66 FLRA No. 26

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
FEDERAL DISTRICT 1
LOCAL 1998
INTERNATIONAL ASSOCIATION
OF MACHINISTS
AND AEROSPACE WORKERS
(Union)

and

UNITED STATES
DEPARTMENT OF STATE
PASSPORT SERVICES
WASHINGTON, D.C.
(Agency)

0-NG-3097

_____

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

September 20, 2011

_____

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

I. Statement of the Case

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

For the reasons that follow, we find that Proposals 1 and 3 through 8 are within the duty to bargain, and we dismiss the petition for review as to Proposal 2.

II. Background

The Union represents employees who process passport applications. *See* Record of Post-Petition Conference (Record) at 2-3. The Union seeks to bargain over a new work location's office space design. *See id.* at 1-6.

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

III. Proposal 1

A. Wording

> **Proximity of printers, copiers and fax machines:** The design will make it possible for these machines to be distributed evenly and liberally throughout the desk adjudication area by making passageways wide enough to accommodate them and power sources/phone lines available for them. Each adjudicator's desk will be situated within [fifty] feet of a printer, copier and fax machine.

Petition at 3.

B. Meaning of the Proposal

Proposal 1 would require the Agency to distribute printers, copiers, and fax machines (office machines) so that all employees may equally access them, and would require the Agency to locate the office machines no farther than fifty feet from any employee's desk. *See* Record at 2. The Union asserts, and the Agency does not dispute, that the proposal is intended to reduce the amount of time spent walking to or waiting in line for an office machine, thereby helping employees meet the Agency's production standards. *See* Petition at 4; Record at 3.

C. Positions of the Parties

1. Agency

The Agency asserts that Proposal 1 "excessively interfere[s] with management's right to determine its budget" under § 7106(a)(1) of the Statute because the proposal "mak[es] a request to purchase additional printers, copiers and fax machines" and could cause the Union to request such "purchases for the other [twenty-four]" passport offices. SOP at 3. The Agency also asserts that Proposal 1 would "ignore [A]gency methods and means of performing work that [do] not always require [employees] to print, copy or fax when getting credit for review of a passport application." *Id.* at 2. The Agency argues that Proposal 1 is not a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3). *See* Reply at 2.

Additionally, the Agency argues that it has no obligation to bargain over Proposal 1 because it is covered by Article 18, Section 3(d) (Article 18-3(d)) of the parties' agreement. *See* SOP at 3. In this connection, the Agency asserts that employees "work toward . . . production standard[s]," *id.* at 2, and that

"production standard[s] are already addressed" in Article 18-3(d),[2] *id.* at 3.

2. Union

The Union contends that Proposal 1 does not affect management's rights to determine the Agency's budget or the methods and means of performing work, *see* Response at 2-3, and that the proposal is a procedure under § 7106(b)(2) and an appropriate arrangement under § 7106(b)(3), *see id.* at 4-5. Additionally, the Union argues that the proposal is not covered by the parties' agreement. *See id.* at 1.

D. Analysis and Conclusions

1. Right to Determine Budget

The Authority has held that if a proposal prescribes either the particular programs to be included in an agency's budget, or the amount to be allocated in the budget, then the proposal affects the agency's right to determine its budget. *E.g.*, *AFGE, Local 1441*, 61 FLRA 201, 205 (2005) (Chairman Cabaniss concurring) (*Local 1441*). Alternatively, if the agency makes a substantial demonstration that a proposal would result in an increase in costs that is significant and unavoidable and is not offset by compensating benefits, then the Authority will find that the proposal affects the agency's right to determine its budget. *Id.* However, an assertion that a proposal would increase an agency's costs does not, by itself, establish that the proposal affects management's right to determine its budget. *See AFGE, Locals 3807 & 3824*, 55 FLRA 1, 3-4 (1998).

Here, the Agency does not allege that the proposal prescribes particular programs to be included in the Agency's budget or the amount to be allocated in the Agency's budget. *See* SOP at 3. Further, although the Agency claims that the proposal would require the Agency to purchase office machines, *see id.*, the Agency does not claim or demonstrate that the proposal would entail significant and unavoidable costs that would not be offset by compensating benefits. Accordingly, we find that the Agency has not demonstrated that the proposal affects management's right to determine its budget.

2. Right to Determine Methods and Means of Performing Work

In deciding whether a proposal affects management's right to determine the methods and means of performing work, the Authority initially examines whether the proposal concerns a "method" or a "means." *E.g.*, *NTEU, Chapter 83*, 64 FLRA 723, 725 (2010) (*Chapter 83*). The Authority has construed the term "method" to refer to "'the way in which an agency performs its work.'" *Id.* (quoting *AFGE, Local 1920*, 47 FLRA 340, 343 (1993) (*Local 1920*)). The Authority has defined the term "means" to refer to "'any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or [the] furtherance of the performance of its work.'" *Id.* (quoting *Local 1920*, 47 FLRA at 343).

If the proposal concerns a method or a means, then the Authority employs a two-part test to determine whether the proposal affects the management right. *Id.* First, an agency must show that there is a direct and integral relationship between the particular method and means the agency has chosen and accomplishment of the agency's mission. *Id.* Second, the agency must show that the proposal would directly interfere with the mission-related purpose for which the method or means was adopted. *Id.* It is well-established that an agency has the burden of providing a record to support its assertion that a proposal is outside the duty to bargain under the Statute. *See, e.g.*, *NTEU*, 61 FLRA 871, 875 (2006) (then-Member Pope writing separately as to other matters). Thus, where an agency has failed to demonstrate a direct and integral connection between a particular method or means that the agency has chosen and the accomplishment of the agency's mission, the Authority has found that the agency failed to demonstrate that the proposal at issue was nonnegotiable. *See Ass'n of Civilian Technicians, Ariz. Army Chapter 61*, 48 FLRA 412, 420 (1993) (*ACT*).

