68 FLRA No. 59

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOOD NUTRITION AND CONSUMER SERVICES
(Agency)

0-NG-3214

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

March 6, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).[1] This case concerns the negotiability of five proposals addressing merit promotions and details. The Union's proposals were initially raised during negotiations over a new term collective-bargaining agreement. The Agency filed a statement of position (statement), to which the Union filed a response (response). The Agency did not file a reply to the Union's response.

With respect to Proposal 1, we must decide whether the proposal is contrary to federal anti-discrimination law or to the Agency's right to select employees. Because the Agency fails to establish that the proposal is inconsistent with federal anti-discrimination law, and because it has conceded that the proposal is a negotiable procedure, we hold that the proposal is within the duty to bargain.

With respect to Proposal 2, we must decide whether the proposal is contrary to 5 C.F.R. § 300.201(c). We find that the proposal conflicts with § 300.201(c), and accordingly, we find that the proposal is outside the duty to bargain.

With respect to Proposal 3, we must decide whether the proposal is contrary to the Agency's right to hire or whether it is "covered by" a provision of the parties' collective-bargaining agreement. Because the Agency has conceded that the proposal is a negotiable procedure, we hold that the proposal does not conflict with the Agency's right to hire. Likewise, we hold that the "covered-by" doctrine does not apply here. Thus, we hold that the proposal is within the duty to bargain.

With respect to Proposal 4, we must decide whether the proposal is contrary to 5 C.F.R. § 335.103(c). Because we find that the proposal is contrary to § 335.103(c), we hold that it is outside the duty to bargain.

With respect to Proposal 5, we must decide whether the proposal is contrary to 5 C.F.R. § 300.603(b)(7) or the Agency's rights to hire and assign employees, or whether it is "covered by" a provision of the parties' agreement. Because the parties agree that the proposal is subject to § 300.603(b)(7), we find that the proposal is not contrary to that regulation. Further, because the Agency's discretion under § 300.603(b) is not "sole and exclusive,"[2] the proposal does not run afoul of § 300.603(b). Likewise, we find that the Agency has conceded that the proposal is a procedure, and therefore, the proposal does not violate the Agency's rights to hire or assign employees. Finally, the "covered-by" doctrine is irrelevant here. Accordingly, we hold that the proposal is within the duty to bargain.

II. Proposal 1

A. Wording

> If the selecting official chooses to fill a unit position with an applicant who is not presently a federal employee, e.g., via an OPM appointment certificate, it will upon request of any bargaining unit employee who was rated Best Qualified, but not selected, articulate in writing a nondiscriminatory, merit-based reason with sufficient clarity to afford the employee a realistic opportunity to show that the reason is pretextual.[3]

B. Meaning

The parties agree that, under the proposal, if a bargaining-unit employee applies for a bargaining-unit

[1] 5 U.S.C. §§ 7101-7135.

[2] *See POPA*, 53 FLRA 625, 648 (1997) (*POPA I*), *overruled in part by POPA*, 59 FLRA 331 (2003) (*POPA II*) (then-Member Pope concurring, in part, and dissenting, in part).

[3] Pet. at 3.

position and receives a rating of best qualified, but the Agency selects an external, non-federal-government applicant for the position, the employee may request information from the Agency.[4] Specifically, if the employee feels that the Agency discriminated against him or her because he or she is a member of a protected class, then he or she may request from the Agency a written, merit-based reason for his or her non-selection.[5] The reason would have to be explained with sufficient clarity to grant the employee the opportunity to demonstrate that the Agency's stated reason is pretextual, referencing the burden-shifting framework established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*[6] and its progeny.[7]

C. Analysis and Conclusions

1. The proposal is not contrary to federal anti-discrimination law.

The Agency argues that the proposal "is contrary to law because it establishes a protected class that currently does not exist under law,"[8] i.e., current federal employees. The Union disputes this assertion.[9] Because the Union's explanation is consistent with the proposal's plain wording and agreed-upon meaning, we adopt that explanation.[10] Accordingly, we find that the proposal does not create an additional protected class.

