

**67 FLRA No. 82**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1164  
(Union)

and

SOCIAL SECURITY ADMINISTRATION  
WORCESTER FIELD OFFICE  
WORCESTER, MASSACHUSETTS  
(Agency)

0-NG-3179

DECISION AND ORDER  
ON A NEGOTIABILITY ISSUE

March 19, 2014

Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester and Patrick Pizzella, Members  
(Member Pizzella concurring)

**I. Statement of the Case**

The Union filed a negotiability appeal (the petition). The petition concerns the negotiability of one proposal relating to potential “adverse actions and negative consequences”<sup>1</sup> of the Agency’s decision to make changes to employees’ interviewing assignments.

The main question before us is whether the proposal is negotiable as an appropriate arrangement under § 7106(b)(3) of the Federal Service Labor-Management Relations Statute (the Statute). Because the proposal excessively interferes with management’s rights, the answer is no.

**II. Background**

This dispute arose when the Union requested impact-and-implementation bargaining in response to the Agency’s planned changes to bargaining-unit employees’ interviewing assignments. Most of the affected employees primarily conduct interviews of potential beneficiaries and process documents related to Social Security and Supplemental Security Income benefits (interviewing group). Prior to the changes at issue here, this group rotated duties daily on a

repeating basis – one day conducting face-to-face interviews; one day conducting telephone interviews; and one day working at their desks without interviewing (desk day). Other affected employees primarily processed specific documents related to these benefits, but did not generally conduct interviews (specialized group). Under the changes at issue here, the Agency modified the interviewing group’s daily rotation of duties to include a desk day every Wednesday, and interviews on all other days of the week. Also under the changes, the Agency modified the specialized group’s duties by requiring them to conduct interviews on Wednesdays.

As relevant here, the Union submitted one proposal to the Agency to offset the alleged “adverse actions and negative consequences”<sup>2</sup> to bargaining-unit employees that resulted from the Agency’s changes. The Agency declared the proposal outside the duty to bargain.

The Union then filed its petition with the Authority. The Agency filed a statement of position (statement). The Union filed a response to that statement (response), and the Agency filed a reply to the response (reply).

**III. Proposal****A. Wording**

No employee shall be held responsible for any clearance reductions, development delays, processing delays, case backlogs, and other workload problems caused by Management[’]s interviewing assignment changes.<sup>3</sup>

**B. Meaning**

The parties agree that the proposal would protect employees from “adverse actions and negative consequences” resulting from any “clearance reductions,” “development delays,” “processing delays,” and other workload problems caused by the Agency’s changes to employees’ interviewing assignments.<sup>4</sup> Specifically, the proposal would protect employees from adverse consequences such as discipline, non-issuance of awards, denial of details, denial of opportunities to mentor, and poor references for promotions.<sup>5</sup> The parties also agree that, as used in the proposal: (1) “‘clearance reductions’ refer[] to any possible reduction in the overall number of cases processed by an employee from start to finish”;

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.* at 4-5; *see* Record of Post-Pet. Conference (Record) at 2.

<sup>5</sup> Pet. at 5.

<sup>1</sup> Union’s Pet. (Pet.) at 5.

(2) “‘development delays’ . . . relate[] to the preliminary processing of a case, that is, delays related to the time it takes to develop a claim for processing”; and (3) “‘processing delays’ relate[] to any delay in the handling of the case as it works its way through the system once assigned.”<sup>6</sup>

### C. Analysis and Conclusions

1. The proposal affects management’s rights to direct and discipline employees under § 7106(a)(2)(A) of the Statute, and its right to assign work under § 7106(a)(2)(B) of the Statute.