The Agency asserts that Proposal 1 would "ignore [A]gency methods and means of performing work that *[do] not always require* [employees] to print, copy or fax." SOP at 2 (emphasis added). However, the Agency does not identify a method or means of performing work that Proposal 1 *does* implicate. *See id.* As such, the Agency does not demonstrate that Proposal 1 concerns a method or means of performing work. Even assuming that the Agency had identified a method or means that Proposal 1 concerns, the Agency does not demonstrate that there is a direct and integral relationship between a particular method or means that the Agency has chosen and the accomplishment of the Agency's mission. *See id.* Therefore, the Agency has failed to demonstrate that the proposal affects the methods or means of performing work under the first

[2] Article 18-3(d) states, in pertinent part, that employees "shall have a minimum of [sixty] minutes of the day counted as non-productive time when assigned to desk adjudication. . . . Should time spent in meetings, outside activities and/or performing tasks outside the responsibilities assigned not be properly recorded or approved, the employee may discuss these variances with their supervisor." SOP, Attach. A at 47.

prong of the methods and means test. *See ACT*, 48 FLRA at 420. Further, the Agency does not demonstrate that Proposal 1 would directly interfere with the mission-related purpose for which that method or means was adopted. *See id*. As the Agency has not met its burden of providing a record to support its assertion that Proposal 1 is outside the duty to bargain, *see NTEU*, 61 FLRA at 875, we reject the Agency's claim that Proposal 1 affects the methods and means of performing work.[3]

3. "Covered By"

Under the Authority's "covered by" doctrine, a party is not required to bargain over conditions of employment that already have been resolved by bargaining. *See, e.g.*, *United Am. Nurses, D.C. Nurses Ass'n & United Am. Nurses, Local 203*, 64 FLRA 879, 882 (2010) (*D.C. Nurses*). To assess whether a particular proposal is "covered by" the parties' agreement, the Authority applies a two-prong test. *Id.*

Under the first prong of the "covered by" analysis, the Authority examines whether the subject matter is expressly contained in the agreement. *Id.* The Authority does not require an exact congruence between the matter proposed for bargaining and the text of the agreement; if a reasonable reader would conclude that the provision settles the matter in dispute, then the matter is covered by the parties' agreement. *NTEU v. FLRA*, 452 F.3d 793, 796 (D.C. Cir. 2006). The Authority has found that the subject matter of a proposal is expressly contained in a contract provision when the proposal would modify or conflict with the express terms of the contract provision. *See NATCA*, 61 FLRA 437, 441 (2006). Conversely, the Authority has found that the subject matter of a proposal is not expressly contained in a contract provision when the proposal would not modify or conflict with the express terms of the contract provision, "even if the proposals concerned the same general range of matters addressed in the provision[]." *Id.* at 442.

If the subject matter in dispute is not expressly contained in the agreement, then, under the second prong of the "covered by" analysis, the Authority determines whether the matter is "'inseparably bound up with, and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the [agreement].'" *Id.* at 441 (quoting *U.S. Dep't of Health & Human Servs., Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004, 1018 (1993) (*HHS*)). That analysis considers the parties' intent and bargaining history. *Id.* Additionally, in order to satisfy the second prong, a matter must be more than tangentially related to a contract provision. *U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 592 (2010) (*IRS*). Rather, the party asserting the "covered by" argument must demonstrate that the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the collective bargaining agreement that the negotiations that resulted in that provision are presumed to have foreclosed further bargaining over the matter. *See HHS*, 47 FLRA at 1018. *See also IRS*, 64 FLRA at 592 (quoting *SSA*, 64 FLRA 199, 203 (2009)) (prong two met if matter is "so tied" to the contract provision that the negotiations are presumed to have foreclosed further bargaining).

As to the first prong of the "covered by" test, Proposal 1 would require the Agency to distribute office machines so that all employees may equally access them, and would require the Agency to locate the office machines no farther than fifty feet from any employee's desk. *See* Petition at 4; Record at 2. Article 18-3(d) discusses employees' non-productive time; it does not discuss the distribution and location of office machines. *See* SOP, Attach. A at 47. In addition, the Agency does not claim, and the record does not indicate, that Proposal 1 would modify or conflict with Article 18-3(d). *See NATCA*, 61 FLRA at 441. Accordingly, the subject matter of Proposal 1 is not expressly contained in Article 18-3(d). *See D.C. Nurses*, 64 FLRA at 882. Thus, we find that Proposal 1 is not covered by Article 18-3(d) under prong one of the "covered by" test.

As to the second prong of the "covered by" test, the Agency does not cite bargaining history or any other evidence that indicates that the matters addressed in Proposal 1 are inseparably bound up with, and thus plainly an aspect of Article 18-3(d). *See* SOP at 2-3. Likewise, the Agency does not demonstrate that the location and distribution of office machines are so commonly considered to be an aspect of employees' non-productive time that it should be presumed that Article 18-3(d) foreclosed further bargaining over the location and distribution of those machines. *See id.* As stated previously, the Agency has the burden of providing a record to support its assertion that a proposal is outside the duty to bargain under the Statute. *See, e.g.*, *NTEU*, 61 FLRA at 875. Based on the foregoing, we find that the Agency has not demonstrated that Proposal 1 is covered by Article 18-3(d).

[3] The dissent's arguments regarding Proposals 1 and 5 and the methods and means of performing work are flawed. In this regard, the dissent does not explain how the Agency met its burden of demonstrating that the proposals implicated particular methods or means, or involved direct and integral relationships, or directly interfered with mission-related purposes. *See* Dissent at 23-24. Moreover, the dissent's reliance on certain precedents is misplaced. In particular, the dissent relies on *NFFE, Local 2192*, 59 FLRA 868 (2004) (Chairman Cabaniss dissenting in part) (*Local 2192*), even though in that decision -- unlike here -- it was undisputed that there was a direct and integral relationship between the means and the accomplishment of the agency's mission. *Id.* at 872.

For the reasons discussed above, we find that Proposal 1 is within the duty to bargain.

IV. Proposal 2

A. Wording

> **Internal sink or water fountain:** To allow employees efficient access to drinking water, the sixth floor agency space will contain an internal, non-bathroom sink or water fountain that can be used to fill water bottles.

Petition at 4.

B. Meaning of the Proposal

The parties agree that the proposal would require a non-bathroom sink or water fountain to be located in the area where employees perform their work. *See* Record at 3.

C. Positions of the Parties

1. Agency

The Agency asserts that it does not have an obligation to bargain over Proposal 2 because Article 32, Section 10 of the parties' agreement (Article 32-10) "precludes the [A]gency from bargaining further the demands already set out in the contract in regard to drinking water accessibility."[4] SOP at 4-5. The Agency concedes that Proposal 2 does not affect any management rights, *id.*, but nevertheless argues that it is not a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3). *See* Reply at 2-3.

2. Union

The Union argues that Proposal 2 is not covered by Article 32-10. Response at 7-8. Additionally, the Union argues that Proposal 2 is a procedure under § 7106(b)(2), *see id.* at 9, and an appropriate arrangement under § 7106(b)(3), *see id.* at 9-10.