The Agency also argues that, in grievances involving non-selection, the proposal improperly shifts the burden of proof to the Agency when an outside candidate is selected over a bargaining-unit employee.[11] The Union responds that the proposal says "nothing about burdens of any kind."[12] The Agency's argument is inconsistent with the agreed-upon meaning of the proposal, which does not impose any burden on the Agency other than providing information. Thus, we find that the proposal does not transfer the burden of proof to the Agency.

Accordingly, the Agency has not established that the proposal is contrary to federal anti-discrimination law.

2. The proposal affects the Agency's right to select employees.

The Agency also argues that the proposal affects its right to select under § 7106(a)(2)(C) of the Statute by discouraging it from selecting outside candidates.[13] The Union does not dispute that the proposal affects the Agency's right to select. Under § 2424.32(c)(2) of the Authority's Regulations, "[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion."[14] Thus, consistent with that regulation and Authority precedent, the Union has conceded that the proposal affects the Agency's right to select employees.[15] Accordingly, we find that the proposal affects the Agency's right to select under § 7106(a)(2)(C) of the Statute.[16] But even if the proposal concerns the exercise of this management right, the proposal is nevertheless negotiable if it constitutes a procedure within the meaning of § 7106(b)(2).[17]

3. The proposal is a procedure.

It is also uncontested that the proposal is a procedure. The Union argues in its response that the proposal constitutes a procedure under § 7106(b)(2).[18] The Agency did not address this issue in its statement of position or file a reply to the Union's response. As discussed above, by not responding to the Union's argument, the Agency has conceded that the proposal is a procedure under § 7106(b)(2).[19] We therefore hold that this proposal is a procedure. In light of this determination, we find it unnecessary to reach the Union's argument that the proposal is also an appropriate arrangement under § 7106(b)(3).[20]

[4] Record of Post-Petition Conference (Record) at 1-2.
[5] *Id.* at 2.
[6] 411 U.S. 792 (1973).
[7] Record at 2.
[8] Statement at 2.
[9] Response at 6-8.
[10] *See NAIL, Local 7*, 67 FLRA 654, 656 (2014) (Member Pizzella concurring, in part, and dissenting, in part) (citing *NAGE, Local R-109*, 66 FLRA 278, 278-80 (2011)).
[11] Statement at 3-4 (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993)).
[12] Response at 7.
[13] Statement at 4.
[14] 5 C.F.R. § 2424.32(c)(2).
[15] *See, e.g., AFGE, Local 1367*, 64 FLRA 869, 870 (2010) (citing *Nat'l Weather Serv. Emps. Org.*, 63 FLRA 450, 452 (2009); 5 C.F.R. § 2424.32(c)(2)) ("Where a union does not respond to an agency argument that a proposal affects a management right under § 7106 of the Statute, the Authority finds that the union has conceded that the proposal affects the claimed management right.").
[16] *See* 5 C.F.R. § 2424.32(c)(2).
[17] *NATCA, Local ZHU*, 65 FLRA 738, 744 (2011) (*Local ZHU*) (citing *NATCA, AFL-CIO*, 61 FLRA 336, 339 (2005) (*NATCA*)).
[18] Response at 4, 10-11.
[19] *See, e.g., NAIL, Local 5*, 67 FLRA 85, 91 (2012) (*Local 5*) (citing *Local ZHU*, 65 FLRA at 744).
[20] *See AFGE, AFL-CIO, Local 1760*, 28 FLRA 160, 166 (1987) (*Local 1760*).