The Agency contends that the proposal would affect management’s § 7106(a)(2)(A) rights to direct and discipline employees, and its § 7106(a)(2)(B) right to assign work.<sup>7</sup> The Union expressly concedes that the proposal affects management’s rights to direct and discipline employees, and to assign work.<sup>8</sup> Therefore, we find that the proposal affects those rights.<sup>9</sup>

2. The proposal is not an appropriate arrangement.

The Union asserts that, despite the proposal’s effects on management’s rights, the proposal is negotiable as an appropriate arrangement under § 7106(b)(3) of the Statute.<sup>10</sup>

The current test for determining whether a proposal is within the duty to bargain under § 7106(b)(3) is described in *NAGE, Local R14-87 (KANG)*.<sup>11</sup> Under that test, the Authority initially determines whether a proposal is intended to be an “arrangement” for employees adversely affected by the exercise of a management right.<sup>12</sup> An arrangement must seek to mitigate adverse effects “flowing from the exercise of a protected management right.”<sup>13</sup> To establish that a proposal is an arrangement, a union must identify the effects or reasonably foreseeable effects on employees that flow from the exercise of management’s rights and

how those effects are adverse.<sup>14</sup> The alleged arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management’s rights.<sup>15</sup>

If a proposal is an arrangement, then the Authority determines whether it is appropriate or whether it is inappropriate because it excessively interferes with the applicable management rights.<sup>16</sup> The Authority makes this determination by weighing “the competing practical needs of employees and managers” to ascertain whether the benefit to employees flowing from the proposal outweighs the proposal’s burden on the exercise of the management right or rights involved.<sup>17</sup>

The Union requests that the Authority reverse this well-established excessive-interference standard in negotiability cases involving proposals. According to the Union, the Authority should adopt, in those cases, an “abrogation” standard where the agency must show that the proposal would “preclude management from ultimately acting” to exercise its management rights.<sup>18</sup> Specifically, the Union argues that the legislative intent of § 7106 “was to expand the scope of bargaining while protecting the right of federal agencies to ‘ultimately exercise’ certain management prerogatives.”<sup>19</sup> The Union also argues that, based on the plain wording of § 7106, “[u]nions retain the right to bargain over appropriate arrangements, within the bounds of the definitions of those terms and without waiving management’s ultimate right to act.”<sup>20</sup> Further, the Union contends that an abrogation standard would resolve “legal and practical problems inherent with the existing negotiability standards” by: (1) being “*more* consistent with the plain language and legislative history of” § 7106; (2) putting the parties on notice “that a union proposal would be presumed negotiable unless an agency can show that the proposal would abrogate its rights,” “rather than push[ing] parties into engaging in . . . excessive[-]interference [arguments] and into litigation”; (3) “promot[ing] broad collective bargaining by placing the burden on the parties to resolve” negotiability disputes at the “bargaining table,” and through impasse procedures, rather than encouraging agencies to “raise[e] legal objections at the start” of negotiations; and (4) being consistent with the Authority’s precedent concerning agreed-upon contract provisions.<sup>21</sup>

<sup>6</sup> Record at 2.

<sup>7</sup> Agency’s Statement of Position (Statement) at 10, 13.

<sup>8</sup> Union’s Resp. (Resp.) at 14.

<sup>9</sup> See *NATCA*, 66 FLRA 658, 661 (2012) (finding union conceded that proposal affects management’s right to assign work).

<sup>10</sup> Resp. at 3.

<sup>11</sup> 21 FLRA 24 (1986).

<sup>12</sup> *Id.* at 31.

<sup>13</sup> *U.S. Dep’t of the Treasury, Office of the Chief Counsel, IRS v. FLRA*, 960 F.2d 1068, 1073 (D.C. Cir. 1992).

<sup>14</sup> *KANG*, 21 FLRA at 31.

<sup>15</sup> *E.g., AFGE, Local 1687*, 52 FLRA 521, 523 (1996).

<sup>16</sup> *KANG*, 21 FLRA at 31-33.

<sup>17</sup> *Id.* at 31-32.

<sup>18</sup> Resp. at 15, 32.

<sup>19</sup> *Id.* at 24.

<sup>20</sup> *Id.* at 31.

<sup>21</sup> *Id.* at 31-34 (emphasis added).

