73 FLRA No. 126

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R1-134
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL UNDERSEA WARFARE CENTER DIVISION
NEWPORT, RHODE ISLAND
(Agency)

0-NG-3571
0-NG-3580
0-NG-3602

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

September 18, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

These cases are before the Authority on three negotiability appeals (petitions) filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).[1] The petitions concern the negotiability of seven proposals related to a successor agreement on bargaining-unit employees' personnel system. Because the proposals address similar matters arising from negotiations over the same agreement, we find it appropriate to consolidate these cases in the interest of expeditious processing.[2] For the following reasons, we find that two proposals are within the Agency's duty to bargain, and the remaining five proposals are outside the duty to bargain.

II. Background

In a 1997 Federal Register Notice (Notice),[3] the Office of Personnel Management (OPM) approved the creation of a Demonstration Project at the Agency. The Demonstration Project is an alternative personnel system that replaces the General Schedule (GS) pay structure with pay bands for determining salaries. Since 2004, as authorized by the Notice, the parties have negotiated agreements over implementation of the Demonstration Project. This dispute arose during the parties' negotiations over such an agreement for fiscal year 2021.

After the parties exchanged proposals, the Agency provided the Union with written allegations of nonnegotiability. Thereafter, the Union filed the three petitions. The Authority docketed the first petition as 0-NG-3571, which concerns three proposals – Article 25, Section 4; Article 25, Section 9; and Article 25, Section 10 – hereafter referred to as Proposal 1, Proposal 2, and Proposal 3, respectively.[4] The Authority docketed the second petition as 0-NG-3580, which concerns three proposals – Article 26, Section 13; Article 29, Section 2; and Article 29, Section 3 – hereafter referred to as Proposal 4, Proposal 5, and Proposal 6, respectively.[5] The Authority docketed the third petition as 0-NG-3602, which concerns one proposal – Article 25 – hereafter referred to as Proposal 7.[6]

Subsequently, in each case, the Agency filed a timely statement of position (statement). In 0-NG-3571 and 0-NG-3580, the Union filed a response (response), and the Agency filed a reply (reply). The Union did not file a response and the Agency did not file a reply in 0-NG-3602. Additionally, in each case, an Authority representative

[1] 5 U.S.C. § 7105(a)(2)(E).

[2] *AFGE, Council 53, Nat'l VA Council*, 71 FLRA 1124, 1124 (2020) (Member Abbott dissenting on other grounds) (citing *NFFE*, 21 FLRA 1105, 1105 (1986); *AFGE, Loc. 3748, AFL-CIO*, 20 FLRA 495, 495 n.* (1985)) (consolidating negotiability petitions); *IFPTE, Loc. 49*, 52 FLRA 830, 831 (1996) (same).

[3] Science and Technology Reinvention Laboratory Personnel Demonstration Project at the Naval Sea Systems Command Warfare Centers, 62 Fed. Reg. 64,050 (Dec. 3, 1997) (Notice).

[4] The Union's petition in 0-NG-3571 initially included eight proposals, but at the post-petition conference (PPC), the Union withdrew the following proposals from the petition: Article 3, Section 1; Article 4, Section 1; Article 4, Section 1; Article 25, Section 6; and Article 25, Section 8. 0-NG-3571, Record (Rec.) of PPC (0-NG-3571, Rec.) at 2.

[5] The Agency disagrees with the background information presented in all three of the Union's petitions. *See* 0-NG-3571, Statement of Position (Statement) Form at 1; 0-NG-3571, Statement Br. at 2-3; 0-NG-3580, Statement Br. at 2; 0-NG-3602, Statement Br. at 2. As these disagreements do not affect our analysis of the negotiability of the proposals, we find it unnecessary to resolve those disagreements. *AFGE, Council of Prison Locs. 33, Loc. 506*, 66 FLRA 819, 825 n.8, 828 n.9 (2012) (*Local 506*), *pet. for review granted, decision enforced in part, vacated in part, & remanded sub nom. U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779 (D.C. Cir. 2013) (finding it unnecessary to resolve disputes when they did not affect negotiability analysis).

[6] 0-NG-3602, Pet. at 2-3.

conducted a post-petition conference with the parties under § 2424.23 of the Authority's Regulations.[7]

III. Preliminary Matters

A. The Union does not establish that a hearing is necessary.

In each petition, the Union requests a hearing under § 2424.31(c) of the Authority's Regulations, asserting the Demonstration Project provides bargaining rights regarding incentive pay that are complex and exceed the Statute's scope.[8] Section 2424.31 states that a hearing may be appropriate "[w]hen necessary to resolve disputed issues of material fact in a negotiability . . . dispute, or when it would otherwise aid in decision making."[9] The Union does not demonstrate there are disputed issues of material fact for the Authority to resolve, nor do we find a hearing would otherwise aid in resolving the parties' negotiability dispute. Consequently, we deny the Union's request for a hearing.[10]

B. We do not consider the Agency's supplemental submission.

After filing its reply in 0-NG-3580, the Agency requested leave to file, and did file, "Agency Comments on Record of Post-Petition Conference."[11] Under § 2424.27 of the Authority's Regulations, the Authority will not consider any submission filed by a party, other than a submission specifically authorized by the Regulations, without a showing of extraordinary circumstances.[12] In its submission, the Agency seeks to "clarify[] parts of the language used in the PPC report" for the PPC held on November 3, 2021.[13] The Authority submitted the record of the PPC to the parties on November 9, 2021 by facsimile and certified mail.[14] The Agency filed its reply on November 19, 2021, and its submission on December 9, 2021. Because the Agency's submission addresses issues the Agency could have raised in its reply, and asserts no extraordinary circumstances, we do not consider it.

C. We do not consider the Union's supplemental submissions or the Agency's oppositions to those submissions.

After filing its response in 0-NG-3571 and 0-NG-3580, the Union filed separate supplemental submissions concerning the proposals in each case.[15] The Union neither requested permission to file, nor asserts any extraordinary circumstances for, the supplemental submissions. In both submissions, the Union states it "believes that this supplementary information is needed to fully evaluate the Union proposals" contained in each respective case, but does not explain why it could not have provided the information with any of its earlier filings.[16] Therefore, consistent with § 2424.27, we do not consider the Union's supplemental submissions.[17]

The Agency filed oppositions objecting to the Union's supplemental submissions.[18] Because we do not consider the Union's submissions, we do not consider the Agency's oppositions.[19]

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[7] 5 C.F.R. § 2424.23.

[8] 0-NG-3571, Pet. at 24; 0-NG-3580, Pet. at 6; 0-NG-3602, Pet. at 4.

[9] 5 C.F.R. § 2424.31.

[10] *See, e.g.*, *AFGE, Loc. 2119*, 72 FLRA 706, 706 n.4 (2022) (Member Abbott concurring) (citing *Prof'l Airways Sys. Specialists*, 59 FLRA 25, 25 n.2 (2003)).

[11] 0-NG-3580, Agency's Supp. Submission at 2.

[12] 5 C.F.R. § 2424.27; *NTEU*, 66 FLRA 809, 810 (2012) (*NTEU 2012*) (Member Beck dissenting in part on other grounds) (citing *IFPTE, Loc. 3*, 57 FLRA 699, 699 n.1 (2002)) (declining to consider supplemental submission when filing party did not assert extraordinary circumstances), *pet. for review granted, decision vacated on other grounds, & remanded sub. nom. U.S. Dept. of the Treasury, IRS Off. of Chief Counsel, Wash., D.C. v. FLRA*, 739 F.3d 13 (D.C. Cir. 2014).

[13] 0-NG-3580, Agency's Supp. Submission at 1.

[14] 0-NG-3580, Rec. at 1, 7-8.

[15] 0-NG-3571, Union's Supp. Submission (0-NG-3571 Submission); 0-NG-3580, Union's Supp. Submission (0-NG-3580 Submission).

[16] 0-NG-3571 Submission at 1; 0-NG-3580 Submission at 1.

[17] 5 C.F.R. § 2424.27; *NTEU 2012*, 66 FLRA at 810; *AFGE, Loc. 1547*, 64 FLRA 642, 643 (2010) (Member Beck dissenting in part on other grounds) (declining to consider supplemental submission when permission to file supplemental submission not requested).

[18] 0-NG-3571, Agency's Opp'n to Union's Additional Submissions; 0-NG-3580, Agency's Opp'n to Union's Additional Submissions.

[19] *See, e.g.*, *AFGE, Loc. 3690*, 70 FLRA 10, 12 (2016) ("Where the Authority declines to consider a supplemental submission, the Authority also declines to consider a response to that submission because the response is moot." (citation omitted)).