Accordingly, the proposal is within the duty to bargain.[21]

III. Proposal 2

A. Wording

> Prior to the use of a crediting plan or similar rating guide the Employer will provide NTEU with specific notice of the plan/guide. However, once the plan/guide has been used and the Union so notified, the Employer is not required to notify the Union again unless there is a change in the plan. At the Employer's discretion, it may limit disclosure of the plan/guide to a face-to-face briefing, rather than describe it in any written notice. The Employer may withhold any test questions or answers if needed to protect the integrity of the test; however, it will reveal the number of points or other impact the test results could have on the overall assessment. Otherwise, the Union will be informed of the criteria to be assessed and the potential points or impact of each in the total assessment.[22]

B. Meaning

The parties agree that, under this proposal, the Agency would have to notify the Union before using a "crediting plan or similar rating guide" to evaluate applicants for a merit promotion.[23] A "crediting plan or rating guide" is the combination of knowledge, skills, and abilities (KSAs) required to successfully perform in a position; the job criteria for a position; and the weights to be used to evaluate whether a candidate possesses the KSAs.[24] The meaning of a "crediting plan or rating guide" is taken from Authority precedent.[25] Further, as part of its notification to the Union, the Agency would have to provide the Union with any criteria that it plans to use to assess applicants.[26] The Agency could notify the Union in writing or orally in a face-to-face meeting.[27] Moreover, the Agency would be required to give notice only when it uses a new crediting plan or rating guide, or changes an existing crediting plan or rating guide.[28]

Additionally, the proposal would require the Agency to inform the Union of the existence of tests that would be used and to explain how the tests would affect the application process.[29] However, the Agency could withhold test questions and answers to protect the integrity of the test.[30] The test questions and answers would have to be consistent with the Delegated Examining Operations Handbook, an Office of Personnel Management (OPM) manual that establishes the types of tests and answers that may be used in the process covered by this proposal.[31]

C. Analysis and Conclusion: The proposal contrary to 5 C.F.R. § 300.201(c).

The Agency argues, as relevant here, that the Union's proposal is contrary to 5 C.F.R. § 300.201(c), which, according to the Agency, "expressly forbids the release of crediting plans."[32] Section 300.201(c) states, "Each employee entrusted with test material has a positive duty to protect the confidentiality of that material and to assure release only as required to conduct an examination authorized by [OPM]."[33] Also relevant is subsection (a), which states that OPM "does not release the following: (1) [t]esting and examination materials used solely to determine individual qualifications, and (2) test material, including test plans, item analysis data, criterion instruments, and other material the disclosure of which would compromise the objectivity of the testing process."[34]

Although the proposal would permit the Agency to "withhold any test questions or answers if needed to

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[21] Member Pizzella notes that he is sympathetic to the Agency's concerns regarding the phrase "with sufficient clarity to afford the employee a realistic opportunity to show that the reason is pretextual." Although he agrees that the clause is vague, unnecessary, and likely to generate disputes over the adequacy of the Agency's explanation that will only distract from the ultimate question of whether the Agency based a hiring decision on improper criteria, these concerns go to the wisdom of the proposal, not its lawfulness. And "[i]f the subject of the proposal is appropriate for mandatory bargaining[,] as it is here, the merits and wisdom of the proposal must be left to the parties." *Tualatin Valley Bargaining Council v. Tigard Sch. Dist. 23J*, 840 P.2d 657, 666 (Ore. 1992) (Van Hoomissen, J., dissenting).

[22] Pet. at 5.

[23] Record at 2.

[24] *Id.*

[25] *Id.*; *see also Ass'n of Civilian Technicians, Inc., Heartland Chapter*, 56 FLRA 236, 240 (2000).

[26] Record at 2.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Statement at 6.

[33] 5 C.F.R. § 300.201(c).

[34] *Id.* § 300.201(a).

protect the integrity of the test,"[35] § 300.201(c)'s prohibition on the release of "test materials" applies to more than just test questions and answers. Moreover, although it argues that "n[o] . . . law creates an absolute bar against the release of crediting plans,"[36] the Union does not specifically address the Agency's claim that § 300.201(c) bars the disclosure of crediting plans in its response.