Consistent with Authority precedent rejecting similar requests in the past, we reject the Union's request that we abandon the excessive-interference test in negotiability cases involving proposals.<sup>22</sup> This test has been consistently applied by the Authority for nearly thirty years and has been upheld by courts.<sup>23</sup> In fact, in adopting the excessive-interference test in *KANG*, the Authority referenced the decision of the U.S. Court of Appeals for the D.C. Circuit in *AFGE, AFL-CIO, Local 2782 v. FLRA*,<sup>24</sup> and stated that the court "enunciated a standard[,] which requires an analysis of whether 'excessive interference' with a right reserved to management would result from implementation of the proposal."<sup>25</sup> The Union's arguments provide no basis for finding that the excessive-interference test is inconsistent with the plain wording or legislative intent of § 7106, or that an abrogation standard (in the context of negotiability cases involving proposals) would be *more* consistent with § 7106's wording and legislative intent.<sup>26</sup> Therefore, in applying the *KANG* test in this case, we apply the excessive-interference standard.

Applying the *KANG* test here, even assuming that the proposal is an arrangement, we find that it is not appropriate because it excessively interferes with the management rights at issue.<sup>27</sup> With regard to the proposal's benefits to employees, the proposal is intended to ensure that employees will not be subject to "adverse actions and negative consequences" resulting from any "clearance reductions," "development delays," "processing delays," and other workload problems caused by the Agency's changes to employees' interviewing assignments.<sup>28</sup> Specifically, the proposal would protect employees from adverse consequences relating to matters such as "performance appraisals and in any considerations of potential discipline, performance actions, awards, promotion applications (including supervisory references), details, training, [and] mentoring."<sup>29</sup>

With regard to the proposal's burdens on management's rights, the proposal would completely preclude management from disciplining and holding employees accountable for their work performance in

connection with any and all clearance reductions, development delays, processing delays, case backlogs, and other workload problems associated with the Agency's changes.<sup>30</sup> The proposal contains no exception that takes into account the seriousness of the clearance reductions, development delays, processing delays, case backlogs, and other workload problems.<sup>31</sup> Therefore, the burdens on management are significant.

In *NATCA, AFL-CIO (NATCA)*,<sup>32</sup> the Authority held that a proposal immunizing employees from discipline for specified conduct excessively interfered with management's right to discipline. Similarly, in *Patent Office Professional Association (POPA I)*,<sup>33</sup> the Authority held that proposals immunizing employees from accountability for their work performance for specified conduct, regardless of the circumstances of that conduct, excessively interfered with management's rights to direct employees and to assign work. Therefore, *NATCA* and *POPA I* support a conclusion that the proposal in this case excessively interferes with management's rights to direct and discipline employees and to assign work.

The Union argues that the proposal's burdens on management are limited because the proposal allows management "discretion in performance appraisals, discipline, work assignment, etc." for performance deficiencies that are *not* related to the Agency's changes.<sup>34</sup> But in *NATCA*, the Authority also held that even though the proposal at issue there "would not preclude discipline or performance-based action for other matters, or that the immunity applied for only two months, did not outweigh the significant burden on management's rights imposed by the immunity afforded employees under the proposal."<sup>35</sup> Therefore, that the Union's proposal in this case would not preclude discipline or accountability for employees' work performance for matters unrelated to the Agency's changes do not support a conclusion that the proposal is an appropriate arrangement.

Although the Union cites *Patent Office Professional Association*<sup>36</sup> to argue that the proposal is an appropriate arrangement, that decision is distinguishable. In that decision, the Authority found a provision to be an appropriate arrangement where the provision mandated

<sup>22</sup> *AFGE, Nat'l Border Patrol Council*, 40 FLRA 521, 525-26 (1991); *AFGE, Nat'l Border Patrol Council*, 39 FLRA 675, 678, 682 (1991).

<sup>23</sup> *E.g., NTEU v. FLRA*, 550 F.3d 1148 (D.C. Cir. 2008) (applying *KANG* test with approval).

<sup>24</sup> 702 F.2d 1183 (D.C. Cir. 1983).

