

**73 FLRA No. 51**

FEDERAL EDUCATION ASSOCIATION  
(Union)

and

UNITED STATES  
DEPARTMENT OF DEFENSE  
EDUCATION ACTIVITY  
ALEXANDRIA, VIRGINIA  
(Agency)

0-NG-3486

-----

DECISION AND ORDER  
ON NEGOTIABILITY ISSUES

September 28, 2022

-----

Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and Susan Tsui Grundmann,  
Members  
(Member Kiko concurring in part and dissenting in part)

**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).<sup>1</sup> The petition for review (petition) concerns the negotiability of five proposals<sup>2</sup> relating to teaching-preparation activities, renewal-agreement travel (RAT), the length of the school year, and the assignment of work that occurs before and after the school year.<sup>3</sup>

For the following reasons, we find that Proposals 2, 4, and 6 are within the duty to bargain and that Proposals 3 and 5 are outside the duty to bargain.

**II. Background**

The Union represents teachers who work overseas in elementary and secondary schools run by the Department of Defense. During negotiations over a successor collective-bargaining agreement, the Union requested that the Agency provide written allegations of nonnegotiability for pending proposals. After the Agency complied, the Union filed the petition. Subsequently, the Agency filed a statement of position (statement), the Union filed a response (response), and the Agency filed a reply (reply).

**III. Preliminary Matter: Section 2424.30(a) of the Authority's Regulations does not bar the petition.**

At an Authority-conducted post-petition conference with the parties, the Union stated that it had filed a grievance concerning the parties' successor-agreement negotiations.<sup>4</sup> The Authority's Office of Case Intake and Publication then issued an order directing the Union to show cause why the petition should not be dismissed.<sup>5</sup> Under § 2424.30(a) of the Authority's Regulations, the Authority will dismiss a negotiability appeal without prejudice where the union has filed "a grievance alleging an unfair labor practice under the parties' negotiated grievance procedure, and the . . . grievance concerns issues directly related" to the negotiability petition.<sup>6</sup>

In response to the order, the Union explained the pending grievance concerns the Agency's refusal to negotiate proposals that the Agency believes to be contrary to some now-revoked executive orders.<sup>7</sup> A review of the Agency's statement establishes that none of its allegations of nonnegotiability are based on executive orders.<sup>8</sup> Additionally, the Union submitted evidence establishing that the proposals involved in the pending grievance are not included in the petition.<sup>9</sup> Because the Union showed the proposals in its petition are not directly related to the pending grievance, we consider the petition.<sup>10</sup>

<sup>1</sup> 5 U.S.C. § 7105(a)(2)(E).

<sup>2</sup> The petition initially involved six proposals, but, during an Authority-conducted post-petition conference with the parties, the Union withdrew Proposal 1. Record of Post-Pet. Conf. (Rec.) at 1.

<sup>3</sup> Pet. at 6, 8, 10, 12, 13.

<sup>4</sup> Rec. at 1 n.3.

<sup>5</sup> Order to Show Cause (Ord.) at 1.

<sup>6</sup> 5 C.F.R. § 2424.30(a).

<sup>7</sup> Resp. to Ord. at 1-2; *see also* Resp. to Ord., Attach. 1, Grievance at 1 (explaining basis for grievance).

<sup>8</sup> *See* Statement at 5, 7, 9, 11, 13.

<sup>9</sup> *Compare* Resp. to Ord., Attach. 2, Statement of Position submitted to Federal Service Impasses Panel, at 1-2, 4-5 (discussing grievance and identifying the involved proposals as Art. 2, § 1B; Art. 5, § 2A-D (Agency proposals); Art. 5, § 2A-I (Union proposals); Art. 12, § 2C; Art. 14, § 6; and Art. 16, §§ 2, 4, 7), *with* Pet. at 6, 8, 10, 12, 13 (identifying proposals involved in petition as Art. 46, § 2B; Art. 48, § 5; Art. 56, § 1; Art. 56, § 2; Art. 56, § 3).

<sup>10</sup> *See AFGE, Loc. 1938*, 66 FLRA 1038, 1039 (2012) (considering petition where examination of grievance's subject matter showed it was not directly related to the petition).