Given the apparent conflict between the proposal and § 300.201(c), and in the absence of any argument to the contrary from the Union, we find that the proposal is contrary to government-wide regulation, and therefore outside the duty to bargain. Accordingly, we find it unnecessary to address the Agency's arguments that the proposal is "covered by" provisions of the parties' agreement or that the proposal interferes with its rights to hire and to select employees, under § 7106(a)(2).[37] Nor do we need to address the Union's argument that the proposal is a procedure or an appropriate arrangement, under § 7106(b)(2) or (3), respectively, because a provision that is contrary to law or government-wide regulation remains so regardless of whether it is a procedure or an appropriate arrangement.[38]

IV. Proposal 3

A. Wording

> Upon request, the Employer will give the Union a copy of the documentation showing the 5 CFR Part 300 validation of the plan/guide, as well as any analysis of the impact of the plan/guide under the Uniform Guidelines on Employee Selection Procedures (1978): 43 Federal Register 38295 (August 25, 1978). All information that is collected in the application process will conform to 5 CFR Part 300. In addition, the Employer will ensure that this process is consistent with and follows the guidelines outlined in Part 60-3, Uniform Guidelines on Employee Selection Procedures.[39]

B. Meaning

The parties agree[40] that this proposal would require the Agency to ensure that its selection process is consistent with 5 C.F.R. Part 300 and the Uniform Guidelines on Employee Selection Procedures (the Guidelines).[41] Part 300 concerns procedures for the initial appointment process and competitive promotions, and the Guidelines require agencies to validate crediting plans if those plans could have an adverse impact on the employment opportunities of protected classes.[42] Under the proposal, the Union could request documentation from the Agency that shows that the Agency has complied with these authorities.[43] The Agency could satisfy this obligation by explaining to the Union in writing that it did not need to comply with the validation requirements of the Guidelines because no adverse impact existed.[44]

C. Analysis and Conclusions

1. The proposal is not contrary to § 7114(b)(4) of the Statute.

The Agency argues that the proposal is contrary to § 7114(b)(4) of the Statute because it would require the Agency to provide information for which the Union had not demonstrated a particularized need.[45] Section 7114(b)(4) requires an agency to provide, upon request, certain information upon a showing that the union has a "particularized need" for the information.[46] However, as noted by the Union, "the entitlement to information under § 7114(b)(4) is a 'statutory floor and not a ceiling.'"[47] Thus, a proposal is not contrary to § 7114(b)(4) simply because it provides "a right to information over and above the statutory entitlement."[48] Accordingly, the Agency has not established that the proposal is contrary to § 7114(b)(4).

2. The proposal does not affect the Agency's right to hire.

The Agency references only indirectly its right to hire, stating that "there is nothing in the Union's

[35] Pet. at 5.
[36] Response at 30.
[37] Statement at 6-7.
[38] *NTEU*, 55 FLRA 1174, 1181 (1999) (*NTEU II*) (citing *NTEU*, 52 FLRA 1265, 1272 (1997) (*NTEU I*)); *see also* 5 U.S.C. § 7117(a)(1) ("[T]he duty to bargain in good faith shall . . . extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a [g]overnment-wide rule or regulation.").
[39] Pet. at 7.
[40] Record at 3.
[41] Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,295 (1978).
[42] Record at 3.
[43] *Id.*
[44] *Id.*
[45] Statement at 8.
[46] *E.g., IRS, Wash., D.C. & IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 669 (1995).
[47] Response at 38 (quoting *United Am. Nurses, D.C. Nurses Ass'n & United Am. Nurses, Local 203*, 64 FLRA 879, 882 (2010) (*Local 203*)).
[48] *Local 203*, 64 FLRA at 882 (citing *POPA*, 39 FLRA 783, 815 (1991)).

submission that articulates how any bargaining[-]unit employees are adversely affected by the Agency's right to hire and promote employees."[49] And it neither explains how the proposal burdens the exercise of its right to hire nor responds to the Union's statement that the Agency "does not allege that mandating its compliance with 5 C.F.R. Part 300 and 41 C.F.R. § 60-3 and requiring the Agency to provide documentation of a validation study, if applicable, interferes with its right to hire."[50] Accordingly, we find that the Agency has not established that the proposal affects a management right.