D. Analysis and Conclusions

A petition for review "that concerns only a bargaining obligation dispute may not be resolved [in a negotiability proceeding]." 5 C.F.R. § 2424.2(d). A claim that a proposal is covered by a collective bargaining agreement is a bargaining obligation dispute. 5 C.F.R. § 2424.2(a)(1). Here, the Agency does not claim that Proposal 2 is inconsistent with law, rule, or regulation. *See* SOP at 4-5. Rather, the Agency's only claim is that Proposal 2 is covered by Article 32-10. *See id.* at 4-5. As we are not presented with a negotiability dispute with regard to Proposal 2, we dismiss the petition as to that proposal.[5] *See NATCA, Local ZHU*, 65 FLRA 738, 741 (2011).

V. Proposal 3

A. Wording

> **Acoustics at counter:** Subject to security requirements, counter workspaces will be designed such that it is not necessary to raise one's voice beyond what would be generally regarded as a normal talking volume in order to communicate with customers without violating Internal Controls and PII guidelines set forth by the Department.

Petition at 5; Record at 3 (correcting typographical error in petition).

B. Meaning of the Proposal

The parties agree that Proposal 3 would require the Agency to design the acoustics of counter workspaces so that employees would not have to raise their voices when talking with customers. *See* Record at 3. The parties also agree that PII means personally identifiable information. *See id.*

C. Positions of the Parties

1. Agency

The Agency argues that Proposal 3 affects management's right to determine its internal security practices, asserting that the Agency has a "responsibility to keep its employees protected from passport applicants." SOP at 6-7. Additionally, the Agency claims that Proposal 3 "infringes on the management right to determine the cost associated with the building design." *Id.* Further, the Agency asserts that Proposal 3 "seeks to interfere in management's . . . prerogative in making final design and material determinations." *Id.* at 6. The Agency also asserts that Proposal 3 is not an

[4] Article 32-10 states: "DRINKING WATER: Clean drinking water shall be accessible to bargaining unit employees. The Employer shall provide alternative water sources where there is a certifiable need." SOP, Attach. B at 92.

[5] We note that the Agency concedes that Proposal 2 is not outside the duty to bargain on management rights grounds. Thus, there is no basis to address the parties' arguments regarding whether Proposal 2 is a procedure or an appropriate arrangement, and we do not address those arguments.

appropriate arrangement under § 7106(b)(3) or a procedure under § 7106(b)(2). *See* Reply at 3. Finally, the Agency asserts that it is not required to bargain over Proposal 3 because Article 4, Section 10 of the parties' agreement (Article 4-10) "covers management's obligation to the Union regarding building design."[6] SOP at 7.

2. Union

The Union contends that Proposal 3 does not affect management's right to determine the Agency's internal security practices, and asserts that the proposal "does not interfere with any management right." Response at 12. The Union argues that Proposal 3 is a procedure under § 7106(b)(2) and an appropriate arrangement under § 7106(b)(3). *See id.* at 13-14.

Additionally, the Union disputes the Agency's claim that Proposal 3 is covered by Article 4-10, which the Union claims concerns "access to [the] design plans" that is merely a "prerequisite for the Union to make . . . proposals." *Id.* at 11. The Union also claims that Article 4-10 regards "notification to the design team of Union concerns" and that such notification does not "substitute[] for an obligation to negotiate any . . . change that flows from an office relocation." *Id.* Further, the Union argues that Article 12, Section 16(f)(x) of the parties' agreement (Article 12-16(f)(x)), which permits bargaining over "[o]ffice moves/changes affecting more than one bargaining unit employee," Response, Attach. G, A28, indicates that Article 4-10 does not preclude bargaining over office relocations, *see* Response at 11.

D. Analysis and Conclusions

1. Right to Determine Internal Security Practices

An agency's right to determine its internal security practices under § 7106(a)(1) of the Statute includes the authority to determine the policies and practices that are part of the agency's plan to secure or safeguard its personnel, property, and operations. *E.g. SSA*, 65 FLRA 523, 526 (2011). Where an agency shows a link or reasonable connection between its goal of safeguarding personnel or property, or preventing disruption of agency operations, and the disputed practice, the Authority will find that the practice constitutes the agency's exercise of its right to determine its internal security practices. *Id.*

The Agency asserts that it has a "responsibility to keep its employees protected from passport applicants," SOP at 7, but does not explain why Proposal 3, which concerns acoustics, would affect management's right to determine its internal security practices. *See id.* at 6-7. Thus, the Agency's internal security argument is unsupported, and we reject it as a bare assertion.[7] *See, e.g., Local 2139*, 57 FLRA at 295 n.7.

2. "Covered By"

Proposal 3 would require the Agency to design the acoustics of counter workspaces so that employees would not have to raise their voices when talking with customers. *See* Petition at 5; Record at 3. Article 4-10 requires the Agency to brief the Union on proposed design plans, provide the Union with available design plans, and bring the Union's concerns to the design team, when the Agency is considering changes to office layouts. *See* SOP, Attach. D at 9. Article 4-10 is silent as to what layout or design changes the Agency may make, and does not discuss changes to the acoustic design of counter workspaces. *See id.* In this regard, the Agency does not claim, and the record does not indicate, that Proposal 3 would modify or conflict with the express terms of Article 4-10. *See NATCA*, 61 FLRA at 441. Accordingly, the subject matter of Proposal 3 is not

[6] Article 4-10 states:

> CHANGE IN OFFICE LAYOUT: Where changes to office layouts are being considered, including new and/or reconfigured current office space, the [Agency] will brief the Union on the proposed design plans. The [Agency] will bring Union concerns to the attention of the design team for serious consideration. The [Agency] agrees to provide Union officials with copies of current and proposed design plans if available.

SOP, Attach. D at 9.

[7] As such, it is not necessary to examine the Union's assertion that Proposal 3 is a procedure or an appropriate arrangement. *See NTEU*, 55 FLRA at 1177. In addition, the Agency does not cite a right under § 7106 when it asserts that Proposal 3 "infringes on the management right to determine the cost associated with building design." SOP at 7. To the extent the Agency is arguing that Proposal 3 affects management's right to determine its budget, the Agency does not explain how Proposal 3 prescribes either the particular programs to be included in its budget, or the amount to be allocated in its budget, and does not make a substantial demonstration that an increase in costs is significant and unavoidable and is not offset by compensating benefits. *See id.* Accordingly, even if we were to construe the Agency's assertion as a claim that Proposal 3 affects management's right to determine its budget, we would reject the claim as a bare assertion. *See Local 2139*, 57 FLRA at 295 n.7. Additionally, with regard to the Agency's argument that Proposal 3 "seeks to interfere in management's . . . prerogative in making final design and material determinations," SOP at 6, the Agency does not cite a management right under § 7106 that the proposal would affect. Accordingly, that argument provides no basis for finding that Proposal 3 is outside the duty to bargain.

expressly contained in Article 4-10. *See D.C. Nurses*, 64 FLRA at 882. Thus, we find that Proposal 3 is not covered by Article 4-10 under prong one of the "covered by" test.

