itself whether officers are equally qualified for assignments, Proposal 2 is not negotiable as a procedure within the meaning of § 7106(b)(2) of the Statute. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Det. Ctr., Hous., Tex.*, 59 FLRA 744, 745 (2004); *AFGE, Local 3935*, 59 FLRA at 482-483.

In their testimony, Ziv and Mulherin sought to show that Proposal 2 provides management with a significant amount of flexibility in establishing qualifications and making assignments. However, their testimony on this point is meaningful only to the extent it is consistent with Proposal 2's wording. *Cf. Int'l Fed'n of Prof'l & Technical Eng'rs, Local 3*, 51 FLRA 451, 459 (1995) ("[T]he Authority does not base a negotiability determination on a statement of intent that does not comport with the proposal's wording." (citation omitted)). The testimony of Ziv and Mulherin is not consistent with the proposal's wording. In this regard, Ziv testified that under Proposal 2, management could identify additional skills or requirements and then "assign[an officer] to a particular location regardless of his or her seniority or other qualifications," (Tr. 47), and Mulherin testified that under Proposal 2, management could determine that if an officer was "not qualified in a particular area, . . . then [management] would be able to limit that officer's ability to select to that port of entry." Tr. 100. But Proposal 2 does not allow management to use factors beyond the basic requirements listed in the second sentence to determine that an officer is not qualified. And while Proposal 2 allows management to "identify" additional qualifications, Proposal 2 does not expressly allow management to reassign officers, or to limit the assignments to which they may bid, based on those "identified" qualifications. Ziv's and Mulherin's descriptions of Proposal 2 are therefore inconsistent with the proposal's wording, and they do not persuade me that management has any effective ability here to prevent an officer who has met the minimum qualifications from being assigned to the location of his or her choice.

Further, the decisions the GC cites do not show that Chapter 141's proposals are negotiable. In *AFGE, Local 1164*, the Authority found that a proposal requiring the agency to select employees on a rotating basis, in order of seniority, from a roster created by the agency to fill vacancies in specialized units did not affect management's rights to assign work and employees. 60 FLRA at 785. Unlike Chapter 141's proposals, the proposal in *AFGE, Local 1164* effectively provided that: the agency retained the authority to establish qualifications; the agency retained the authority to determine which employees were equally qualified; and employees with the same job title were not necessarily equally qualified. Moreover, the proposal in *AFGE, Local 1164* did not bar management from considering other job-related individual characteristics. *Id.* at 786. Given these differences, the GC's reliance on *AFGE, Local 1164* is misplaced.

In *Customs*, the Authority found a proposal addressing how long equally qualified employees would remain in a particular rotational assignment did not directly interfere with management's right to determine when work would be performed, an aspect of management's right to assign work. 38 FLRA at 787-88. In our case, however, Chapter 141's proposals do not allow management to establish qualifications and do not let management determine for itself whether officers placed into the schedule rotation are equally qualified. Moreover, to the extent that *Customs* suggests that employees are equally

qualified by meeting the minimum requirements for a position, or that a decision as to the duration of an assignment does not affect management rights, it is apparent that these cases are no longer good law. *E.g.*, *AFGE, Local 3935*, 59 FLRA at 482-83; *Council 163*, 51 FLRA at 1513. For these reasons, the GC's reliance on these decisions is misplaced.

Because Proposal 2 provides that it is necessary for an officer to be "qualified" (as previously defined) before he or she can bid on assignments, Proposal 2's definition of what makes an officer "qualified" applies to all of the Union's proposals, either explicitly (as in the case of Proposals 3 and 4), or implicitly (as in the other parts of the proposal). Accordingly, the finding that Proposal 2 affects management's rights applies to all of the Union's proposals. *See AFGE, Local 1164*, 60 FLRA at 787.

While Proposal 2 is the main way in which the proposals affect management's rights (thereby not qualifying as a negotiable procedure), other aspects of the proposals also affect management's rights as well. Proposal 3 requires that every year, management "*will . . . determine the number of slots and shifts in each port needed to provide a minimum of 24/7, two (2) officer coverage for Fort Fairfield and Limestone, and 8/7, two (2) officer coverage for Easton.*" GC Ex. 2 (emphasis added); *see also* Tr. 369-70. By effectively requiring the Agency to annually establish a specified amount of officers at the three ports of entry, Proposal 3 pertains to the Agency's staffing patterns, a matter that is bargainable at the election of the Agency, under § 7106(b)(1) of the Statute. *NAGE*, 54 FLRA at 1306. It is clear that the Agency has elected not to bargain over this matter.