Moreover, even assuming that the Agency sufficiently raises a claim that the proposal affects a management right, the proposal is negotiable if it constitutes a procedure.[51] And, as with Proposal 1,[52] the Agency did not address the Union's claim[53] that the proposal is procedure. Accordingly, we find that the Agency has conceded that the proposal is a negotiable procedure under § 7106(b)(2).[54] As such, we find it unnecessary to address the Union's claim that the proposal is also an appropriate arrangement under § 7106(b)(3).[55]

3. The "covered-by" doctrine is inapplicable.

The Agency also appears to argue that the proposal is "covered by" provisions of the parties' agreement.[56] Under the Authority's covered-by doctrine, a party is not required to bargain over terms and conditions of employment that have already been resolved by bargaining.[57] However, the 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.[58] Thus, the Agency's covered-by argument does not establish that the proposal is outside the duty to bargain.

We therefore hold that the proposal is within the duty to bargain.

V. Proposal 4

A. Wording

> In the event that the Employer fails to conduct a competitive promotion action in accordance with Section 13.04(1), employees detailed to or assigned higher graded work for more than forty-five (45) consecutive calendar days in a twelve (12) month period will be temporarily promoted to the higher grade and will continue with that temporary promotion for the entire duration that the employee remains detailed to or assigned the higher graded work. The employees assigned the higher graded work will not be penalized for the Employer's failure to conduct a timely competitive promotion.[59]

B. Meaning

Under Section 13.04(1) of the parties' agreement, any employee detailed/temporarily promoted to a higher-graded position or to a position with higher-promotion potential must compete for that position if they remain in it for longer than 120 days.[60] The parties agree that if a non-competitive promotion lasted more than 120 days, Proposal 4 would require the Agency to pay the employee retroactive backpay beginning from the forty-sixth day in the position and ending whenever the employee receives a promotion or is removed from the position.[61]

C. Analysis and Conclusion: The proposal is contrary to 5 C.F.R. § 335.103(c).

The Agency argues that this proposal is contrary to 5 C.F.R. § 335.103(c), as interpreted by OPM.[62] The Union concedes[63] that OPM has interpreted 5 C.F.R.

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[49] Statement at 8.
[50] Response at 38.
[51] *Local ZHU*, 65 FLRA at 744 (citing *NATCA*, 61 FLRA at 339).
[52] *See supra* section II.C.3.
[53] Response at 38-39.
[54] *See, e.g., Local 5*, 67 FLRA at 91 (citing *Local ZHU*, 65 FLRA at 744).
[55] *See Local 1760*, 28 FLRA at 166.
[56] Statement at 7.
[57] *NATCA, AFL-CIO*, 62 FLRA 174, 176 (2007).
[58] *See, e.g., U.S. Patent & Trademark Office*, 57 FLRA 185, 193 (2001) (covered-by does not apply when no term agreement is in effect); *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1017-18 (1993) ("*[U]pon execution of an agreement*, an agency should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining; similarly, a union should be secure in the knowledge that the agency may not rely on that agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining.") (emphasis added).
[59] Record at 3.
[60] *Id.*
[61] *Id.*
[62] Statement at 8.
[63] Response at 43.

§ 335.103(c) as limiting retroactive, temporary promotions to 120 days and that the Authority deferred to OPM's interpretation in *U.S. Department of VA, Ralph H. Johnson Medical Center, Charleston, South Carolina* (*Johnson*).[64] But the Union argues that we should reverse our precedent and hold that § 335.103(c) does not prohibit temporary retroactive promotions of more than 120 days.[65]

The Union first argues that because the interpretation of § 335.103(c) that the Authority relies upon was made in an advisory opinion, it is not binding on the Authority.[66] But the Authority has never held that OPM's interpretation of § 335.103(c) is binding, only that it is entitled to deference.[67] Thus, this argument provides no basis for reversing *Johnson*. The Union also argues that *Johnson* was an unexplained departure from our precedent regarding the weight accorded to OPM advisory opinions and from Authority precedent concerning the validity of retroactive temporary promotions of more than 120 days.[68] As discussed above, the Authority has previously accorded deference to OPM advisory opinions, so there is no merit to the first contention. And, as to the latter, the Authority departed from prior precedent interpreting § 335.103(c) based on an advisory opinion from the agency that wrote § 335.103(c), so the departure from precedent is hardly unexplained.