<sup>25</sup> *KANG*, 21 FLRA at 25.

<sup>26</sup> Resp. at 31-32 (emphasis added).

<sup>27</sup> *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 932 (2012).

<sup>28</sup> Pet. at 4-5; *see also* Record at 2.

<sup>29</sup> Resp. at 47; *see also* Pet. at 5.

<sup>30</sup> *E.g., NATCA, AFL-CIO*, 62 FLRA 174, 180-81 (2007) (*NATCA*); *Patent Office Prof'l Ass'n*, 48 FLRA 129, 147 (1993) (*POPA I*).

<sup>31</sup> *See NATCA*, 62 FLRA at 174.

<sup>32</sup> 62 FLRA at 180-81.

<sup>33</sup> 48 FLRA at 147.

<sup>34</sup> Resp. at 47.

<sup>35</sup> 62 FLRA at 181.

<sup>36</sup> *Patent Office Prof'l Ass'n*, 47 FLRA 10, 34-37 (1993).

that the agency could not hold employees responsible for matters outside their control when the agency rated their performance.<sup>37</sup> The Authority noted, among other things, that the burden placed on the agency to avoid appraising employees on matters outside their control was “slight” because the agency retained the discretion to establish performance elements and standards reflecting the work for which employees were responsible.<sup>38</sup> By contrast, here, the proposal imposes a more significant burden on management by eliminating the Agency’s discretion to hold employees accountable for certain aspects of their performance, regardless of performance standards.

Weighing the burdens placed on the Agency against the benefits to employees, we find that the proposal excessively interferes with management’s rights to direct employees and discipline under § 7106(a)(2)(A) and to assign work under § 7106(a)(2)(B).<sup>39</sup> Accordingly, we find that the proposal is not an appropriate arrangement and, therefore, is outside the duty to bargain.<sup>40</sup>

The Agency also argues that the proposal is outside the duty to bargain because it is “covered by” the parties’ agreement<sup>41</sup> and interferes with management’s rights to suspend, remove, and reduce in grade or pay.<sup>42</sup> In addition, the Agency contends that the proposal is not a procedure under § 7106(b)(2) of the Statute.<sup>43</sup> However, in light of our conclusion that the proposal is nonnegotiable because it is not an appropriate arrangement, and because the Union does not assert that the proposal is within the duty to bargain under § 7106(b)(2), it is unnecessary to address the Agency’s remaining arguments.

Finally, the Union argues that the Authority should adopt a “clear and unmistakable waiver” standard instead of the Authority’s “covered-by” test.<sup>44</sup> But because we do not address the Agency’s “covered-by” argument, we find it unnecessary to address the Union’s request.

#### IV. Order

We dismiss the petition for review.

<sup>37</sup> *Id.* at 36.

<sup>38</sup> *Id.*

<sup>39</sup> See *NATCA*, 62 FLRA at 174; see also *POPA I*, 48 FLRA at 147.

<sup>40</sup> See *NATCA*, 62 FLRA at 174; see also *POPA I*, 48 FLRA at 147.

<sup>41</sup> Statement at 2.

<sup>42</sup> *Id.* at 13.

<sup>43</sup> *Id.* at 14-15.

<sup>44</sup> Resp. at 4.

#### Member Pizzella, concurring:

I agree with my colleagues that the Union’s proposal – that would “preclude management from disciplining and holding employees accountable for their work performance” that results from the commonsense changes to the rotation of duties that were implemented by management – excessively interferes with management’s rights to direct and discipline employees and to assign work.<sup>1</sup>

Unlike my colleagues, however, I would take this opportunity to acknowledge the recent decision of the U.S. Court of Appeals for the D.C. Circuit in *U.S. Department of the Treasury, IRS, Office of the Chief Counsel, Washington, D.C. v. FLRA (IRS)*<sup>2</sup> that calls into question the manner in which the Authority determines whether bargaining proposals and contract provisions impermissibly interfere with § 7106(a) management rights.