IV. The Proposals[20]

A. Proposals 1, 2, and 3[21]

1. Wording

a. Proposal 1

Section 4. Pay Pools
a. Continuing Pay (CP) Pool
1. The amount of funding for each individual CP pool is calculated as a percentage of the total base pay (excluding locality) of all employees in that unit. All CP pools in the Division are based on the same percentage of salary and must be distributed yearly among all NAGE R1-134 pay pool units. Minimum funding for each CP Pay Pool is 1.4% percent of the total base salaries in each Pay Pool. Locality pay is not included in CP Pay Pool funding, but is applied later to the new base pay, which includes any CP Pay Points awarded to the employee.

2. CP in excess of the minimum is determined by considering such factors as historical spending for within-grade increases (WIGI's), quality step increases (QSI's) and in-level career promotions, labor market conditions and the need to recruit and retain a skilled workforce to meet the business needs of the organization, and the fiscal condition of the organization.

3. Any decision to reduce the amount of funds devoted to continuing pay (CP) increases below the minimum 1.4% level occurs only in lieu of more drastic cost cutting measures (e.g., RIF or furlough), and must be negotiated and agreed upon by the union prior to implementation. However, the minimum guaranteed CP payments specified in this agreement must be paid to eligible employees.

4. All CP Pay Pools at the Division are based on the same percentage of salary, but may be augmented by funding from the "Set-Aside" fund administered at the NUWCDIVNPT level.

b. Bonus Pay (BP) Pool

1. The amount of funding allocated to each BP pool is calculated as a percentage of the total base salary of all employees in that unit. The percentage is determined principally by historical spending for performance awards, special act awards, and awards for beneficial suggestions; the organization's fiscal condition and financial strategies; and employee retention rates. It must also consider the pay and Pay Band demographics of the bargaining unit members. (i.e., protected classes, employees not eligible for CP, fairness of compensation for equal work, value to the organization, and mentoring provided to entry level and junior level employees.)

2. Based on historical factors the typical BP funding has been 1.6% of the base pay or higher (not including the locality adjustment. Any decision to reduce the amount of funds devoted to Bonus pay (BP) compensation must be negotiated and agreed to by the union prior to implementation. However, the minimum guaranteed BP payments specified in this agreement must be paid to eligible employees each year.

3. All BP Pay Pools at the Division are based on the same percentage of salary, but may be augmented by funding from the "Set-Aside" fund administered at the NUWCDIVNPT level.[22]

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[20] To the extent applicable, the proposals' formatting in this decision is consistent with the Union's attachments to its petitions setting forth its proposals. 0-NG-3571, Pet., Attach. 2, Pat L Version 30 April Rev L Word V Highlighted Rev. B; 0-NG-3580, Pet., Attach. 2, Pat L Version 30 April Rev L Word V Highlighted Rev A; 0-NG-3602, Pet., Attach. 2, Resp. to Agency Rev b.

[21] As these three proposals present similar legal issues, we address them together.

[22] 0-NG-3571, Pet. at 10-14, as amended by 0-NG-3571, Rec. at 2-3. As set out in the petition, a portion of Proposal 1 duplicates wording in Proposals 2 and 3, 0-NG-3571, Pet. at 10-14, but the duplicate wording is not discussed in the 0-NG-3571 Record as part of Proposal 1. *See* 0-NG-3571, Rec. at 2-3. Therefore, we set out Proposal 1's wording as agreed by the parties in the PPC record.

b. Proposal 2

Section 9. Funding of NAGE R1-134 CP and BP Pay Pool Criteria. The size of the NAGE R1-134 Incentive Pay (IP) Pool as well as the size of the two funds, CP and BP, within that pool is determined annually during the party's negotiations. With consideration of the needs and cultures of the organization, other appropriate factors (noted in this contract), and the factors noted below:

1. Continuing Pay (CP) Factors:
a. Historical spending for within-grade increases (WIGIs) quality step increases (QSIs) and in-level career promotions have been factors to consider. However, because the parties have been under this Demonstration Project for seventeen (17) years these factors are now of less consideration. Focus now needs to be placed on ensuring there is sufficient CP funding to accommodate the high-performance level of bargaining unit members that should be rewarded without artificial restrictions.
b. Labor market conditions and the need to recruit and retain a skilled work force to meet the business needs of the organization, and the
c. Fiscal condition of the organization.

2. Bonus Pay (BP) Factors include:
a. Historical spending for performance awards, special act awards, and awards for beneficial suggestions; The organization's fiscal condition and financial strategies; and employee retention rates are some of the factors for consideration in establishing the size of the BP Pay Pool.
b. It is understood that the parties have been under this Demonstration Project for seventeen (17) years and spending on special act awards, and performance awards have been negligible and therefore are not appropriate factors for consideration for funding of the BP Pay Pool.
c. The demographics of the bargaining unit, as regards to protected classes, monetary position in Pay Bands, and the requirement to compensate for performance are key factors that must be considered.

Any decision to reduce the amount of funds devoted to continuing pay (CP) increases below 1.4% percent will typically occur only in lieu of more drastic cost cutting measures (e.g., RIF or furlough). Any agency proposals to reduce the amount of funding in the CP pool below the 1.4% minimum of the base salaries of the employees in the NAGE R1-134 bargaining unit, and/or funding in the BP pool below the 1.6% minimum of base salaries of the employees in the NAGE R1-134 bargaining unit will trigger negotiations noted below in Section 10.

2. A detailed analysis and explanation for the reason(s) for proposed cuts to CP and or BP, from the previous year funding levels, and/or cuts in funding below the minimum funding levels, noted in this Section, for CP and/or BP, will be provided by the agency to the union at the commencement of negotiations.[23]

c. Proposal 3

Section 10. Discussions and Negotiations.
If the minimum funding levels for CP and/or BP, noted above in Section 9 are not agreed to by the agency in discussions with the union, the parties will proceed to negotiations as outlined below in this section.

a. The Agency and the Union shall meet within fifteen (15) work days after 1 October for the purpose of the Agency briefing the Union on its funding profile for the Fiscal Year. The briefing shall address total personnel funding, shortfalls if any in personnel funding, issues if any with personnel assigned to agency overhead, reduction in total funding from previous Fiscal Year if any,

[23] 0-NG-3571, Pet. at 16-19, as amended by 0-NG-3571, Rec. at 3-4.

funding projected for contracting-out, and funding projection for new agency hiring. In addition, the Agency shall address and provide the agency overhead funding burden for providing contractor's office space, utilities, parking and office supplies overhead cost projected for the Fiscal Year. The Union will rely on this information to prepare for negotiations.

b. While the Union does not waive its right to negotiate decisions delegated to the Local Division/site level (NUWCDIVNPT), as is the case with defining the size of the Incentive Pay pool, the Union will accept "without negotiations" should the Agency establish and set the following proposal on Incentive Pay, in writing, to the Union by 1 November of the performance year:

1. The agency will establish and set the NAGE R1-134 Continuing Pay (CP) pool Incentive Pay funding no lower than 1.4% of the total basic salary of the NAGE R1-134 bargaining unit members.
2. The Agency will establish and set the NAGE R1-134 Bonus Pay (BP) pool Incentive Pay funding no lower than 1.6% of aggregate salary of the NAGE R1-134 bargaining unit members.

If the conditions in Parts 1, and 2, noted above in this Section, are not met by 1 November the Agency and Union shall meet, no later than 15 November 2021 to discuss and negotiate the design of the decision process for defining the size of the Incentive Pay pool and the two funds (CP and BP) within the Incentive Pay pool.[24]

2. Meaning

Generally, all three proposals would require the Agency to fund employee incentive pay pools at a certain level, and funding set below that level would require negotiation and Union agreement before implementation.[25]

The parties agree that the terms in Proposal 1 have the following meanings. "NUWCDIVNPT" refers to the Agency; "pay pool unit" refers to the different job series of employees, such as administrative and technicians, that constitute the total workforce at the Agency's facility; "Continuing Pay" (CP) refers to an amount of funding used as an adjustment to an employee's base salary, where the adjustment is determined based on the "Continuing Pay . . . Pool" (CP pool) unit of the employee; "CP Pay Points" refers to amounts of CP awarded to an employee; and "Bonus Pay" (BP) refers to funding used as a one-time bonus provided to an employee, where the bonus is based on the "Bonus Pay . . . Pool" (BP pool) unit of the employee.[26]

The parties disagree on the operation of Proposal 1 Sections 4.a., which discusses the CP pool, and 4.b., which discusses the BP pool.[27] According to the Union, both subsections identify a series of factors for the Agency to consider in determining the amount of funding to allocate to these pay pools.[28] The Union asserts that the funding amounts are "suggested" threshold amounts that, if met, do not trigger an Agency obligation to bargain over the amounts.[29] The Agency contends that the minimum funding percentages are requirements – rather than suggestions – and the proposal requires it to bargain over any lesser amount.[30]