With regard to the second prong of the "covered by" test, the Agency does not cite bargaining history or any other evidence that indicates that the matters in Proposal 3 are inseparably bound up with, and thus plainly an aspect of, a subject expressly covered by Article 4-10. *See* SOP at 6-7. Likewise, the Agency does not demonstrate that the acoustics of employee workspaces is so commonly considered to be an aspect of contractual notice and consultation requirements that it should be presumed that Article 4-10 foreclosed further bargaining over the acoustics of employee workspaces. *See id.* As such, the Agency does not demonstrate that the second prong of the "covered by" test is met.

Additionally, the Agency does not dispute the Union's claim, *see* Response at 11, that Article 12-16(f)(x), which permits bargaining over "[o]ffice moves/changes," Response, Attach. G, A28, indicates that Article 4-10 does not preclude bargaining over any proposal "regarding building design," SOP at 7. In this connection, the Authority has held that the "covered by" doctrine does not excuse an agency from bargaining over a proposal if the collective bargaining agreement at issue provides for bargaining over the subject matter contained in the proposal. *See NAGE, Local R1-109*, 64 FLRA 132, 134 (2009) (Member Beck dissenting as to other matters) (*NAGE*). Thus, the Union's undisputed claim provides an additional basis for finding that Proposal 3 is not covered by Article 4-10.[8]

Based on the foregoing, we find that Proposal 3 is within the duty to bargain.[9]

VI. Proposal 4

A. Wording

> **Window desks:** The adjudication area will contain no fewer window seats for [employees] than was the case at the Jackson Federal Building ([a] window seat being defined as a desk with an unobstructed view, set up such that a cubicle wall is not blocking the view out of the window).[10]

Petition at 6.

B. Meaning of the Proposal

The parties explain that Proposal 4 would require the Agency to provide at least as many window seats as existed at the previous location, the Jackson Federal Building. *See* Record at 4.

C. Positions of the Parties

1. Agency

The Agency argues that Proposal 4 affects management's right to determine the methods and means of performing work under § 7106(b)(1). *See* SOP at 8-9. In this connection, the Agency asserts that it "intends to design the workspace to facilitate the ability to work in teams in proximity to immediate supervisors so that mentoring, supervisory assistance, and exchange of information among adjudicators is possible." *Id.* at 8. Additionally, the Agency argues that Proposal 4 is not a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3). *See* Reply at 4. Finally, the Agency claims that Proposal 4 is covered by

[8] The dissent concludes that Proposals 3, 4, 5, and 6 are outside the Agency's duty to bargain based on the "covered by" test. However, the dissent does not assert that these proposals would modify or conflict with Article 4, Section 10 of the parties' agreement (Article 4-10), *see* Dissent at 21-22, and thus does not explain how these proposals are covered by that article under the first prong of the test, *see NATCA*, 61 FLRA at 441. In addition, the dissent cites *Federal Bureau of Prisons v. FLRA*, No. 10-1089, 2011 WL 2652437 (D.C. Cir. July 8, 2011) (*BOP v. FLRA*) *granting petition for review of United States Department of Justice, Federal Bureau of Prisons, Washington., D.C.*, 64 FLRA 559 (2010) (*BOP*), even though the first prong of the "covered by" test was not before the court in that matter, *see BOP*, 64 FLRA at 560; *BOP v. FLRA* at *3-5. As to the second prong of the "covered by" test, the dissent does not explain how the Agency met its burden of demonstrating that the subject matter is so tied to the proposals that negotiations are presumed to have foreclosed further bargaining. *See IRS*, 64 FLRA at 592. In this connection, the dissent asserts that it is not "necessary" to consider bargaining history, Dissent at 21, even though the dissent does not dispute that the Authority considers bargaining history when analyzing the second prong of the "covered by" test, *see NATCA*, 61 FLRA at 441, and even though in *BOP v. FLRA*, the court expressly relied on bargaining history, *see BOP v. FLRA* at *4.

[9] In a footnote, the dissent cites an article in Whole Building Design Guide, and an entry in USLegal. *See* Dissent at 23 n*. We note that neither of these documents is in the record, and neither party asked the Authority to take official notice of them. We also note that *the parties* bear the burden of creating a record on which a negotiability determination can be made. *E.g., Fraternal Order of Police, Lodge #1F*, 57 FLRA 373, 377 n.10 (2001).

[10] At the post-petition conference, the Union deleted the following sentence from Proposal 4: "Which employee is assigned to which space will be negotiated in the office seating agreement." Record at 4; *see also* Petition at 6.

Article 4-10 because the proposal "seeks to expand what is required in [the] agreement."[11] SOP at 8.

2. Union

The Union contends that Proposal 4 "does not interfere with any management right," Response at 17, and asserts that the proposal is a procedure under § 7106(b)(2) and an appropriate arrangement under § 7106(b)(3), *see id.* at 17-18. Additionally, the Union disputes the Agency's claim that Proposal 4 is covered by Article 4-10. *See id.* at 16.

D. Analysis and Conclusions

1. Right to Determine Methods and Means of Performing Work

The Agency asserts that it "intends to design the workspace to facilitate the ability to work in teams in proximity to immediate supervisors so that mentoring, supervisory assistance, and exchange of information among adjudicators is possible." SOP at 8. Even assuming that this is a claim that the planned workspace design constitutes a method and means of performing work, *cf. Chapter 83*, 64 FLRA at 725 (noting that "functional grouping" policies in the work place may concern the methods and means of performing work) -- and even assuming that there is a direct and integral relationship between the workspace design that the Agency has chosen and the accomplishment of the Agency's mission -- the Agency has not demonstrated that Proposal 4 would directly interfere with the mission-related purpose for which the method or means was adopted. *See Chapter 83*, 64 FLRA at 725 (agency failed to support claim under second prong of methods and means test). *See also NTEU*, 41 FLRA 1283, 1289-91 (1991) (same). Accordingly, we find that the Agency has not demonstrated that Proposal 4 affects management's rights to determine the methods and means of performing work. *See Chapter 83*, 64 FLRA at 725 (rejecting agency's unexplained arguments).[12]