For the reasons discussed below, I would embrace the excessive interference standard to determine whether a proposal or provision impermissibly interferes with any § 7106(a) management right regardless of whether the matter arises as an exception to an arbitrator’s award, as a negotiability dispute involving proposals, or as the result of a negotiability appeal involving agency-head disapproval of contract provisions under § 7114(c)(2).

Prior to my confirmation as a Member of the Authority (in November 2013), my colleagues suddenly, and unexpectedly, determined (entirely sua sponte) that they would no longer apply the excessive interference standard to determine whether an arbitrator’s award impermissibly interferes with a management right but would instead re-adopt a standard – abrogation<sup>3</sup> – that was previously abandoned by the Authority in 2002.<sup>4</sup> In other words, my colleagues determined that an arbitrator’s application of a contractual provision would no longer be found to be contrary to law unless it entirely

<sup>1</sup> Majority at 5.

<sup>2</sup> No. 12-1456 consolidated with 13-1066, 2014 U.S. App. LEXIS 68 (D.C. Cir. January 3, 2014).

<sup>3</sup> *U.S. EPA*, 65 FLRA 113, 119 (2010) (*EPA*) (Member Beck concurring).

<sup>4</sup> *NTEU*, 65 FLRA 509, 520 n.1 (2011) (*NTEU I*) (Dissenting Opinion of Member Beck) (citing *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 58 FLRA 109, 115 (2002) (*Fed. Transfer Ctr.*) (Concurring Opinion of Member Armendariz)). In *Fed. Transfer Ctr.*, Member Armendariz noted that the abrogation standard was “one-sided,” “meaningless,” and without “utility.” 58 FLRA at 115.

“abrogate[d] – i.e., waive[d]” a management right.<sup>5</sup> Several months later in *NTEU I*, my colleagues expanded (again sua sponte) the application of the abrogation standard into the context of “negotiability appeal[s] involving agency-head disapproval of contract provisions” under § 7114(c)(2)<sup>6</sup> even though the excessive interference standard had been in this context (and upheld by several federal courts) for thirty years.<sup>7</sup> But in the context of “negotiability cases involving proposals,” my colleagues continued to apply the excessive interference standard.<sup>8</sup>

As this summary demonstrates, the Authority’s precedent has shifted aimlessly between the application of the excessive interference and abrogation standards for nearly thirty years. As a consequence, agencies and unions alike have been unable to predict with any certainty under which standard they should argue negotiability cases and exceptions that challenge an arbitrator’s award because it impermissibly interferes with a management right and under which standard their cases ultimately will be adjudicated.<sup>9</sup>

Finally, on January 3, 2014, the court in *IRS* delivered an unmistakable rebuke to the Authority for its “inconsistent interpretations” of these standards.<sup>10</sup> The court specifically found that the Authority’s recent adoption of the abrogation standard was “arbitrary and capricious” in the context of § 7114(c)(2) agency-head review and “vacate[d] the Authority’s decision” to expand the abrogation standard into that context.<sup>11</sup> In a direct challenge to the Authority’s rationale, the court found that “two identical provisions” affecting management rights “in precisely the same way” cannot be found to be appropriate or inappropriate depending “*on the point* at which the agency asserts” its arguments (i.e., at the bargaining table, upon agency head review, or as the result of an arbitral award).<sup>12</sup>

<sup>5</sup> *EPA*, 65 FLRA at 118.

<sup>6</sup> *NTEU I*, 65 FLRA at 512.

<sup>7</sup> See Majority at 4 n.22 (citing *NTEU v. FLRA*, 550 F.3d 1148 (D.C. Cir. 2008)) (applying *KANG*, *NAGE*, *Local R 14-87*, 21 FLRA 24, 31 (1986) (*KANG*) test with approval).

<sup>8</sup> *Id.*

<sup>9</sup> See, e.g., *SSA Indianapolis, Ind.*, 66 FLRA 62, 65 (2011) (applying abrogation standard to deny agency’s exceptions where agency argued “excessive interference”); *U.S. Dep’t of Commerce, Patent & Trademark Office*, 65 FLRA 290, 296 (2010) (Member Beck dissenting in part) (same).