Where the parties disagree over a proposal's meaning, the Authority looks first to the proposal's plain wording and the union's statement of intent.[31] If the union's explanation comports with the proposal's plain wording, then the Authority adopts that meaning in determining whether the proposal is within the duty to bargain.[32] However, when a union's explanation is inconsistent with the plain wording, the Authority does not

[24] 0-NG-3571, Pet. at 21, as amended by 0-NG-3571, Rec. at 4-5.
[25] 0-NG-3571, Rec. at 2-4.
[26] *Id.* at 3. We note that the parties do not specify whether these terms' meanings are intended to be the same in subsequent proposals.
[27] *Id.*
[28] *Id.*
[29] *Id.* (asserting the "funding amounts are only suggested amounts"); *see* 0-NG-3571, Pet. at 15 ("The minimum funding percentages . . . are not intended to be absolutes. They are offered as t[h]resholds that[,] if met[,] will avoid formal negotiations . . . .").
[30] 0-NG-3571, Rec. at 3.
[31] *AFGE, Council 119*, 72 FLRA 63, 64 (2021) (*Council 119*) (Member Abbott dissenting in part on other grounds) (citing *AFGE, Nat'l Council of EEOC Locs. No. 216*, 71 FLRA 603, 606 (2020) (*EEOC Locals*) (Member DuBester dissenting in part)).
[32] *Id.* (citing *NAGE, Loc. R-109*, 66 FLRA 278, 278-79 (2011); *NAGE, Loc. R1-100*, 61 FLRA 480, 480-81 (2006) (*Local R1-100*) (Member Armendariz concurring)).

adopt that explanation, and instead, bases the negotiability decision on the proposal's wording.[33]

Contrary to the Union's explanation, Proposal 1's plain wording does not merely provide suggested funding amounts. Rather, Section 4.a.1. sets funding at 1.4% for a CP pool, and Section 4.a.3. permits the Agency to fund the CP pool below 1.4% in certain circumstances, but "*only* in lieu of more drastic cost cutting measures (e.g., RIF or furlough)," *and* if the lower amount is "negotiated and agreed upon by the [U]nion prior to implementation."[34] As to the BP pool, the proposal's plain wording indicates that the "typical" BP pool funding has been 1.6%, and that any lesser amount "must be negotiated and agreed upon by the [U]nion prior to implementation."[35] The plain wording allows the Agency discretion to set funding above 1.4% for the CP pool and 1.6% for the BP pool, but requires the Agency to adopt minimum amounts for both of those pools, unless the Union agrees to lesser amounts after negotiations, and further limits the circumstances in which the Agency could propose reducing the CP pools. Therefore, we reject the Union's above statement of the proposal's meaning, and we rely on the proposal's plain wording in determining its negotiability.[36]

Regarding Proposal 2, the parties agree that it requires them to negotiate the size of the incentive-pay pool, and the CP and BP funds within that pool.[37] The Union asserts that Proposal 2 identifies factors for negotiating the funding levels for the CP and BP pools, and that when the factors are not met, the parties must bargain under Article 25, Section 10 (Proposal 3).[38] The Agency agrees that Proposal 2 lists a series of factors to consider in negotiating the funding levels for CP and BP, but asserts that it also requires the Agency to fund the pay pools at a minimum amount.[39] The Union's explanation regarding Proposal 2's identification of funding-level factors for Agency consideration comports with the proposal's plain wording.[40] However, although Proposal 2 states that the size of the CP and BP pools will be established during negotiations, it also requires the Agency to fund both pools at the specified minimum amounts, and requires bargaining before the Agency can reduce the pools' funding below those amounts.[41] The Union's explanation of Proposal 2's meaning and operation omits these requirements. Therefore, we find that the Union's explanation does not comport with the proposal's plain wording in that respect, and we rely on the proposal's plain wording in assessing its negotiability.[42]

Regarding Proposal 3, the parties agree that it requires the parties to commence bargaining between October 1 and 15 if the pools are not funded at the minimum levels set out in Proposal 2; and that the Agency must provide the Union with certain budgetary information to assist the Union with negotiation preparation.[43] The parties also agree that if the Agency agrees to fund the CP and BP pools at the percentages established in Proposal 2 by November 1, the parties need not continue negotiations.[44]

3. Analysis and Conclusions

a. Proposals 1 and 2 affect management's right to determine budget.

The Agency argues that Proposals 1 and 2 are contrary to management's right to determine its budget under § 7106(a)(1) of the Statute.[45] The Authority applies a two-part test to determine whether a proposal affects management's right to determine budget.[46] Under the first part of the test, 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 right.[47] However, the establishment of a program that is not included in the agency's budget does not, per se, affect the right.[48] Further, an assertion that a proposal would increase an agency's costs does not, by itself, establish that the proposal affects the right under the first part of the test.[49] Under the second part of the test, 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.[50]

[33] *NTEU*, 70 FLRA 724, 726 (2018) (*NTEU*) (Member DuBester concurring, in part, and dissenting in part), *pet. for review granted, decision vacated on other grounds, & remanded sub. nom. NTEU v. FLRA*, 942 F.3d 1154 (D.C. Cir. 2019).
[34] 0-NG-3571, Pet. at 12 (emphasis added).
[35] *Id.*
[36] *NTEU*, 70 FLRA at 726.
[37] 0-NG-3571, Rec. at 4; 0-NG-3571, Pet. at 19.
[38] 0-NG-3571, Rec. at 4.
[39] *Id.*
[40] *EEOC Locals*, 71 FLRA at 606-07.
[41] 0-NG-3571, Pet. at 16-19, as amended by 0-NG-3571, Rec. at 3-4.
[42] *NTEU*, 70 FLRA at 726.
[43] 0-NG-3571, Rec. at 4.
[44] *Id.* at 5.
[45] 5 U.S.C. § 7106(a)(1); 0-NG-3571, Statement Br. at 16-17, 19-21, 23-24, 27-28, 31-32, 35-37; *see id.* at 5, 7-10.
[46] *AFGE, AFL-CIO*, 2 FLRA 603, 608 (1980).
[47] *NAGE, Loc. R14-52*, 48 FLRA 1198, 1204-06 (1993) (*Local R14-52*); *NFFE, Fed. Dist. 1, Loc. 1998, IAMAW*, 66 FLRA 124, 125 (2011) (*NFFE*) (Member Beck dissenting in part on other grounds).
[48] *See Local R14-52*, 48 FLRA at 1204, 1209.
[49] *NFFE*, 66 FLRA at 125; *Local R14-52*, 48 FLRA at 1204 (citing *Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 657-59 (1990); *AFGE, Loc. 1857*, 36 FLRA 894, 904 (1990)).
[50] *NFFE*, 66 FLRA at 125.

The Agency contends that Proposals 1 and 2 affect the right to determine budget because they require the Agency to budget minimums of 1.4% and 1.6% of employees' total base salaries to fund the CP and BP pools, respectively, and require bargaining over any lesser funding amounts.[51] As described above, the proposals permit the Agency to allocate funding below 1.4% for the CP pool[52] and below 1.6% for the BP pool *only* after negotiation with, and agreement by, the Union. Therefore, the proposals effectively prescribe the amounts the Agency must allocate in its budget for the CP and BP pools, and leave the Agency no discretion to set funding below these "minimums." Thus, we find that the proposals affect management's right to determine its budget.[53]

b. The Union does not show that Proposals 1 and 2 are negotiable as exceptions to the affected management right.

In its responses, the Union asserts that Proposals 1 and 2 are negotiable as procedures under § 7106(b)(2), and appropriate arrangements under § 7106(b)(3), of the Statute.[54] Under § 2424.25(c)(1) of the Authority's Regulations, a union must set forth its arguments and supporting authorities for any assertion that its proposal constitutes an exception to a management right, including "[w]hether and why the proposal" constitutes a negotiable procedure under § 7106(b)(2), or an appropriate arrangement under § 7106(b)(3).[55] In other words, if the union fails to articulate why a proposal is a procedure or an appropriate arrangement, the Authority will not make those arguments for the union.

i. The Union does not show that Proposals 1 and 2 are procedures.

The Union claims that Proposal 1 is a negotiable procedure because "the 1.4% CP and 1.6% BP pool funding elements" function "as a procedure for Agency consideration in the design of the decision process for defining the size of the incentive-pay pool," and "if not agreed to as an element of the design of the decision process, the parties will move to negotiations."[56] As to Proposal 2, the Union claims, without elaboration, that it is a procedure.[57]

The Union neither cites any authority to support its contention that the proposals are negotiable procedures nor explains how the proposals meet the requirements of § 7106(b)(2) of the Statute. When a union fails to support a § 7106(b)(2) claim, the Authority rejects it as a bare assertion.[58] Accordingly, we reject the Union's claims as bare assertions.

ii. The Union does not show that Proposals 1 and 2 are appropriate arrangements.