2. "Covered By"

Proposal 4 would require the Agency to provide at least as many window seats as existed at the previous location. *See* Petition at 6; Record at 4. As stated previously, Article 4-10 requires the Agency to brief the Union on proposed design plans, provide the Union with available design plans, and bring the Union's concerns to the design team, when the Agency is considering changes to office layouts. *See* SOP, Attach. D at 9. Article 4-10 is silent as to the actual types of changes to layout or design that the Agency might make. *See id.* In this connection, Article 4-10 does not discuss how many window seats the Agency may or may not provide. *See id.* Further, the Agency does not claim, and the record does not indicate, that Proposal 4 would modify or conflict with the express terms of Article 4-10. *See NATCA*, 61 FLRA at 441. Accordingly, the subject matter of Proposal 4 is not expressly contained in Article 4-10. *See D.C. Nurses*, 64 FLRA at 882. Thus, we find that Proposal 4 is not covered by Article 4-10 under prong one of the "covered by" test.

As to the second prong of the "covered by" test, the Agency does not cite bargaining history or any other evidence that indicates that the matters in Proposal 4 are inseparably bound up with, and thus plainly an aspect of, a subject expressly covered by Article 4-10. *See* SOP at 8-9. Likewise, the Agency does not demonstrate that the number of window seats is so commonly considered to be an aspect of contractual notice and consultation requirements that it should be presumed that Article 4-10 foreclosed further bargaining over the number of window seats in the new office location. *See id.* Thus, we find that the Agency has not demonstrated that Proposal 4 is covered by Article 4-10.

Based on the foregoing, we find that Proposal 4 is within the duty to bargain.

VII. Proposal 5

A. Wording

> **Access to work/cart space:** There will be no reduction in the amount of shelf space available for the daytime storage of in progress work (i.e. shelves that in progress batches can be placed on during breaks and lunch to satisfy internal controls guidelines). The [A]gency will continue to provide multiple locations for [employee] batches and WIP boxes to be placed on/pulled from. Adequate shelf space will be provided for a specific location for specialist "work in progress" batches to be stored overnight.

Petition at 7.

B. Meaning of the Proposals

The parties agree that Proposal 5 would require the Agency to provide at least the same amount of space

[11] The wording of Article 4-10 is set forth *supra* note 6.

[12] Because we have found that Proposal 4 does not affect the methods and means of performing work, it is not necessary to resolve the Union's claim that Proposal 4 is a procedure or an appropriate arrangement. *See NTEU*, 55 FLRA at 1177.

available for daytime storage of passport applications in the new location as at the old location. *See* Record at 4. The parties explain that: (1) "batches" are boxes of about thirty passport applications; (2) WIP, i.e., work in progress, are applications taken from the batches for follow-up work; and (3) internal control guidelines are Agency regulations that require that an employee stepping away from his or her desk for more than several minutes place applications on a shelf or cart, for security purposes. *See id.*

C. Positions of the Parties

1. Agency

The Agency asserts that Proposal 5 "seeks to bargain the means and methods of performing work and attempts to modify an internal security practice." SOP at 10. In this connection, the Agency claims that it intends to continue to "mak[e] shelves and storage carts available for passport specialists[.]" *Id.* Additionally, the Agency argues that Proposal 5 is not a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3). *See* Reply at 5. The Agency also argues that "workspace design is covered by Article 4-10[.]" SOP at 10.

2. Union

The Union asserts that Proposal 5 "does not interfere with any management right." Response at 20. The Union further claims that Proposal 5 is both a procedure under § 7106(b)(2) and an appropriate arrangement under § 7106(b)(3). *See id.* Additionally, the Union asserts that Proposal 5 is not covered by the parties' agreement. *See id.*

D. Analysis and Conclusions

1. Methods and Means of Performing Work and Internal Security

The Agency asserts that Proposal 5 "seeks to bargain the means and methods of performing work," and claims that it intends to continue to "mak[e] shelves and storage carts available for passport specialists." SOP at 10. Even assuming that shelves and storage carts are methods or means of performing work, and even assuming that Proposal 5 concerns methods or means of performing work, the Agency does not demonstrate that there is a direct and integral relationship between the particular methods or means that the Agency has chosen and the accomplishment of the Agency's mission. *See id.* Therefore, the Agency has failed to show that Proposal 5 is nonnegotiable. *See ACT*, 48 FLRA at 420. Further, the Agency does not demonstrate that Proposal 5 would directly interfere with the mission-related purpose for which such methods or means were adopted. *See* SOP at 10-11. As the Agency has not met its burden of providing a record to support its assertion that Proposal 5 is outside the duty to bargain, *see NTEU*, 61 FLRA at 875, we reject the Agency's claim that Proposal 1 affects the methods and means of performing work.

With regard to the Agency's claim that Proposal 5 "attempts to modify an internal security practice," SOP at 10, the Agency does not explain why Proposal 5 would satisfy the internal security tests discussed previously with regard to Proposal 3. *See supra*, Part V-D. Accordingly, we reject this management's right argument as a bare assertion.[13] *See, e.g., Local 2139*, 57 FLRA at 295 n.7.

2. "Covered By"

Proposal 5 would require the Agency to provide at least the same amount of space available for daytime storage of passport applications in the new location as the old location. *See* Petition at 7; Record at 4. As stated previously, Article 4-10 requires the Agency to brief the Union on proposed design plans, provide the Union with available design plans, and bring the Union's concerns to the design team, when the Agency is considering changes to office layouts. *See* SOP, Attach. D at 9. Article 4-10 is silent as to substantive decisions the Agency may make with regard to layout and design, and does not discuss how much shelf and storage space the Agency will provide to employees. *See id.* In addition, the Agency does not claim, and the record does not indicate, that Proposal 5 would modify or conflict with the express terms of Article 4-10. *See NATCA*, 61 FLRA at 441. Accordingly, the subject matter of Proposal 5 is not expressly contained in Article 4-10. *See D.C. Nurses*, 64 FLRA at 882. Thus, we find that Proposal 5 is not covered by Article 4-10 under prong one of the "covered by" test.

As to the second prong of the "covered by" test, the Agency does not cite bargaining history or any other evidence that indicates that the matters in Proposal 5 are inseparably bound up with, and thus plainly an aspect of, a subject expressly covered by Article 4-10. *See* SOP at 10-11. Likewise, the Agency does not demonstrate that shelf space and storage space are so commonly considered to be aspects of contractual notice and consultation requirements that it should be presumed that Article 4-10 foreclosed further bargaining over shelf space and storage space. *See id.* Thus, we find that the

[13] Because we have found that Proposal 5 does not affect the management rights cited by the Agency, it is not necessary to resolve the Union's claim that Proposal 5 is a procedure or an appropriate arrangement. *See NTEU*, 55 FLRA at 1177.