The Union also argues that the Authority should not have deferred to OPM's interpretation of § 335.103(c), because OPM's interpretation of § 335.103(c) is inconsistent with its practice of granting waivers authorizing non-competitive 180-day promotions in certain circumstances.[69] But requiring agencies to seek, and occasionally granting, waivers from § 335.103(c) is entirely consistent with interpreting that regulation to forbid retroactive, non-competitive promotions lasting longer than 120 days without OPM approval. Thus, the Union's argument does not establish that OPM has interpreted § 335.103(c) inconsistently.

Likewise, the Union argues that OPM's interpretation is not entitled to deference, because it "did not appear to consider either the Back Pay Act or [OPM's] own backpay regulations."[70] Specifically, the Union claims that the Back Pay Act entitles an employee who has been affected by an unjustified and unwarranted personnel action to backpay, and that "[i]n this case, the unwarranted personnel action would be a non-competitive promotion."[71] But the Back Pay Act permits recovery only of "pay, allowances, or differentials,"[72] which are defined, in pertinent part, as pay "to which an employee is entitled by statute or regulation and which are payable by the employing agency."[73] And § 335.103(c), as interpreted by OPM, demonstrates that pay for non-competitive temporary promotions over 120 days does not meet that definition.

The Union also argues that OPM's advisory opinion "says nothing about an arbitrator ordering the Agency to run a competitive selection procedure, [and] giv[ing] the harmed employee priority consideration[] and a retroactive promotion with back[p]ay, if selected."[74] But the Union's proposal does not address retroactive, permanent promotions, so even if an arbitrator could grant a retroactive promotion of more than 120 days under the circumstances described by the Union, it would not establish that the proposal is within the duty to bargain. Moreover, we note that the Union has not requested severance of any portion of this proposal, and, in the absence of a request for severance, if any part of a proposal is outside the duty to bargain, then the entire proposal is outside the duty to bargain.[75] Finally, the Union argues that if § 335.103(c) is interpreted consistent with OPM's advisory opinion, then it violates Article 13, Section 13.04(1) of the parties' agreement.[76] But preexisting government-wide regulations trump conflicting collective-bargaining-agreement provisions,[77] so even if § 335.103(c), as interpreted by OPM, does conflict with Article 13, Section 13.04(1), such a conflict would not establish that the Union's proposal is within the duty to bargain.

Accordingly, the Union's proposal is contrary to a government-wide regulation, and therefore outside the duty to bargain. In light of this determination, we need not address whether the proposal affects a management

[64] 60 FLRA 46, 49-50 (2004) (Chairman Cabaniss and then-Member Pope concurring); *accord U.S. Dep't of VA, Med. Ctr., Wash., D.C.*, 67 FLRA 194, 197 (2014) (*Med. Ctr.*).
[65] Response at 43-51.
[66] *Id.* at 43-44.
[67] *Med. Ctr.*, 67 FLRA at 198 ("[W]e find that OPM's opinion is entitled to our deference.") (citing *Cong. Research Emps. Ass'n, IFPTE, Local 75*, 59 FLRA 994, 1000 (2004)).
[68] Response at 44-47.
[69] *Id.* at 48.
[70] *Id.* at 50.
[71] *Id.*
[72] 5 U.S.C. § 5596(b)(1)(A)(i).
[73] 5 C.F.R. § 550.803.
[74] Response at 50.
[75] *NTEU*, 66 FLRA 584, 586 (2012) (citing *Nat'l Weather Serv. Emps. Org., Branch 9-10*, 61 FLRA 779, 782 (2006)).
[76] Response at 55-56.
[77] *See* 5 U.S.C. §§ 7116(a)(7) ("[I]t shall be an unfair labor practice for an agency . . . to enforce any rule or regulation . . . which is in conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed."), 7117(a)(1) ("[T]he duty to bargain in good faith shall . . . extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a [g]overnment-wide rule or regulation.").

right or whether it is negotiable under § 7106(b), because a provision that is contrary to law or government-wide regulation remains so regardless of whether it would otherwise be negotiable under § 7106(b).[78]