In determining whether a proposal is an appropriate arrangement, the Authority first examines whether the proposal is intended as an arrangement for employees adversely affected by the exercise of a management right.[59] To establish that a proposal is an arrangement, a union must identify the actual effects, or reasonably foreseeable effects, on employees that flow from the exercise of the management right and how those effects are adverse.[60] The alleged arrangement also must

[51] 0-NG-3571, Statement Br. at 16-17, 19-21, 23-24, 27-28, 31-32, 35-37; *see id.* at 5, 7, 8-10.

[52] As discussed above, Proposal 1 further limits when the Agency may allocate funding below 1.4% for the CP pool to certain circumstances enumerated in the proposal.

[53] *IFPTE, Loc. No. 1*, 38 FLRA 1589, 1594-96 (1991) (*IFPTE*) (proposal establishing maximum funding level for performance awards of 1.5% of employees' aggregate base salaries directly interfered with management's right to determine its budget); *NAGE, Loc. R1-144, Fed. Union of Scientists & Eng'rs*, 38 FLRA 456, 475-80 (1990) (*NAGE*) (finding proposal requiring that whenever agency allocated awards funding to particular group of employees, awards budget for that group would be 1.5% of base aggregate payroll interfered with management's right to determine budget); *see also AFGE, Loc. 12*, 68 FLRA 1061, 1062 (2015) (*Local 12*) (Member Pizzella dissenting) (stating a proposal establishing an "administrative procedure" would not affect the right to determine budget "as long as the proposal leaves the agency with discretion to determine how any necessary funding relating to the procedure will be addressed in its budget").

[54] 0-NG-3571, Resp. Form at 2; 0-NG-3571, Resp. Br. at 6-11.

[55] 5 C.F.R. § 2424.25(c)(1)(ii), (iii).

[56] 0-NG-3571, Resp. Br. at 6-7.

[57] 0-NG-3571, Resp. Form at 2.

[58] 5 C.F.R. § 2424.25(c)(1)(ii)-(iii); *see NFFE, Loc. 1450, IAMAW*, 70 FLRA 975, 977 (2018) (*Local 1450*) (rejecting assertion that proposal was procedure under § 7106(b)(2) because union did not explain how proposal met that section's requirements); *AFGE, Loc. 723*, 66 FLRA 639, 644 (*Local 723*) (rejecting assertion that proposals were procedures under § 7106(b)(2) because union failed to present any "argument or authority to support that claim").

[59] *AFGE, Loc. 15*, 73 FLRA 125, 128 (2022) (*Local 15*) (citing *AFGE, Loc. 2058*, 68 FLRA 676, 679 (2015) (*Local 2058*) (Member Pizzella dissenting in part)).

[60] *Id.* (citing *Local 2058*, 68 FLRA at 679; *Marine Eng'rs' Beneficial Ass'n Dist. No. 1-PCD*, 60 FLRA 828, 831 (2005) (*Marine*) (Chairman Cabaniss dissenting on other grounds; Member Pope writing separately on other grounds)).

be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.[61] Proposals that address speculative or hypothetical concerns are not arrangements.[62] That a proposal would provide benefits to employees does not, by itself, mean the proposal is an arrangement.[63]

If the proposal is an arrangement, the Authority then determines whether the arrangement excessively interferes with management rights.[64] The Authority makes this determination by weighing "the competing practical needs of employees and managers" in order to ascertain whether the benefits to employees flowing from the proposal outweigh the proposal's burden on the exercise of the management rights involved.[65]

The Union asserts that Proposal 1 is an appropriate arrangement because it contains factors to be considered in establishing the CP and BP pools, particularly "for defining the size of the incentive[-]pay pool and the two funds within the pool."[66] However, the Union does not identify any actual, or reasonably foreseeable, adverse effects on employees flowing from any existing Agency funding allocations to the CP or BP pool. Thus, the Union's assertions do not explain how Proposal 1 is an arrangement.[67] Consequently, as the Union has not demonstrated that Proposal 1 is an arrangement within the meaning of § 7106(b)(3) of the Statute,[68] we need not address whether Proposal 1 is appropriate.[69]

Regarding Proposal 2, the Union asserts that it is an appropriate arrangement because the 1.4% CP and 1.6% BP allocations address losses suffered by employees upon transitioning to the Demonstration Project from the GS system, including loss of step increases, quality-step increases, in-level promotions, and losses to employees who are at the top of their pay band and only eligible for CP, not BP.[70] However, the Union does not explain how these "adverse effects" flow from the Agency's exercise of its right to determine budget allocations for CP or BP or how the CP or BP allocations in the proposal would address these effects. Consequently, we conclude that Proposal 2 addresses hypothetical concerns, and therefore does not constitute an arrangement within the meaning of § 7106(b)(3).[71] As such, we need not address whether Proposal 2 is "appropriate."[72]

Because Proposals 1 and 2 affect management's right to determine budget, and the Union has not established that the proposals are negotiable as exceptions to that right under § 7106(b)(2) or (3) of the Statute, we find both proposals are outside the duty to bargain.

c. Proposal 3 is inextricably intertwined with Proposal 2, and is, consequently, outside the duty to bargain.

When a proposal is outside the duty to bargain, and another proposal is "inextricably intertwined" with the former proposal, the Authority will dismiss the petition as to both proposals.[73] Proposal 3 requires the parties to bargain if the CP and BP pools are not funded at the minimum levels set out in Proposal 2.[74] Thus, Proposal 3 is triggered only if the conditions in Proposal 2 are not met, and is therefore inextricably intertwined with Proposal 2.[75]

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[61] *NAGE, Loc. R14-87*, 21 FLRA 24, 31 (1986) (*KANG*); *see also AFGE, Loc. 1164*, 65 FLRA 836, 838 (2011).

[62] *Local 15*, 73 FLRA at 128 (citing *Local 2058*, 68 FLRA at 679-80; *Marine*, 60 FLRA at 831).

[63] *Id.* (citing *U.S. DOD, Fort Bragg Dependents Schs., Fort Bragg, N.C.*, 49 FLRA 333, 344 (1994) (*Fort Bragg*)).

[64] *Local 1450*, 70 FLRA at 976.

[65] *Id.* (quoting *KANG*, 21 FLRA at 31).

[66] 0-NG-3571, Resp. Br. at 10 (internal quotations omitted).

[67] *Local 15*, 73 FLRA at 128 (finding that union did not identify any actual, or reasonably foreseeable, adverse effects on employees flowing from exercise of management right); *Fort Bragg*, 49 FLRA at 344-45 (finding that mere assertion by union that proposal would benefit employees because it would afford employees access to representation assistance did not demonstrate that proposal would ameliorate any adverse effects flowing from exercise of management right).

[68] *Fraternal Ord. of Police, DC Lodge 1, NDW Lab. Comm.*, 72 FLRA 377, 379 (2021) (*FOP*) (Member Abbott concurring); *Fort Bragg*, 49 FLRA at 344-45; *see* 5 C.F.R. § 2424.32(a).

[69] *FOP*, 72 FLRA at 379.

[70] 0-NG-3571, Resp. Br. at 7-10.

[71] *FOP*, 72 FLRA at 379-80.

[72] *Id.* at 379.

[73] *AFGE, Loc. 1748, Nat'l Council of Field Lab. Locs.*, 73 FLRA 233, 236 (2022) (*Local 1748*) (citing *NTEU*, 70 FLRA 701, 705 (2018) (*NTEU 2018*)).

[74] 0-NG-3571, Pet. at 21, as amended by 0-NG-3571, Rec. at 4-5; 0-NG-3571, Rec. at 4-5.

[75] *See Local 1748*, 73 FLRA at 236-37 (negotiability of two proposals inextricably intertwined where latter proposal provided process "to accomplish" work assignments required by former, nonnegotiable proposal); *Local R1-100*, 61 FLRA at 484 (the negotiability of two proposals was inextricably intertwined where latter proposal incorporated requirement found in former proposal).