Proposals 3 and 4 limit the duration of assignments. Specifically, Proposal 3 requires that management assign an officer to his or her "home" port of entry for a year, and Proposal 4 prohibits management from assigning an officer whose "home" port of entry is Limestone or Easton to fill in at another port of entry for more than one shift every four weeks. Proposal 4 goes even further in restricting management's right to assign employees, as it prevents management from assigning Limestone or Easton officers to relieve officers in other locations who are on TDY or leave. Because Proposals 3 and 4 limit the duration and the location of assignments, they affect management's rights to assign work and employees. *See, e.g.*, *Council 163*, 51 FLRA at 1513.

Proposal 4 further states that by working a single shift at a port other than their home port, Easton and Limestone officers shall be deemed to have shown they are "capable of working at all of the ports in the Ft. Fairfield area port." By establishing that an officer who has worked one shift at Fort Fairfield per month meets this "proficiency requirement," Proposal 4 further seeks to establish officers' qualifications, and thus affects management's rights to assign work and employees. Indeed, this restriction goes to the heart of CBP's objection to the entirety of the Union's proposal: the Agency insists that officers need to work regularly at all of the locations within the area port (but particularly at Fort Fairfield, where the most varied range of duties and operations are performed) in order to maintain their proficiency in the full range of qualifications for the work unit. Tr. 156-60, 175-76. The impact of Proposal 4 is particularly marked, when it is combined with Proposal 2's definition of a "qualified" officer. Not only is management restricted in determining who is qualified to bid on an assignment, but its hands are further tied by the mandate that an officer

will be considered “proficient” and “capable of working at all of the ports” as long as he or she works at least once a month at Fort Fairfield. And in a similar manner, the proposals in combination affect management’s right to determine the personnel by which agency operations are conducted. *U.S. Dep’t of Veterans Affairs Med. Ctr., Detroit, Mich.*, 61 FLRA 371, 373 (2005).

Proposal 5 indicates that if management is to assign an officer from Fort Fairfield to provide relief at Limestone or Easton, the assignment must be on straight time, rather than on overtime. *See Tr. 255-56*. It is well established that management’s right to assign work includes the right to assign overtime and to determine when overtime will be performed. *AFGE, Council 215*, 60 FLRA 461, 464 (2004). By requiring that certain assignments be on straight time, rather than on overtime, Proposal 5 affects management’s right to assign work.

The Union’s proposals as a whole are not simply procedural in their effect on management’s right to assign work and employees; rather, they undermine and prevent the exercise of management’s underlying decision that all officers in the area port need to rotate among all the different locations and handle all the varied duties performed in the area port in order to become and remain qualified to work as a CBPO. Under the proposals, some senior officers will be assigned for at least a full year¹³ to Easton and to Limestone – where they will not be exposed to many types of work that are only performed at Fort Fairfield – and management will only be able to assign them to relieve Fort Fairfield officers one shift per month, notwithstanding the port director’s insistence that more frequent exposure to the duties performed at Fort Fairfield is necessary. Thus, the net impact of the proposals is to directly interfere with management’s right to assign employees and assign work.

Because Chapter 141’s proposals affect management rights or concern permissive matters that the Respondent clearly has declined to bargain over, and because the proposals do not constitute negotiable procedures within the meaning of § 7106(b)(2) of the Statute, I consider next whether the proposals are negotiable as appropriate arrangements within the meaning of § 7106(b)(3) of the Statute.¹⁴ *See, e.g., U.S. Gen. Servs. Admin.*, 62 FLRA 341, 343 (2008).

¹³ Under the proposals, it is equally possible that these same employees will be able to re-bid for the same locations year after year.

¹⁴ The Respondent also asserts that the proposals affect management’s right to determine the organization of the agency. Management’s right to determine its organization encompasses the right to determine the geographical locations in which an agency will conduct its operations and how various responsibilities be distributed among the agency’s organizational subdivisions. *SSA Gen. Comm.*, 58 FLRA at 274. Further, the Authority has stated that the geographical location where employees or organizational units conduct agency operations affect management’s right to determine its organization. *AFGE, Local 3584, Council of Prison Locals C-33*, 64 FLRA 316, 317 (2009); *AFGE, Local 2145*, 35 FLRA 398, 409-12 (1990). Chapter 141’s proposals, however, do not change the locations where employees will conduct operations; rather, the proposals seek to determine which employees will work at each location. Accordingly, Chapter 141’s proposals do not affect management’s right to determine its organization.

In determining whether a proposal is an appropriate arrangement under § 7106(b)(3) of the Statute, the Authority follows the analysis set forth in *NAGE, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). Under this analysis, the Authority first determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. *Id.* at 31. In order for a proposal to be an arrangement, there must be adverse effects or reasonably foreseeable adverse effects on employees that flow from the exercise of management's rights. *Id.* An arrangement must also be tailored to compensate employees suffering adverse effects attributable to the exercise of management's rights. *AFGE, Local 3935*, 59 FLRA at 483. However, an arrangement need not target in advance the specific employees who will be adversely affected. *AFGE, Local 1170*, 64 FLRA 953, 959-60 (2010). If the proposal is an arrangement, then it must be determined whether it is appropriate, or whether it is inappropriate because it excessively interferes with the relevant management rights, weighing the benefits afforded to employees against the intrusion on the exercise of management's rights. *See KANG*, 21 FLRA at 31-33. Proposals depriving an agency of all discretion in exercising management rights have been found by the Authority to excessively interfere with those rights. *See, e.g., AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 937 (2012).