Agency has not demonstrated that Proposal 5 is covered by Article 4-10.

Based on the foregoing, we find that Proposal 5 is within the duty to bargain.

VIII. Proposal 6

A. Wording

> **Cubicles:** [Bargaining unit employee] cubicles will be no smaller than the cubicles in use as of August, 2010, and contain no lower amount of wall space for hanging reference materials. Glare abatement and availability of sufficient lighting will be considered in the selection of the style of work cubicles.[14]

Petition at 7.

B. Meaning of the Proposal

The parties agree that Proposal 6 would require the Agency to provide cubicles that are at least as large, and have at least as much wall space, as the cubicles at the old location. *See* Record at 5. The parties also agree that the proposal would require the Agency to consider glare abatement and the availability of sufficient lighting. *Id.*

C. Positions of the Parties

1. Agency

The Agency claims that Proposal 6 interferes with: (1) the "management right to determine the budget in controlling the cost associated with office design;" and (2) the "internal security practice of defining the design and structure of the cubicle workspace." SOP at 12. The Agency also argues that Proposal 6 is not a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3). *See* Reply at 5-6. Additionally, the Agency asserts that it does not have an obligation to bargain over Proposal 6 because "workspace design is covered by Article 4-10." SOP at 12.

2. Union

The Union contends that Proposal 6 does not affect management's rights to determine the Agency's budget or internal security practices. Response at 24. The Union asserts that Proposal 6 is a procedure under § 7106(b)(2) and an appropriate arrangement under § 7106(b)(3). *See id.* at 25-26. The Union also disputes the Agency's claim that Proposal 6 is covered by Article 4-10. *See id.* at 24-25.

D. Analysis and Conclusions

1. Right to Determine Budget and Internal Security Practices

The Agency claims that Proposal 6 interferes with the "management right to determine the budget in controlling the cost associated with office design" and the "internal security practice of defining the design and structure of the cubicle workspace." SOP at 12. However, the Agency does not explain why Proposal 6 would satisfy the management rights tests discussed previously. *See supra*, Parts III-D & V-D. As the Agency's claims are unsupported, we reject them as bare assertions.[15] *See, e.g.*, *Local 2139*, 57 FLRA at 295 n.7.

2. "Covered By"

Proposal 6 would require the Agency to provide cubicles that are at least as large, and have at least as much wall space, as the cubicles at the old location, and to consider glare abatement and the availability of sufficient lighting. *See* Petition at 7; Record at 5. As stated previously, Article 4-10 requires the Agency to brief the Union on proposed design plans, provide the Union with available design plans, and bring the Union's concerns to the design team, when the Agency is considering changes to office layouts. *See* SOP, Attach. D at 9. Article 4-10 is silent as to the substantive decisions the Agency may make with regard to layout and design, and does not discuss cubicle size, cubicle wall space, glare abatement, or lighting. *See id.* In addition, the Agency does not claim, and the record does not indicate, that Proposal 6 would modify or conflict with the express terms of Article 4-10. *See NATCA*, 61 FLRA at 441. As such, the subject matter of Proposal 6 is not expressly contained in Article 4-10. *See D.C. Nurses*, 64 FLRA at 882. Thus, we find that Proposal 6 is not covered by Article 4-10 under prong one of the "covered by" test.

As to the second prong of the "covered by" test, the Agency does not cite bargaining history or any other evidence that indicates that the matters in Proposal 6 are inseparably bound up with, and thus plainly an aspect of, a subject expressly covered by Article 4-10.

[14] The Union deleted the sentence "[employees] will be provided with keys to all of the locking portions of their cubicles" from the proposal. Record at 5 (quoting Petition at 7).

[15] Because we have found that Proposal 6 does not affect any of the management rights cited by the Agency, it is not necessary to resolve the Union's claim that Proposal 6 is a procedure or an appropriate arrangement. *See NTEU*, 55 FLRA at 1177.

See SOP at 12-13. Likewise, the Agency does not demonstrate that issues of cubicles space, cubicle wall space, and lighting/glare are so commonly considered to be aspects of contractual notice and consultation requirements that it should be presumed that Article 4-10 foreclosed further bargaining over cubicle space, cubicle wall space, and lighting/glare. *See id.* As such, the Agency does not demonstrate that the second prong of the "covered by" test is met.

Additionally, as with Proposal 3, the Agency does not dispute the Union's claim, *see* Response at 25, that Article 12-16(f)(x), which permits bargaining over "[o]ffice moves/changes," Response, Attach. G, A28, indicates that Article 4-10 does not preclude bargaining over any proposal "regarding building design," SOP at 7. In this connection, the Authority has held that the "covered by" doctrine does not excuse an agency from bargaining over a proposal if the collective bargaining agreement at issue provides for bargaining over the subject matter contained in the proposal. *See NAGE*, 64 FLRA at 134. Thus, the Union's undisputed claim provides an additional basis for finding that Proposal 6 is not covered by Article 4-10.

Based on the foregoing, we find that Proposal 6 is within the duty to bargain.

IX. Proposal 7

A. Wording

> **Shredders:** The office will contain at least one shredder for every twelve [employees]. Due to the names and addresses written on cardboard envelopes, a shredder capable of shredding such envelopes to the degree required by internal controls regulations will be acquired if available.

Petition at 8.

B. Meaning of the Proposal

The parties explain that Proposal 7 would require the Agency to provide a shredder for every twelve employees, and to provide a shredder capable of shredding cardboard envelopes, if such a shredder were available. *See* Record at 5.

C. Positions of the Parties

1. Agency

The Agency asserts that Proposal 7 "interferes with the management right to determine the budget in controlling the costs associated with the purchase of shredders" and "seeks to have [the Agency] bargain over the technology, methods and means of performing work." SOP at 14. The Agency also asserts that it will not "bargain over its internal security practices." *Id.* at 15. Further, the Agency argues that Proposal 7 is not a procedure under § 7106(b)(2), or an appropriate arrangement under § 7106(b)(3). *See* Reply at 6. Finally, the Agency claims that it has no obligation to bargain over Proposal 7 because "Article 18, Section (3)(d) allows that production time is not measured when performing tasks outside the responsibilities assigned."[16] SOP at 14 (internal quotation marks omitted).