As discussed above, because Proposal 2 is outside the duty to bargain, Proposal 3 is also outside the duty to bargain.[76]

B. Proposal 4

1. Wording

> Article 26. Funding NAGE Individual CP and BP Pay Pools.
> Section 13. Minimum Incentive Pay Requirements
>
> As reflected in the Federal Register, it is an IP principle that: "All employees who are making positive performance contributions as demonstrated by acceptable performance will share in incentive pay. Amounts and time intervals will be set by the Division and sites." Accordingly, the following is agreed to:
> Employees whose salaries fall below the mid-band salary, and who demonstrate acceptable performance, are guaranteed a minimum of 1 CP point every other IP performance cycle. Employees whose salaries are at the mid-band salary or above, and who demonstrate acceptable performance, are guaranteed a minimum of 1 BP point every other IP cycle.
>
> An employee whose salary falls below mid-band, and who received a Summary Assessment of Exceptional Contributor, is guaranteed a minimum of 2 CP points unless assigned 0 pay points under the "Assignment of Zero Point Section" of this contract. Additional CP and BP points may be awarded as appropriate up to a total of four. An employee whose salary falls above mid-band, and who received a Summary Assessment of Exceptional Contributor, is guaranteed a minimum of 2 BP points unless assigned 0 pay points under the "Assignment of Zero Point Section" of this contract. Additional CP and/or BP points may be awarded as appropriate up to a total of four (4).[77]

2. Meaning

The parties agree that the proposal means the following. "IP" means incentive pay, "BP" means bonus pay, and "CP" means continuing pay.[78] A bargaining-unit employee is eligible for IP if the Agency gives them a performance rating of "acceptable," and an eligible employee is assigned "points" to determine the amount they would receive.[79] The "Assignment of Zero Point Section" of the parties' collective-bargaining agreement outlines circumstances where an employee rated as "acceptable" receives "0 pay points," because they do not qualify for IP for a reason unrelated to performance.[80] "Summary Assessment" refers to an overall assessment of that employee's "contributing factors," which are the part of the performance evaluation that make up the rating

[76] *Local 1748*, 73 FLRA at 236 (citing *IFPTE, Loc. 49*, 52 FLRA 813, 821 (1996) (Member Armendariz concurring); *AFGE, Loc. 3369*, 49 FLRA 793, 798 (1994)); *NTEU 2018*, 70 FLRA at 706. Because Proposal 3 is inextricably intertwined with Proposals 1 and 2, which we have found nonnegotiable, we need not address the Union's unsupported assertions that Proposal 3 is a procedure under § 7106(b)(2) and an appropriate arrangement under § 7106(b)(3). *AFGE, Council 222*, 73 FLRA 567, 570 n.48 (2023) (declining to address remaining nonnegotiability arguments where proposal inextricably intertwined with proposal found outside duty to bargain). Moreover, because resolving the Agency's budget argument fully disposes of Proposals 1, 2, and, consequently, Proposal 3, we need not address the Agency's remaining arguments that the proposals are contrary to management's rights to determine the Agency's mission, organization, number of employees, and internal security practices, 0-NG-3571, Statement Br. at 3; the Notice, 0-NG-3571, Statement Form at 3; 0-NG-3571, Statement Br. at 5-13, 15-16, 18-19, 22, 26-27, 30-31, 34-35, 39-40, 44; and that the Union is not negotiating in good faith under 5 U.S.C. § 7117, 0-NG-3571, Statement Br. at 25, 29, 33, 38. *See, e.g.*, *NAGE, Loc. R1-109*, 61 FLRA 593, 597 & n.3 (2006) (*Local R1-109*) (where proposal violated right to assign work under § 7106(a)(2)(B) of Statute, Authority found it unnecessary to address agency's additional arguments).

[77] 0-NG-3580, Pet. at 3.

[78] 0-NG-3580, Rec. at 2.

[79] *Id.*

[80] *Id.* at 3. The parties did not identify the specific provision of their agreement that is the "Assignment of Zero Point Section."

entitling an employee to IP.[81] Employees who received an "acceptable" performance rating may be rated in their Summary Assessment, in ascending order, as contributor, major contributor, or "Exceptional Contributor."[82] All Summary Assessment ratings are eligible for IP.[83] "[M]id-band salary" refers to the average salary of the pay band.[84] The Agency must give employees below the "mid-band salary" who are rated as acceptable a minimum of one CP point every other performance cycle, and a minimum of two CP points for those rated as "Exceptional Contributor" unless they are assigned "0 pay points" under the "Assignment of Zero Point Section."[85] The Agency must give employees at or above the "mid-band salary" one BP point every other performance cycle, and a minimum of two BP points to employees rated as "Exceptional Contributor" unless they are assigned "0 pay points" under the "Assignment of Zero Point Section."[86] The Agency may award an additional four IP (CP or BP) points to employees rated "Exceptional Contributor."[87]

The Union asserts that Proposal 4 establishes IP "criteria," whereas the Agency contends that the proposal establishes IP "outcome[s]" by requiring assignment of specific IP points, thereby removing management's discretion.[88] The proposal's plain wording conditions IP on employees meeting certain salary and performance requirements, and when those requirements are met, *requires* the Agency to provide a particular award.[89] Because the Union's statement of the meaning is inconsistent with the proposal's plain wording, we reject its statement, and we rely on the proposal's plain wording.[90]

3. Analysis and Conclusions

a. Proposal 4 does not affect management's rights to direct employees and assign work.

The Agency argues that Proposal 4 affects management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute, respectively.[91] The Agency contends that the proposal establishes mandatory performance awards and leaves the Agency no discretion to decide the amount of the IP based on an employee's performance.[92]

In *NTEU v. FLRA*, the United States Court of Appeals for the District of Columbia Circuit held that the rights to assign work and direct employees do not include the "right to reward [the] performance of what has been assigned."[93] Adopting the court's rationale, the Authority has subsequently and consistently held management's rights to direct employees and assign work do not extend to proposals that concern awards for eligible performance under Agency-established performance standards[94] or determinations as to the awards' amounts.[95]

Proposal 4 requires that an employee receive specific awards, but only after the Agency has rated the employee's performance under Agency-established performance standards and, therefore, deemed them eligible for such awards. As the Agency concedes, the proposal does not require the Agency to evaluate employee performance a particular way.[96] Therefore, consistent with the precedent discussed above, we conclude that Proposal 4

[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 2.
[85] *Id.* at 3.
[86] *Id.*
[87] *Id.*
[88] *Id.* at 4.
[89] 0-NG-3580, Pet. at 3.
[90] *NTEU*, 70 FLRA at 726.
[91] 5 U.S.C. § 7106(a)(2); 0-NG-3580, Statement Br. at 7, 18-21; *see id.* at 10; *see* 0-NG-3580, Statement Form at 3.
[92] 0-NG-3580, Statement Br. at 7.
[93] *NTEU v. FLRA*, 793 F.2d 371, 374 (D.C. Cir. 1986); *see id.* at 375 ("We hold that the level of incentive pay awarded for the performance of agency work, even work that has been 'assigned' or 'directed,' does not come within the nonbargainable management rights to assign work and direct employees.").
[94] *NAGE, Loc. R1-*203, 55 FLRA 1081, 1083 (1999) (finding proposal entitling employee to certain performance award "would not determine either the standards that the [a]gency would apply to appraise employee performance or the criteria that would be applied to determine whether an employee's performance warrants an award," and, therefore, did not constitute an exercise of management's rights to direct employees and assign work.); *NTEU*, 30 FLRA 1170, 1171-73 (1988) (*NTEU 1988*) (finding proposal entitling employee to certain performance award after being rated as eligible under agency-established performance standards did not constitute an exercise of management's rights to direct employees and assign work); *see also Indep. Union of Pension Emps. for Democracy & Just.*, 72 FLRA 571, 573 (2021) (Chairman DuBester concurring) ("while management has the right to establish minimum standards for assigned work and to evaluate employees against those standards, setting incentives for superior performance that goes beyond the effective completion of job requirements does not fall within the management rights to assign work and direct employees" (citing *NTEU*, 793 F.2d at 375)).
[95] *AFGE, AFL-CIO, Loc. 3477*, 27 FLRA 440, 442 (1987) (proposal that determined level of incentive pay for agency-rated performance of work did not affect management's rights to direct employees and assign work); *NTEU*, 27 FLRA 132, 135 (1987) (*NTEU 1987*) (same).
[96] 0-NG-3580, Statement Br. at 7.

does not affect management's rights to direct employees and assign work.[97]

b. Proposal 4 is not inconsistent with a government-wide rule or regulation, or an Agency regulation for which there is a compelling need.