VI. Proposal 5

A. Wording

> The Employer shall waive time-in-grade requirements to the full extent of its authority for any employee already assigned or detailed to higher graded work when considering her or him for the temporary promotion.[79]

B. Meaning

The parties agree that, under this proposal, if the Agency assigns or details an employee to higher-graded work, it must exercise its authority to waive time-in-grade requirements when considering whether that employee should receive a temporary promotion.[80] The phrase "higher[-]graded work" has the same meaning as in Proposal 4.[81] Further, 5 C.F.R. § 300.603(b) lists eight exceptions to the time-in-grade requirements set forth under 5 C.F.R., Subchapter F.[82] If an employee falls under one of these exceptions, the proposal would require the Agency to apply the exception and grant that employee a temporary promotion.[83] Further, the Agency would be required to abide by any additional exceptions that OPM might create.[84]

C. Analysis and Conclusions

1. The proposal is not contrary to 5 C.F.R. § 300.603(b)(7).

The Agency argues that the proposal conflicts with 5 C.F.R. § 300.603(b)(7).[85] That regulation states:

> The following actions may be taken without regard to this subpart [concerning time-in-grade requirements for competitive-service positions] but must be consistent with all other applicable requirements, such as qualification standards:
>
> . . . .
>
> (7) Advancement to avoid hardship to an agency or inequity to an employee in an individual meritorious case[,] but only with the prior approval of the agency head or his or her designee . . . .[86]

Specifically, the Agency claims that "[t]he proposed language would impermissibly expand the Agency's authority to encompass any already-assigned or detailed employee . . . [and] would nullify any discretion an agency head has in determining whether any failure to waive would inflict any hardship on the agency . . . or an inequity on the employee."[87]

But the parties agree that, as relevant here, the proposal is implicated only when § 300.603(b)(7) is satisfied.[88] In other words, the proposal would not apply unless the Agency had already made a case-by-case determination that § 300.603(b)(7) authorized the waiver of time-in-grade requirements.[89] Thus, the Agency's argument that the proposal expands the scope of § 300.603(b)(7) or limits the Agency's discretion in determining whether the requirements for § 300.603(b)(7) are met is inconsistent with the agreed-upon meaning of the proposal.

Likewise, the Agency argues that "[t]he proposed language is in . . . direct conflict with the regulation in that actions 'will be taken,' rather than 'may' be taken."[90] Thus, the Agency argues that the proposal "removes the Agency's discretion – discretion required by regulation."[91] But the Authority has consistently held that matters concerning conditions of employment are subject to collective bargaining when they are within the discretion of an agency and not otherwise inconsistent with law or applicable rule or regulation.[92] While the Authority has held that an

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[78] *NTEU II*, 55 FLRA at 1181 (citing *NTEU I*, 52 FLRA at 1272); *see also* 5 U.S.C. § 7117(a)(1) ("[T]he duty to bargain in good faith shall . . . extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a [g]overnment-wide rule or regulation.").
[79] Record at 4.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Statement at 9.
[86] 5 C.F.R. § 300.603(b)(7).
[87] Statement at 9.
[88] Record at 4.
[89] *Cf. POPA I*, 53 FLRA at 649 (citing *NTEU*, 23 FLRA 681, 682-83 (1986)) ("[W]here a regulation calls for a case-by-case determination as to whether the standard it establishes has been met, the Authority has held that a proposal that, in effect, made a blanket determination that the standard had been met was outside the duty to bargain because it was inconsistent with the regulation.").
[90] Statement at 10.
[91] *Id.*
[92] *U.S. DHS, U.S. ICE*, 67 FLRA 501, 502 (2014) (*ICE*) (Member Pizzella dissenting); *POPA I*, 53 FLRA at 648.

exercise of discretion is not subject to bargaining where the discretion is "sole and exclusive,"[93] the Agency does not argue that this exception applies here.[94]

Accordingly, we find that the proposal is not contrary to 5 C.F.R. § 300.603(b)(7).