2. Union

The Union disputes the Agency's claims that Proposal 7 affects management's rights. *See* Response at 29-30. The Union argues that Proposal 7 is a procedure under § 7106(b)(2) and an appropriate arrangement under § 7106(b)(3). *See id.* at 32-33. Additionally, the Union disputes the Agency's claim that Proposal 7 is covered by Article 18-3(d). *Id.* at 32.

D. Analysis and Conclusions

1. Management Rights

The Agency asserts that Proposal 7: (1) "interferes with the management right to determine the budget in controlling the cost associated with the purchase of shredders"; (2) affects management's right to determine its internal security practices; and (3) affects the methods, means or technology of performing work under§ 7106(b)(1). SOP at 14-15. However, the Agency does not support its claims using the applicable Authority tests discussed previously. *See supra* Parts III-D. & V-D. Thus, we reject these management's rights arguments as bare assertions.[17] *See, e.g., Local 2139*, 57 FLRA at 295 n.7.

2. "Covered By"

Proposal 7 requires the Agency to furnish the office with shredders and, if available, a shredder capable

[16] The pertinent wording of Article 18-3 is set forth *supra* note 2.

[17] Because we have found that Proposal 7 does not affect any of the management rights cited by the Agency, it is not necessary to resolve the Union's claim that Proposal 7 is a procedure or an appropriate arrangement. *See NTEU*, 55 FLRA at 1177.

of shredding cardboard envelopes. *See* Response at 28; Record at 5. Article 18-3(d) discusses non-productive time; it does not discuss shredders. *See* SOP, Attach. A. at 47. In addition, the Agency does not claim, and the record does not indicate, that Proposal 7 would modify or conflict with Article 18-3(d). *See NATCA*, 61 FLRA at 441. Accordingly, the subject matter of Proposal 7 is not expressly contained in Article 18-3(d). *See D.C. Nurses*, 64 FLRA at 882. Thus, we find that Proposal 7 is not covered by Article 18-3(d) under prong one of the "covered by" test.

As to the second prong of the "covered by" test, the Agency does not cite bargaining history or any other evidence that indicates that the matters in Proposal 7, i.e., the number and type of shredders, are inseparably bound up with, and thus plainly an aspect of, a subject expressly covered by Article 18-3(d). *See* SOP at 14-15. Likewise, the Agency does not demonstrate that the number and type shredders is so commonly considered to be an aspect of non-productive time that it should be presumed that Article 18-3(d) foreclosed further bargaining over the number and type of shredders. *See id.* Thus, we find that the Agency has not demonstrated that Proposal 7 is covered by Article 18-3(d). Based on the foregoing, we find that Proposal 7 is within the duty to bargain.

X. Proposal 8

A. Wording

> **Ergonomics:** Sit/stand desks will be made available for those employees who need them to address ergonomic issues.

Petition at 9.

B. Meaning of the Proposal

The parties agree that sit/stand desks are desks that can be raised or lowered hydraulically, and that Proposal 8 would permit employees to request sit/stand desks without having to provide medical documentation. *See* Record at 5-6.

C. Positions of the Parties

1. Agency

The Agency contends that requiring the Agency to "purchase such desks would have an excessive impact on [the Agency's] management right to determine the budget of this relocation" and could have a "budget impact on the [Agency] and its other [twenty-four] [p]assport [o]ffices nationwide." SOP at 16. The Agency argues that Proposal 8 is not a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3). *See* Reply at 7. Additionally, the Agency claims that it has no obligation to bargain over Proposal 8 because "[e]rgonomic planning and the purchase of necessary equipment are already covered by" Article 32, Section 8 of the parties' agreement (Article 32-8).[18] SOP at 16.

2. Union

The Union disputes the Agency's claim that Proposal 8 affects management's right to determine its budget. *See* Response at 35. In addition, the Union asserts that the proposal is a procedure under § 7106(b)(2) and an appropriate arrangement under § 7106(b)(3). *See id.* at 36-37. The Union argues that the "covered by" doctrine does not apply to Article 32-8 because that article requires the Agency to negotiate with the Union over ergonomic issues. *See id.* at 35-36. In this regard, the Union asserts that Article 32-8 "requires . . . the Agency [to] 'work with . . . Union officials . . . to address ergonomic issues,'" and asserts that "work with" entails bargaining. *Id.* at 36.

D. Analysis and Conclusions

1. Right to Determine Budget

The Agency asserts that requiring the Agency to "purchase . . . desks would have an excessive impact on [the Agency's] right to determine the budget of this relocation." SOP at 16. However, the Agency does not explain how Proposal 8 satisfies the applicable test set forth above. *See supra*, Part III-D. Thus, we reject this

[18] Article 32-8 states, in pertinent part:

> ERGONOMIC PLANNING: The [Agency] agrees to work with . . . the national or local level Union officials, as appropriate, to address ergonomic issues. Appropriate measures may include, but are not limited to:
> a. Obtaining ergonomically "correct" equipment, devices, chairs, and floor surfaces;
> b. DESD site visits (including consultation with local Union representatives);
> c. Consulting with ergonomic experts;
> d. Obtaining training for [Agency] officials, Union officials, and bargaining unit employees on ergonomic matters; and
> e. Distributing information on methods and techniques to avoid or reduce workplace injuries and strain in brochures, posters on the bulletin boards, and online resources.

SOP, Attach. B at 91.

claim as a bare assertion.[19] *See, e.g.*, *Local 2139*, 57 FLRA at 295 n.7.

2. "Covered By"

As stated previously, the Authority has held that the "covered by" doctrine does not excuse an agency from bargaining over a proposal if the collective bargaining agreement at issue provides for bargaining over the subject matter contained in the proposal. *See NAGE*, 64 FLRA at 133-34. Here, Article 32-8 states that the Agency "agrees to *work with* . . . the national or local level Union officials . . . to address ergonomic issues." SOP, Attach. B at 91 (emphasis added). The Union contends, and the Agency does not dispute, that "work with" means "bargain." *See* Response at 35-36; SOP at 16; Reply at 6-7. As Article 32-8 provides that the Union may bargain over ergonomic issues, we find that Proposal 8 is not covered by Article 32-8. *See NAGE*, 64 FLRA at 134.

Based on the foregoing, we find that Proposal 8 is within the duty to bargain.

XI. Order

The Agency shall, upon request or as otherwise agreed to by the parties, negotiate with the Union over Proposals 1 and 3 through 8. The petition for review as to Proposal 2 is dismissed.