The Agency also asserts that Proposal 4 is nonnegotiable because it is inconsistent with the Notice,[98] which the Agency asserts is a government-wide regulation.[99] Under the Statute, the duty to bargain extends to conditions of employment affecting employees in a unit of exclusive recognition unless the matters proposed for bargaining are inconsistent with federal law, government-wide rule or regulation, or an agency regulation for which a compelling need exists.[100]

We first examine whether the Notice is a government-wide regulation. The National Defense Authorization Act of 1995 (NDAA)[101] authorized the Department of Defense to participate in demonstration projects with OPM approval. In conjunction with this authority, 5 U.S.C. § 4703 and its implementing regulation, 5 C.F.R. § 470.101, authorize OPM, either directly or through agreement with other agencies, to conduct and evaluate demonstration projects, and OPM must publish each tentatively approved demonstration-project plan in a Federal Register notice.[102]

Under 5 C.F.R. § 470.103, demonstration projects are conducted to "determine whether a specified change in personnel management policies or procedures would result in improved [f]ederal personnel management."[103] Each demonstration project "must require the waiver" of applicable provisions of "law, rule, or regulation . . . eligible for waiver under the demonstration authority contained in 5 U.S.C. [§] 4703."[104] Additionally, 5 C.F.R. § 470.313 states that "[a]gencies will prepare demonstration project implementing regulations, as appropriate, to replace [g]overnment-wide statutes and regulations waived for the project."[105] Section 470.313 further states that OPM must approve regulations that implement an OPM-approved demonstration project, and those regulations "shall have the full force and authority pursuant to Title VI of the Civil Service Reform Act of 1978."[106] In 1997, OPM issued the Notice in the Federal Register, "approv[ing]" the Department of Defense implementation of the Demonstration Project at the Agency, which the NDAA "authorize[d]."[107]

While OPM *approved* the Agency's Demonstration Project, and issued the Notice, that does not transform the Notice into a government-wide regulation. The Authority has concluded that a regulation is a government-wide regulation under § 7117(a)(1) of the Statute if it is generally applicable throughout the government.[108] Although the Authority has explained that a government-wide regulation need not apply to "every [f]ederal employee,"[109] the Authority has also found that regulations applying only within a particular agency are not government-wide regulations within the meaning of § 7117(a)(1).[110] It is undisputed that the Notice applies only to civilian employees in the "Naval Sea Systems

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[97] *NTEU 1988*, 30 FLRA at 1172-73. Given our conclusion that Proposal 4 does not affect management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B), we need not address the Union's arguments that the proposal is negotiable under § 7106(b)(2) or (b)(3). 0-NG-3580, Resp. Form at 2.

[98] *See, e.g.*, 0-NG-3580, Statement Br. at 9 (arguing that the Notice preserves for supervisors the discretion to determine employees' incentive pay ("Supervisors will conduct an annual review of each employee's salary and decide how total compensation should be adjusted to reflect the employee's performance contribution to the organization. The adjustment may be made as a continuing increase to base pay and/or as a one-time cash bonus to adjust total compensation." (quoting Notice, 62 Fed. Reg. at 64,062))).

[99] *Id.* at 7-8, 18-21.

[100] *NAGE, Loc. R1-144, Fed. Union of Scientists & Eng'rs*, 43 FLRA 47, 50-51 (1991).

[101] NDAA, Pub. L. No. 103-337, 108 Stat. 2663.

[102] 5 U.S.C. § 4703(a); 5 C.F.R. §§ 470.101(a)-(b), 470.307(a)-(b).

[103] 5 C.F.R. § 470.103.

[104] *Id.* (explaining that a "project which can be undertaken under an agency's own authority [that] . . . does not require the waiver of a provision of law, rule, or regulation is not considered a 'demonstration project'").

[105] *Id.* § 470.313.

[106] *Id.*

[107] Notice, 62 Fed. Reg. at 64,050.

[108] *Off. of the Adjutant Gen., Mo. Nat'l Guard, Jefferson City, Mo.*, 58 FLRA 418, 421 (2003) (citing *Overseas Educ. Ass'n*, 22 FLRA 351, 354 (1986), *aff'd sub nom. Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816-18 (D.C. Cir. 1986) (*OEA*)).

[109] *NTEU, Chapter 6*, 3 FLRA 747, 751-56 (1980) ("A requirement that a regulation apply to all [f]ederal civilian employees in order to constitute a '[g]overnment-wide' regulation under [§] 7117 would render that provision meaningless, since it does not appear that there is any regulation which literally affects every civilian employee of the [f]ederal [g]overnment.").

[110] *AFGE, AFL-CIO, Nat'l Council of VA Locs.*, 29 FLRA 515, 554-55 (1987) (Chairman Calhoun writing separately on other grounds) ("[S]ince the [a]gency's regulations apply only within the [agency] itself, they are not [g]overnment-wide regulations within the meaning of [§] 7117(a)(1) of the Statute . . . .").

Command Warfare Centers,"[111] and are therefore not "generally applicable throughout the [f]ederal [g]overnment."[112] Further, the Notice's waiver of government-wide statutes and regulations only applies *within* the Agency, specific to the Demonstration Project.[113] The Authority has found that even where a rule or regulation – like the Notice – has the force and effect of law, that rule or regulation is not a government-wide rule or regulation within the meaning of § 7117(a)(1) of the Statute where it only applies within an agency.[114] Therefore, we find the Notice is not a government-wide rule or regulation within the meaning of § 7117(a)(1) of the Statute. As such, the Agency's reliance on the Notice provides no basis for finding that Proposal 4 conflicts with a government-wide regulation.

To the extent the Agency asserts the Notice is an Agency regulation, it does not argue that a compelling need supports the regulation, as § 2424.50 of the Authority's Regulations requires.[115] Therefore, the Agency also has not demonstrated that Proposal 4 is outside the duty to bargain on the ground that it conflicts with an Agency regulation.

For the above reasons, we find that Proposal 4 is within the duty to bargain.

C. Proposal 5

1. Wording

Article 29. Miscellaneous/Other
Section 2. IP for Union Official's.
a. Union officials who perform work under their activity-assigned duties or responsibilities for less than 520 hours per performance year cannot be rated under the Performance Development System, and therefore are ineligible for Incentive Pay. Because ineligibility for IP would deny union officials compensation, to which they would otherwise be entitled, such as within-grade increases and/or quality step increases; the following procedure is agreed to as an appropriate arrangement for IP for union officials.
b. One full-time union official, not performing 520 hours of activity-assigned duties, shall receive the equivalent of l CP + l BP (2 BP if at top of his/her pay band). This payout represents the average IP, both CP and BP, paid to the employees in their bargaining unit, rounded to the nearest whole point.
c. One full-time and five (5) part-time NAGE Rl-134 officials (officials include officers, stewards, or other union representatives) shall receive yearly IP based upon their full-time/part-time status, as union officials, each year as follows:
Category.
a. Full Time:
Yearly IP Pay.
In each IP cycle, one (l) NAGE Rl-134 official shall be eligible for Full Time status for receipt of IP and shall receive the equivalent of l CP + l BP (2 BP if at top of his/her pay band). This payout represents the average IP, both CP and BP, paid to the employees in their bargaining unit, rounded to the nearest whole point.
In each IP cycle, one (l) NAGE Rl-134 official shall be eligible for Full Time status.

b. Part-Time
Yearly IP Pay
In each pay cycle, five (5) part-time union officials shall receive the greater of one (1) CP (up to his/her mid-band, one (1) BP at or above his/her mid-band),

[111] Notice, 62 Fed. Reg. at 64,050; *see id.* at 64,050 (NDAA authorizing the Secretary of Defense, with OPM approval, to conduct a Demonstration Project *at the Agency*).
[112] *OEA*, 827 F.2d at 816-17.
[113] *See generally* Notice, 62 Fed. Reg. at 64,066-68 (listing "Waivers of Law and Regulation" for implementing the Demonstration Project *at the Agency*); *see also id.* at 64,067 (specifically waiving "[5 U.S.C. §] 7106(a)(2): In so far as provision on assigning and directing, documenting performance discussions, Performance Development Resources, Performance Plans, criteria and process for incentive pay, and communication and documentation requirements for incentive pay and reconsideration of incentive pay decisions; and, in so far as provision on reducing employees in grade may prevent the parties from negotiating procedures for non-adverse assignment of employees to a lower pay band").
[114] *See SSA, Off. of Disability Adjudication & Rev.*, 64 FLRA 1000, 1002 n.5 (2010) (stating that regulations that are not generally applicable throughout the federal government are not government-wide regulations); *OEA*, 827 F.2d at 816-18; *NAGE, Fed. Union of Scientists & Eng'rs., Loc. R1-144*, 42 FLRA 730, 748 (1991) (finding that chapter of Federal Acquisition Regulations relied on by agency is reserved for the Department of Defense and therefore is an agency regulation, not a government-wide regulation).
[115] *NAIL, Loc. 5*, 67 FLRA 85, 90 (2012) (*Local 5*) (citing *U.S. DOD, Off. of Dependents Schs.*, 40 FLRA 425, 443 (1991)) (finding agency failed to show compelling need for agency regulation when it did not address regulatory criteria for determining compelling need); 5 C.F.R. § 2424.50 (providing illustrative criteria with which an agency could demonstrate that a compelling need exists for an agency rule or regulation).