<sup>10</sup> *IRS*, 2014 U.S. App. LEXIS 68 at \*2.

<sup>11</sup> *Id.* at \*21.

<sup>12</sup> *Id.* at \*18 (emphasis added).

Besides the clear mandate of the court, there are many other reasons why it is imperative that the Authority bring clarity to this matter once and for all. But foremost is the reality that the ongoing shifting of standards by the Authority does not “facilitate[] and encourage[] the amicable settlement[] of disputes”<sup>13</sup> and does not bring any sense of finality or predictability to the parties that look to us for a fair adjudication of their good-faith disputes.

Accordingly, it is imperative that the Authority finally adopt excessive interference as the sole standard by which we will determine whether a proposal or provision impermissibly interferes with § 7106(a) management rights regardless of the “point at which [an] agency asserts [that an] arrangement is inappropriate.”<sup>14</sup> As the court acknowledged, it should not matter whether the matter arises in a negotiability dispute involving proposals, as the result of a negotiability appeal involving agency-head disapproval of contract provisions under § 7114(c)(2), or as an exception to an arbitrator’s award.<sup>15</sup>

As to the first scenario, in this case, my colleagues “reject[]” the Union’s request to expand the abrogation standard to negotiability cases involving proposals.<sup>16</sup> I agree with my colleagues because the excessive interference standard has not only served the Authority well for thirty years,<sup>17</sup> but it has been upheld consistently by federal courts in seven different federal circuits<sup>18</sup> and similar “interference” standards have been

<sup>13</sup> 5 U.S.C. § 7101(a)(1)(C).

<sup>14</sup> *IRS*, 2014 U.S. App. LEXIS 68 at \*18.

<sup>15</sup> *Id.*

<sup>16</sup> See Majority at 4.

<sup>17</sup> *Id.*

<sup>18</sup> See *U.S. INS, U.S. Border Patrol v. FLRA*, 12 F.3d 882, 884 (9th Cir. 1993) (“The Second, Fourth[,] and D.C. Circuits have adopted the [excessive interference] analysis[,] and we feel constrained to join them.”); *U.S. INS v. FLRA*, 4 F.3d 268, 272 n.7 (4th Cir. 1993) (“The competing practical needs of employees and managers are weighed in the light of various factors, so as to determine whether, on balance, the impact of the proposal on management’s rights is *excessive* when compared to the benefits afforded employees.”) (quoting *Nuclear Regulatory Comm’n v. FLRA*, 895 F.2d 152, 155 (4th Cir. 1990)); *U.S. DOJ, INS v. FLRA*, 975 F.2d 218, 225 (5th Cir. 1992) (“[W]e find the FLRA’s interpretation of § 7106(b)(3) to be reasonable and thus we adopt the ‘excessive interference’ test.”); *Overseas Educ. Ass’n v. FLRA*, 961 F.2d 36, 40 (2d Cir. 1992) (“[The] excessive interference standard properly adds flesh to the term ‘appropriate’ by employing a test that balances the competing needs of employees and managers.”);

endorsed by numerous state courts to define the extent to which various collective bargaining arrangements may impinge on public employer-management rights.<sup>19</sup> To the contrary, no federal court has ever endorsed the abrogation standard, and the court in *IRS* “vacate[d]” the Authority’s attempt to insert that standard into negotiability appeals that involve agency-head disapproval under § 7114(c)(2) and tacitly endorsed excessive interference as the sole standard the Authority should apply.<sup>20</sup>

Furthermore, in view of the court’s warning that – “two identical provisions” affecting management rights “in precisely the same way” cannot be found to be appropriate or inappropriate depending “*on the point* at which the agency asserts” its arguments – and its observation – that “the Authority has given no indication that it plans to abandon the ‘excessive interference’ [standard]” – there is no sound justification to continue to apply the abrogation standard only when an agency challenges an arbitrator’s award because it impermissibly interferes with a management right.<sup>21</sup>