2. The proposal affects the Agency's rights to hire and assign employees.

The Agency argues that the proposal affects its rights to hire and assign employees under § 7106(a)(2)(A) of the Statute.[95] The Union does not dispute that the proposal affects these rights. Accordingly, we find that the proposal affects the Agency's rights to hire and assign employees under § 7106(a)(2)(A).[96]

3. The proposal is a procedure.

As with Proposal 1,[97] the Agency did not address the Union's claim[98] that the proposal is a procedure. Accordingly, the Agency has conceded that the proposal is a procedure under § 7106(b)(2).[99] We therefore find that the proposal is a procedure. Accordingly, we find it unnecessary to address the Union's claim that the proposal is also an appropriate arrangement under § 7106(b)(3).[100]

4. The "covered-by" doctrine is inapplicable.

The Agency also argues that the proposal is "covered by" Article 13, Section 13.03(1) and (4) of the parties' agreement.[101] As discussed above, the covered-by doctrine does not apply here.[102] Thus, the Agency's covered-by argument does not establish that the proposal is outside the duty to bargain.

We therefore hold that the proposal is within the duty to bargain.

VII. Order

We order the Agency to bargain, upon request, over Proposals 1, 3, and 5. We dismiss the petition for review as to Proposals 2 and 4.

[93] *ICE*, 67 FLRA at 502-03; *POPA I*, 53 FLRA at 648.

[94] Member Pizzella notes that although he would not necessarily find so in the first instance, he acknowledges that Authority precedent establishes that agencies may agree to limitations on their statutory or regulatory discretion, provided that the discretion is not sole and exclusive. But he wishes to emphasize how important it is for policymakers to keep this legal background in mind when drafting statutes or regulations. *See, e.g., U.S. Dep't of the Treasury, IRS v. FLRA*, 996 F.2d 1246, 1250 (D.C. Cir. 1993) ("The exemption [of proposals inconsistent with government-wide rules or regulations from the duty to bargain] essentially permits the government to pull a subject out of the bargaining process by issuing a government-wide rule that creates a regime inconsistent with bargaining."). Moreover, he notes that agencies have the ability to clarify whether a regulation should be interpreted to confer sole and exclusive discretion if they believe that the Authority has erred in determining the scope of discretion afforded by one of the agencies' regulations. *See POPA I*, 53 FLRA at 655-56 (finding that agency discretion under Office of Government Ethics (OGE) regulations concerning conflicts of interest and financial disclosures was not sole and exclusive); U.S. Office of Gov't Ethics, DO-99-014, OGE Regulations and an Agency's Duty to Engage in Collective Bargaining (1999) (OGE Memo) (clarifying that agency discretion under OGE regulations was intended to be sole and exclusive); *POPA II*, 59 FLRA at 342-45 (deferring to OGE's interpretation of its regulations and overruling *POPA I*, in relevant part).

Member Pizzella further notes that, in determining whether a statute or regulation confers sole-and-exclusive discretion, the Authority looks primarily to the text of the provision and the statutory or regulatory history. Unlike in *ICE*, 67 FLRA at 508 (Dissenting Opinion of Member Pizzella), where he determined that the Federal Information Security Management Act conferred sole-and-exclusive discretion based on its unique role in protecting the federal government's information-technology infrastructure, in this case, neither the regulation's text nor the regulatory history suggest an intent to confer sole-and-exclusive discretion. *See* Employment (General); Time-in-Grade Restrictions, 56 Fed. Reg. 23,001 (May 20, 1991) (explaining that purpose of § 300.603(b)'s introductory clause was "to show that the[] exceptions do not constitute a waiver of any other applicable requirement, such as qualification standards").

[95] Statement at 10.

[96] 5 C.F.R. § 2424.32(c)(2); *see also supra* section II.C.2.

[97] *See supra* section II.C.3.

[98] Response at 57.

[99] *See, e.g., Local 5*, 67 FLRA at 91 (citing *Local ZHU*, 65 FLRA at 744).

[100] *See Local 1760*, 28 FLRA at 166.

[101] Statement at 10.

[102] *See supra* section IV.C.3.