> or the IP payment attributed to their activity-assigned duties/responsibilities if greater. Part time union officials will be evaluated and assigned pay points by management based on their performance (productivity, quality, quantity of work, etc.) while working on management-assigned duties only. Their IP and other performance evaluations shall not be based on the expectations of an employee working full time on management-assigned duties. In no way will part-time union officials be under-compensated or penalized for working less than full time on management assigned duties.[116]

2. Meaning

The parties agree that the proposal means the following. "IP," "CP," and "BP" have the same meanings as in Proposal 4; "activity-assigned duties or responsibilities" means Agency-assigned work duties; "Performance Development System" means the performance-rating and IP structure; and "520 hours" is the minimum number of hours an employee must work to get a performance rating.[117] The proposal requires one full-time Union official to receive set IP each performance year for which they would otherwise be ineligible for IP because they worked less than 520 hours on Agency-assigned duties.[118] It also requires five part-time Union officials (those Union officials who work more than 520 hours on Agency-assigned duties) to receive the greater of one CP point if they were below the mid-band salary, one BP point if they were at or above the mid-band salary, or the IP payment related to the employees' Agency-assigned duties.[119] The Agency would rate the part-time Union officials for Agency-assigned work.[120]

The Union asserts that Proposal 5 establishes IP "criteria," whereas the Agency contends that the proposal establishes IP "outcome[s]" by requiring the assignment of specific IP points, thereby removing management's discretion.[121] Proposal 5's plain wording conditions IP on Union officials meeting certain requirements based on their pay band and hours worked on Agency-assigned work duties, and when those requirements are met, *requires* the Agency to provide a particular award.[122] Because the Union's statement of the meaning is inconsistent with the proposal's plain wording, we reject its statement, and rely on the proposal's plain wording.[123]

3. Analysis and Conclusion: Proposal 5 is outside the duty to bargain.

The Agency argues that Proposal 5 affects management's rights to direct employees and assign work under § 7106(a)(2) of the Statute.[124] The Union does not dispute, in either its petition or its response, the Agency's argument.[125] The Authority's Regulations state that a "[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."[126] Therefore, where, as here, a union does not respond to an agency's claim that a proposal affects the exercise of a management right, the Authority will find that the union concedes the proposal affects the claimed management right.[127] Thus, we find that Proposal 5 affects management's rights to direct employees and assign work.

In its response, the Union asserts that Proposal 5 is a negotiable procedure under § 7106(b)(2) and an appropriate arrangement under § 7106(b)(3).[128] Although the Union claims that the "proposal establishes a [procedure] to provide the equivalent of incentive pay to union officers,"[129] it presents no further explanation or authority to support its claim that Proposal 5 is a procedure.[130] As stated previously, if a union fails to articulate why a proposal is a procedure or an appropriate arrangement, the Authority will not make those arguments for the union. Accordingly, we reject the Union's claim as a bare assertion.[131]

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[116] 0-NG-3580, Pet. at 4.
[117] 0-NG-3580, Rec. at 2, 4.
[118] *Id.* at 4.
[119] *Id.* at 5.
[120] *Id.*
[121] *Id.*
[122] 0-NG-3580, Pet. at 4.
[123] *NTEU*, 70 FLRA at 726. We note that the Agency disagrees with the Union's explanation regarding Union officials' entitlement to regular pay increases by way of incentive pay, and incentive-pay entitlement if they are below the mid-band salary. *See* 0-NG-3580, Rec. at 4. As this disagreement does not affect our analysis of the negotiability of Proposal 5, we find it unnecessary to resolve this dispute. *Local 506*, 66 FLRA at 825 n.8, 828 n.9.
[124] 5 U.S.C. § 7106(a)(2); 0-NG-3580, Statement Br. at 24-25; *see* 0-NG-3580, Statement Form at 3.
[125] 0-NG-3580, Pet. at 4-5; 0-NG-3580, Resp. Br. at 4-5.
[126] 5 C.F.R. § 2424.32(c)(2); *id.* § 2424.32(a) (unions bear the "burden of raising and supporting arguments that the proposal . . . is within the duty to bargain, within the duty to bargain at the agency's election, or not contrary to law"); *see also Nat'l Nurses United*, 70 FLRA 306, 307-08 (2017) (citing *AFGE, Loc. 1547*, 64 FLRA 642, 642 (2010) (Member Beck dissenting, in part)).
[127] *See Local 2058*, 68 FLRA at 682-83.
[128] 0-NG-3580, Resp. Form at 2; 0-NG-3580, Resp. Br. at 4-5; 0-NG-3580 Pet. at 4.
[129] 0-NG-3580, Pet. at 4; 0-NG-3580, Resp. Form at 2.
[130] *See* 0-NG-3580, Resp. Form at 2.
[131] 5 C.F.R. § 2424.25(c)(1)(ii)-(iii); *see Local 723*, 66 FLRA at 644; *Local 1450*, 70 FLRA at 977 (citing 5 C.F.R. § 2424.32(c); *NFFE, IAMAW, Fed. Dist. 1, Loc. 1998*, 69 FLRA 626, 628 (2016) (Member Pizzella dissenting)).

The Union asserts Proposal 5 is an arrangement for a full-time Union official who performs Agency-assigned work duties for less than 520 hours per performance year to ameliorate the adverse effect of the Agency's determination that such employees are ineligible for IP because they do not get a performance rating.[132] However, the Union does not address how the identified adverse effect applies to *part-time* Union officials, to whom the proposal also applies, and who *do* get a performance rating.[133] Therefore, Proposal 5 is not tailored to apply only to employees who are adversely affected by management's exercise of its rights.[134] Consequently, we conclude that the Union has not demonstrated that Proposal 5 is an arrangement within the meaning of § 7106(b)(3) of the Statute.[135] As such, we need not address whether the proposal is "appropriate."[136]

Because Proposal 5 affects management's rights to direct employees and assign work, and the Union has not established that the proposal is negotiable as an exception to those rights under § 7106(b)(2) or (3), we find the proposal outside the duty to bargain.[137]

D. Proposal 6

1. Wording

> Section 3. FUNDING.
> IP funding for up to 6 NAGE Rl-134 officials shall be allocated and distributed at the NUWCDIVNPT level (up to 22 pay points yearly), and will be separate and above the funding allocated to the regular pay pool units. The union shall inform management at least 3 weeks before the date that pay pools are "frozen" of the names of the officials to be covered by this agreement.
>
> Either party may request to renegotiate the number of officials so treated, based on changing requirements or any other appropriate reason.[138]

2. Meaning

The parties agree that the proposal means the following. "IP" has the same meaning as in Proposal 4; "NUWCDIVNPT" means the Agency; "pay pool" means the two funds the Agency has allocated for distributing CP and BP; and "22 pay points" represents the maximum incentive-pay points (either CP or BP points) that could be given to Union officials – a total of two IP points for one full-time Union employee and up to four IP points each for five part-time Union employees.[139] Under the proposal, the Agency must provide IP for up to six Union officials every fiscal year, establish a new "pay pool" consisting of only Union officials, and allocate IP for these officials to this new pay pool.[140] Additionally, pay pools for all employees are currently "frozen" at some time after the performance year ends, and the proposal requires the Agency freeze the pay pools when it decides which employees will be in each pay pool.[141]

The Union asserts that Proposal 6 would not result in the pay pools of all employees being smaller, but is meant to keep incentive pay of Union officials separate from other bargaining-unit employees.[142] The Agency disagrees and states that all pay pools would be smaller, and there would need to be new budgetary allocations for the new pay pool.[143] The proposal's plain wording states that IP funding for certain Union officials will be separate from and above the funding allocated to regular pay pool units.[144] While the proposal does not discuss budgetary or monetary impact on the pay pools of other employees, the plain wording is not inconsistent with the Union's explanation. Therefore, we adopt that explanation.[145]

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[132] 0-NG-3580, Pet. at 4; 0-NG-3580, Resp. Br. at 4.
[133] 0-NG-3580, Rec. at 5.
[134] *Local 2058*, 68 FLRA at 680 (finding union did not establish that provision was sufficiently tailored arrangement under § 7106(b)(3)).
[135] *FOP*, 72 FLRA at 379; *Fort Bragg*, 49 FLRA at 344-45; *see* 5 C.F.R. § 2424.32(a).
[136] *FOP*, 72 FLRA at 379.
[137] Because resolving the Agency's management-rights objection fully disposes of Proposal 5, we need not address the Agency's arguments that the proposal is contrary to the Notice. 0-NG-3580, Statement Br. at 11-14, 23-24; 0-NG-3580, Statement Form at 3; *see, e.g.*, *Local R1-109*, 61 FLRA at 597 & n.3.
[138] 0-NG-3580, Pet. at 5.
[139] 0-NG-3580, Rec. at 5.
[140] *Id.*
[141] *Id.* at 5-6.
[142] *Id.* at 5.
[143] *Id.*
[144] 0-NG-3580, Pet. at 5.
[145] *EEOC Locals*, 71 FLRA at 606-07.