The fairness and utility of the abrogation standard has been challenged repeatedly. In 2002, Member Armendariz observed that “the Authority has never applied [the abrogation] standard in such a way to find that an award was deficient” and that “[s]uch a uniformly one-sided application effectively renders the test meaningless and removes all of its utility.”<sup>22</sup> In 2011, Member Beck echoed these same concerns and noted, that after twenty years of applying abrogation in various contexts, the Authority still has never “found that

a contract provision abrogates any management right; it just doesn’t happen.”<sup>23</sup> My research reaffirms that since *NTEU I* in 2011, the Authority still has yet to find that any proposal, any provision, or any application of contract provisions by any arbitrator abrogates any management right.

Accordingly, I would use this case to embrace a single standard – excessive interference – for determining whether a proposal or provision impermissibly interferes with management rights. I believe that our failure to do so will lead only to further admonitions from federal courts that recently have criticized the reasoning employed by the Authority in several significant cases.<sup>24</sup> We cannot simply ignore, and fail to acknowledge, court decisions that we find to be inconvenient. And as I noted in my first opinion as a Member of the Authority, “in order for the federal labor-management relations community to contribute to the effective conduct of government . . . [t]he Authority needs to issue decisions that withstand judicial scrutiny.”<sup>25</sup> Therefore, I am perplexed that my colleagues seem reluctant to give even a passing nod to the court’s decision in *IRS*.

Under these circumstances, it is time for the Authority to bring this matter to repose for the labor-management relations community and to endorse the only standard that is fundamentally fair and that has been affirmatively embraced by the federal courts.

Thank you.

---

*Horner v. Bell*, 825 F.2d 382, 389 (Fed. Cir. 1987) (“[T]he critical inquiry is whether the provision interferes with management prerogatives to ‘an excessive degree.’”) (quoting *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983)); *AFGE, Local 3748 v. FLRA*, 797 F.2d 612, 619 n.38 (8th Cir. 1986) (citing “excessive[e] interfere[nce]” as accepted test for negotiability cases) (quoting *KANG*, 21 FLRA at 31)).

<sup>19</sup> See *Baltimore v. Balt. Ass’n Firefighters, Local 734, I.A.F.F.*, 93 Md. App. 604, 618 (Md. Ct. Spec. App. 1992); *Int’l Assn’ of Firefighters, Local No. 672 v. City of Boise City*, 136 Idaho 162, 171 (Idaho 2011); *United Pub. Workers, Local 646 v. City & County of Honolulu*, No. 26347 2007 Haw. App. LEXIS 277 (Haw. Ct. App. April 17, 2007); *Springfield Police Ass’n v. City of Springfield*, 134 Ore. App. 26, 29 (Or. Ct. App. 1995); *City of Scranton v. Fire Fighters Local Union No. 60*, 20 A. 3d 525, 531 (Pa. Commw. Ct. 2011).

<sup>20</sup> *IRS*, 2014 U.S. App. LEXIS 68 at \*21.

<sup>21</sup> See *EPA*, 65 FLRA at 116-17.

<sup>22</sup> *Fed. Transfer Ctr.*, 58 FLRA at 115 (Concurring Opinion of Member Armendariz).

---

<sup>23</sup> *NTEU I*, 65 FLRA at 520 (Concurring Opinion of Member Beck).

<sup>24</sup> See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779, 787-88 (D.C. Cir. 2013) (Authority asks “wrong question” in determining whether proposal is outside the duty to bargain and construes proposal in manner that “defies reasoned decisionmaking”); *Fed. BOP v. FLRA*, 654 F.3d 91, 97 (D.C. Cir. 2011) (Authority ignores “inconvenient history,” endorses an “incoherent arbitral award,” and embraces an “unreasonably narrow view” of what is covered by the parties’ master agreement).

<sup>25</sup> *U.S. DHS, CBP*, 67 FLRA 107, 113 (2013) (Concurring Opinion of Member Pizzella).