[19] Because we have found that Proposal 8 does not affect management's right to determine its budget, it is not necessary to resolve the Union's claim that Proposal 8 is a procedure or an appropriate arrangement. *See NTEU*, 55 FLRA at 1177.

Member Beck, Dissenting in Part:

I agree with my colleagues that Proposals 7 and 8 are within the Agency's duty to bargain and that the Union's petition concerning Proposal 2 should be dismissed.

However, I disagree with my colleagues' conclusions that Proposals 3, 4, 5, and 6 are not covered by the parties' agreement and that Proposals 1 and 5 do not concern the methods and means of performing the Agency's work.

Application of the "covered by" doctrine to Proposals 3, 4, 5, and 6

Article 4-10 requires the Agency to "brief" the Union and provide copies of "design plans" when "changes to office layouts are being considered, including new and/or reconfigured current office space." Any Union "concerns" about "office layouts" or "design" are to be given "serious consideration." Any reasonable reading of this contractual language must lead to the conclusion that this is how the parties agreed to handle Union concerns about the configuration of office space. I cannot read this language and conclude that the parties intended to leave the Union with the option of insisting on mandatory bargaining about office layouts or design. Consequently, it is clear to me that the subject matter of Proposals 3, 4, 5, and 6 is within the intended coverage of Article 4-10.

My colleagues engage in an unduly narrow reading of this provision when they conclude that the subjects of these four proposals are not "commonly considered" to be an aspect of contractual notice and consultation requirements. Article 4-10 does not concern only notice and consultation rights. Instead, the provision outlines the process by which the Union is to raise any concerns pertaining to "new and/or reconfigured office space," and sets forth the Agency's obligation to "bring" such concerns "to the attention of the design team for serious consideration."

The Court in *Federal Bureau of Prisons v. FLRA*, No. 10-1089, 2011 WL 2652437 (D.C. Cir. July 8, 2011) *granting petition for review of United States Department of Justice, Federal Bureau of Prisons, Washington, D.C.*, 64 FLRA 559 (2010) (*BOP*), recently rejected a similarly narrow application of a contractual provision to a subject over which the Agency refused to bargain. *BOP* at *6. In that case, the Court determined that there need not be an "exact congruence" between the provision in dispute and a provision of the agreement "so long as the agreement expressly or implicitly indicates the parties reached a negotiated agreement on the subject" in order for the matter to be covered by that provision. *Id.* at *3 (citing *NTEU v. FLRA*, 452 F.3d 793,

796 (D.C. Cir. 2006)); *see also*, 61 FLRA 437, 441 (2006) (exact congruence of language is not required to assess whether the subject matter of a proposal is expressly contained in a collective bargaining agreement).

Unlike my colleagues, I cannot conclude that it is necessary for the Agency to resort to bargaining history to support its position because the plain language of Article 4-10 – "office layouts," "office space," and "design plans" – so obviously encompasses the subject of each proposal. Indeed, the Union's original request to bargain characterizes each of these proposals under the subject matter heading of "office design and layout." *See* Petition, Attach. B (attachment to email dated September 3, 2010).

Proposal 3 concerns acoustics at counter workspaces where employees will communicate with customers at the new location. Record of Post Petition Conference at 3. A reasonable reader of Article 4-10 would conclude that workspace acoustics falls within the meaning of "office layout" and "design plans."[*] *See NATCA*, 61 FLRA at 441 (the subject matter of a proposal is covered by an agreement if a reasonable reader would conclude that the provision settles the matter in dispute).

Similarly, Proposals 4, 5, and 6 concern matters that are encompassed by the commonly understood meaning of terms like "office layout," "office space," and "design plans." Proposal 4 concerns the placement and number of window seats; Proposal 5 concerns the placement and amount of daytime work storage (i.e. shelving); and Proposal 6 concerns the size, wall configuration, and lighting of office cubicles.

I would conclude that each of these provisions is covered by Article 4-10.

Application of "methods and means" to Proposals 1 and 5

I also disagree with my colleagues' conclusion that the Agency "does not demonstrate" how Proposals 1 and 5 meet the methods and means test. Majority at 4, 14. In prior cases, we have required the agency only to discuss "the nature of the employees' duties" and how those duties are "integrally related to accomplishment of the Agency's mission." *NTEU, Chapter 83*, 64 FLRA 723, 725 (2010).

Here, the Agency specifically relates the nature of the employees' duties to the accomplishment of its mission. In response to Proposal 1 (number of and location of printers, copiers, and fax machines), the Agency argues that the work performed by passport specialists "does not always require" printing, copying or faxing and that, to the extent access to office equipment is required, the existing number (and configuration) of machines is adequate because "non-productive time . . . is already accounted for in the production standards." Statement of Position at 2; Response at 2. In its response to Proposal 5 (amount of shelf space available for daytime storage), the Agency argues that there are "multiple methods … to secure applications" and that it will "continue the past practice of making shelves and storage carts available" for work in progress. SOP at 10.

Further, the Agency has demonstrated that these proposals interfere with the methods and means it has chosen to accomplish its mission. Proposal 1 interferes with the Agency's determination regarding the number of (and distance to and configuration of) office machines that are required to accomplish specific tasks. *NFFE, Local 2192*, 59 FLRA 868, 872 (2004) (the agency's choice of equipment to use in accomplishing its mission constitutes a determination as to the means of performing work; requiring the agency to purchase equipment interferes with its determination whether to purchase equipment for mission-related purposes); *but cf. ACT, Chapter 61*, 48 FLRA 412, 420 (1993) (Authority determines whether a proposal directly interferes with a mission-related purpose only when the agency demonstrates a direct and integral relationship between the proposal and the agency's mission). Similarly, the request for "adequate shelf space" and for "overnight" storage in Proposal 5 adds a new dimension that interferes with the Agency's chosen means of providing a specific amount of storage space by the use of a combination of shelving and storage carts.

I would conclude that Proposals 1 and 5 concern the methods and means of performing work, and are therefore negotiable only at the election of the Agency.

[*] Experts also agree that workspace acoustics is clearly an aspect of workspace design and layout. The National Institute of Building Sciences notes that the "acoustical environment" of a workspace is a factor of the "project planning and design" of public and private workspace, offices, and conference rooms. "Acoustic Comfort" by Richard Paradis, P.E., National Institute of Building Sciences, Whole Building Design Guide (6/8/10). USLegal notes that facility "layout and design" impacts "how work is done" and integrates the "needs of personnel and customers, materials, and machinery." Facility Layout and Design Law and Legal Definitions, USLegal.