3. Analysis and Conclusions: The Agency does not demonstrate that Proposal 6 is outside the duty to bargain.

The Agency argues that Proposal 6 affects management's right to determine its budget under § 7106(a)(1) of the Statute.[146] Specifically, the Agency argues that the proposal requires the Agency to establish a particular program in its budget – a separate pay-pool fund for Union officials – and prescribes the amount of IP to be allocated in that fund.[147]

Proposal 6 does not dictate the amount the Agency must allocate to the Agency's IP budget for all employees; it merely determines that a portion of this Agency-established IP budget will be devoted to IP for up to six Union officials every fiscal year.[148] Moreover, to the extent the proposal administratively requires a separate pay pool for Union officials, it preserves the Agency's discretion as to how to achieve this result.[149] As described previously, under the first part of the Authority's two-part budget test, the Authority will not find that a proposal affects the right to determine the budget where it simply requires expenditures by the agency, as long as the proposal leaves the agency with discretion to determine how any necessary funding relating to the procedure will be addressed in its budget.[150] Proposal 6 does not prescribe either a particular program or operation, or an amount of funds to be included in the Agency's budget. Moreover, with regard to the second part of the Authority's budget test, the Agency does not claim or demonstrate that the proposal would entail significant and unavoidable costs that would not be offset by compensating benefits. Therefore, we find that the proposal does not affect management's right to determine its budget.[151]

Further, as with Proposal 4, the Agency claims that Proposal 6 is inconsistent with the Notice.[152] For the reasons discussed in Section IV.B.3.b., the Agency does not establish that the Notice is a government-wide regulation or that there is a compelling need for it. Therefore, the Agency's reliance on the Notice does not demonstrate that Proposal 6 is inconsistent with a government-wide regulation or an Agency regulation for which there is a compelling need.[153]

Consequently, Proposal 6 is within the duty to bargain.

E. Proposal 7

1. Wording

> Article 25. The Incentive Pay System.
> Section 5. Other Awards.
> Special Division-level awards continue to exist. Division Annual Awards, Patent and Invention Awards, Waiver Awards, Publication and Presentation Awards, and Beneficial Suggestion Awards continue to be given during the course of the performance year.
> Maximum annual funding for these awards (not including Beneficial Suggestion awards) is .25% percent of the total BP funding and is in addition to that sum. Funding for Other Awards will not be taken from or decrease any IP funds or pay pool funds.
> Section 6. Special Act (SA) Awards for Demonstration Project Employees.
> Special Act awards may be given to DEMO Project employees at any time during the performance year for accomplishments which meet Special Act regulatory requirements specified in NUWCDIVNPTINST 12451.2A, which will be the applicable instruction for Special Act awards for DEMO Project employees, except as modified by this contract.
> Special Act awards funding will not exceed $125,000 per fiscal year, and will

[146] 5 U.S.C. § 7106(a)(1); 0-NG-3580, Statement Br. at 14-15, 27; 0-NG-3580, Reply Br. at 6-7.

[147] 0-NG-3580, Statement Br. at 27-28; *see also id.* at 15; 0-NG-3580, Reply Br. at 7.

[148] *AFGE, Loc. 3836*, 31 FLRA 921, 931 (1988) (finding proposal requiring agency to allocate amount of its overall performance-awards budget to bargaining unit did not directly interfere with management's right to determine budget); *see also NTEU 1987*, 27 FLRA at 139-40 (where agency failed to demonstrate that proposal either "specif[ied] a dollar amount to be budgeted" for a particular program, or "would result in a significant and unavoidable increase in costs which would not be offset by compensating benefits," Authority found proposal did not directly interfere with management's right to determine budget).

[149] *Local 12*, 68 FLRA at 1062 (finding a proposal establishing an "administrative procedure" would not affect the right to determine budget "as long as the proposal leaves the agency with discretion to determine how any necessary funding relating to the procedure will be addressed in its budget"); *NAGE*, 38 FLRA at 480 (portions of proposal requiring establishment of two awards pools – but retaining agency's right to determine the amount of money to be applied to each pool – did not directly interfere with management right to determine budget).

[150] *E.g.*, *Local 12*, 68 FLRA at 1062.

[151] Given our conclusion that Proposal 6 does not affect management's right to determine its budget, we need not address the Union's arguments that the proposal is negotiable under § 7106(b)(2) or (b)(3) of the Statute. 0-NG-3580, Resp. Form at 2.

[152] 0-NG-3580, Statement Br. at 14-15, 26.

[153] *Local 5*, 67 FLRA at 90.

> not reduce IP pool funding. If BP funding falls below 1.6% percent of employee's base pay at any time, no Special Act awards will be given to DEMO Project employees until BP funding returns to the said 1.6% percent level or greater. Special Act Award payments may not exceed $1,500 per employee per fiscal year.[154]

2. Meaning

The parties agree Section 5 of the proposal has the following meaning. "IP" means incentive pay, "BP" means bonus pay, and "pay pools" are allotments of IP that are set aside for – and distributed to – discrete sets of employees.[155] The awards listed in the second sentence are an exhaustive list of "Other Awards," which include monetary and recognition awards.[156] The Agency may omit funding for "Other Awards" or allocate funding in an amount less than or equal to 0.25% of the total BP fund each fiscal year.[157] If the Agency funds "Other Awards," Section 5 establishes rules for administering that fund.[158] Funds allocated for "Other Awards" would be administered separately and independently from the BP fund.[159] Section 5 also bars the Agency from offsetting funding for "Other Awards" by reducing the funds allocated for any IP funds or pay pools.[160]

The parties agree that Section 6 has the following meaning. The Agency may allocate a maximum of $125,000 for "Special Act awards" per fiscal year, but may not award any individual employee more than $1,500.[161] The Agency cannot fund "Special Act awards" by deducting or offsetting funding allocated for IP, and has discretion to issue "Special Act awards" only if BP is funded at an amount greater than or equal to 1.6% of employees' base pay. Section 6 operates to ensure that the Agency issues "Special Act awards" in addition to, rather than as a substitute for, BP.[162]

3. Analysis and Conclusion: Proposal 7 is outside the duty to bargain.

The Agency argues that Proposal 7 affects management's right to determine its budget under § 7106(a)(1) of the Statute because the proposal prescribes the maximum amount of funding the Agency may budget by establishing a "ceiling" of 0.25% of the total BP budget for funding Other Awards and $125,000 for funding Special Awards.[163] The Agency also argues the proposal prevents the Agency from reducing budget funding allocated for IP or other pay pool funds.[164] The Union does not dispute that the proposal prevents the Agency from exceeding the "ceiling" established by the proposal.[165]

Thus, we find Proposal 7 establishes maximum funding levels for "Other Awards" and "Special Awards." In *IFPTE, Local No. 1* (*IFPTE*),[166] the Authority found a proposal affected management's right to determine its budget where the proposal established a formula that set a maximum funding allowance for performance awards at 1.5% of base payroll.[167] The Authority concluded the proposed "ceiling" on funding established a budgetary restriction on the funding levels for performance awards, and that this limitation affected the amount of money the Agency could include in its budget for that purpose.[168] By establishing maximum limits on funding, Proposal 7 operates in the same manner as the proposal in *IFPTE*. Consequently, we find that Proposal 7 affects management's right to determine its budget.

The Union asserts that Proposal 7 is a procedure under § 7106(b)(2) for the distribution of the Agency's budget by establishing the funding ceilings and determining the size of these awards, and that the proposal is an appropriate arrangement under § 7106(b)(3).[169] However, the Union cites no authority, and provides no further explanation, to support a conclusion that the proposal is a procedure or an appropriate arrangement. As stated previously, if a union fails to articulate why a proposal is a procedure or an appropriate arrangement, the Authority will not make those arguments for the union. Thus, we reject the Union's claims as bare assertions.[170]

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[154] 0-NG-3602, Pet. at 2-3.
[155] 0-NG-3602, Rec. at 2-3.
[156] *Id.* at 2.
[157] *Id.* at 3.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.* at 3-4.
[162] *Id.*
[163] 0-NG-3602, Statement Br. at 4-8.
[164] *Id.* at 4.
[165] 0-NG-3602, Pet. at 3.
[166] 38 FLRA at 1595.
[167] *Id.*
[168] *Id.*
[169] 0-NG-3602, Pet. at 3-4.
[170] *Local 2830*, 60 FLRA at 127.

Because Proposal 7 affects management's right to determine budget, and the Union has not established that the proposal is negotiable as an exception to that right under § 7106(b)(2) or (3), we find the proposal is outside the duty to bargain.[171]

V. Decision

We dismiss the Union's petitions as to Proposals 1-3, 5, and 7. We direct the Agency to bargain, upon request, over Proposals 4 and 6.

[171] Because resolving the Agency's management-rights objection fully disposes of Proposal 7, we need not address the Agency's arguments that the proposal is contrary to the Notice. 0-NG-3602, Statement Form at 3; 0-NG-3602, Statement Br. at 6-8, 9; *see, e.g.*, *Local R1-109*, 61 FLRA at 597 & n.3.