Chapter 141's proposals in this case are meant to minimize the length of commutes that many officers face when assigned to ports of entry relatively far from their homes, by allowing officers to select work locations close to home and to remain there most of the time. Tr. 76-79. At least in theory, the Union's proposals appear tailored to minimize those commutes, and with that in mind, I agree that the proposals are arrangements, but it is not at all clear that the proposals will accomplish that goal. It is quite possible that senior officers may select Easton or Limestone as their preferred location because they involve less work, rather than because of the length of the commute, and those officers may actually prevent junior officers who live close to Easton or Limestone from working there. Thus, while I accept the fact that the proposals are intended as a § 7106(b)(3) arrangement, I will take into consideration the potential imprecision of the Union's chosen method in weighing the benefits of the arrangement against the negative impact on management rights.

With regard to whether the proposals are appropriate arrangements, the chance to have an easier, more predictable commute would surely benefit employees. However, these benefits pale in comparison to the burden the proposals impose on management. In combination, Proposals 2, 3, and 4 create a system that severely hampers the port director's ability to determine which officers are qualified for certain assignments. As explained earlier, Proposals 2 and 4 are especially severe in their negative impact, as they virtually require management to find an officer in the rotation to be qualified, without regard to factors such as the officer's experience or skill level, or the degree to which the officer has been exposed to the varied work duties performed only at Fort Fairfield. Indeed, as long as an Easton or Limestone officer has worked at Fort Fairfield once a month, Proposal 4 prohibits management from determining that the officer needs to work at Fort Fairfield more often to maintain or improve his or her skills. As Wentworth testified, limiting officers' exposure to

Fort Fairfield increases the chances that officers will lose skills, which obviously threatens the Agency's ability to perform its mission. Tr. 151-52. Moreover, a decrease in officers' skills would likely require the Agency to spend additional resources retraining and monitoring those officers.

The proposals also deprive management of significant flexibility with regard to its right to assign work and assign employees. Specifically, Proposal 3 prevents management from determining whether a yearlong assignment to a "home" port of entry is an optimal length, and Proposal 4 prevents management from determining whether sending Limestone- and Easton-based officers to Fort Fairfield for one shift every four weeks is enough to ensure that those are keeping up skills used primarily or only at Fort Fairfield.

Indeed, the entirety of the Union's proposals operates to defeat the Agency's underlying determination that all CBPOs need to rotate on a biweekly basis among all of the shifts and locations in the area port in order to maintain proficiency in the full range of duties performed there. It is abundantly clear that the Union's proposals would operate to enable a very few officers to work 90 percent of their time at ports that require very little of them, and to provide management with little or no ability to maintain the skills of those employees. And as noted earlier, it is not at all clear that the few employees with enough seniority and desire to work at Easton and Limestone would be the employees who live closest to those locations. Junior officers who live very close to Easton or Limestone may have to wait a number of years before accumulating enough seniority to minimize their commute, while they shoulder a disproportionate burden of the greater demands of Fort Fairfield. And since there are far fewer shifts worked at Limestone and Easton than at Fort Fairfield, the combined effect of Proposals 2 through 6 will be to enable a few officers to obtain near-permanent assignment to the two locations that expose them to a very narrow range of duties and demands. This system would also totally undermine management's determination that all officers need to rotate among the full range of duties in the area port to maintain their skills and the Agency's efficient operation.¹⁵

Accordingly, the burdens of the Union's proposals greatly outweigh the lifestyle benefits that the proposals would afford the officers. Therefore, because the proposals excessively interfere with management's rights, they are not negotiable as appropriate arrangements within the meaning of § 7106(b)(3) of the Statute. The Respondent was justified in refusing to negotiate on these proposals.

¹⁵ Although the decision of Arbitrator Gosline concerned the negotiability of the 2013 proposals and is not binding in this ULP proceeding, it is nonetheless persuasive and worthy of consideration. In this regard, the changes in the language of the 2013 and 2014 proposals are not significant enough to alter the conclusion that the new proposals also excessively interfere with management rights. See Jt. Ex. 2 at 20-23.

Based on the foregoing, I recommend that the Authority issue the following order:

ORDER

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

Issued, Washington, D.C., July 8, 2016

A handwritten signature in blue ink, appearing to read "Richard A. Pearson", is written over a horizontal line.

RICHARD A. PEARSON
Administrative Law Judge