#### IV. Proposals 2 and 5

##### A. Wording

###### 1. Proposal 2

The Employer shall make reasonable efforts to provide a reasonable amount of preparation time for each unit employee during the employee's work day. For Elementary School unit employees, a reasonable amount of time is approximately 225 minutes each week during the school year. For Secondary school unit employees, a reasonable amount of time is approximately two (2) periods in a cycle of seven (7) instructional periods, or the equivalent thereof, which will be built into the master schedule.<sup>11</sup>

###### 2. Proposal 5

The Employer shall make reasonable efforts to provide a reasonable amount of time at the start/end of the school year to set up and close down their respective classrooms at the beginning and end of the school year. For bargaining unit employees, a reasonable amount of time to set up classrooms for the start of the school year is approximately two and a half (2.5) days. A reasonable amount of time to close down classrooms for bargaining unit educators is approximately one and a half (1.5) days.<sup>12</sup>

##### B. Meaning

Generally, both proposals would require the Agency to make "reasonable efforts" – as determined by the Agency<sup>13</sup> – to provide employees with a "reasonable amount" of paid time to conduct teaching-preparation activities.<sup>14</sup> The proposals define what "approximately" constitutes a reasonable amount of

time.<sup>15</sup> The parties agree on the meaning and operation of the proposals.<sup>16</sup>

Proposal 2 concerns non-teaching time during the school day to plan and prepare for instructional activities.<sup>17</sup> It defines a reasonable amount of preparation time as approximately 225 minutes each week for elementary-school employees and approximately two instructional periods in a seven-period cycle for secondary-school employees.<sup>18</sup>

Proposal 5 concerns paid time to set up classrooms at the beginning of the school year and close them down at the end.<sup>19</sup> It defines a reasonable amount of time to set classrooms up as approximately two and a half days and to close them down as approximately one and a half days.<sup>20</sup>

##### C. Analysis and Conclusions

###### 1. Proposals 2 and 5 affect management's rights to direct employees and assign work.

The Agency argues the proposals are contrary to management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute, respectively, because the proposals define the amount of time that is reasonable for each preparation activity.<sup>21</sup> The Union does not dispute, and therefore concedes, that Proposals 2 and 5 affect these rights.<sup>22</sup> Thus, we find the proposals affect those rights.<sup>23</sup>

###### 2. Proposal 2 is an appropriate arrangement, but Proposal 5 is not.

The Union argues the proposals are appropriate arrangements under § 7106(b)(3) of the Statute.<sup>24</sup> A proposal that affects management's rights under § 7106(a) of the Statute is nevertheless within the duty to bargain if it is an appropriate arrangement under § 7106(b)(3).<sup>25</sup>

When determining whether a proposal is within the duty to bargain under § 7106(b)(3), the Authority first determines whether the proposal is intended to be an

<sup>11</sup> Pet. at 6.

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

<sup>13</sup> Rec. at 2-3.

<sup>14</sup> *Id.*

<sup>15</sup> Pet. at 6, 12.

<sup>16</sup> Rec. at 2-3.

<sup>17</sup> *Id.* at 2.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 3.

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

<sup>21</sup> Statement at 5, 11.

<sup>22</sup> *Nat'l Weather Serv. Emps. Org.*, 63 FLRA 450, 452 (2009) (noting that, by failing to dispute agency allegations, union conceded that proposal affected claimed management right).

<sup>23</sup> See, e.g., *AFGE, Loc. 2058*, 68 FLRA 676, 682-83 (2015) (Member Pizzella dissenting in part) (finding that proposal affected management rights where union conceded that that they did).

<sup>24</sup> Resp. at 3-6, 14-15.

<sup>25</sup> See, e.g., *NTEU*, 72 FLRA 752, 755 (2022) (Chairman DuBester concurring in part and dissenting in part on other grounds).

“arrangement” for employees adversely affected by the exercise of a management right.<sup>26</sup> 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.<sup>27</sup> The alleged arrangement also must be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management’s rights.<sup>28</sup>

If the proposal is an arrangement, the Authority then determines whether the arrangement excessively interferes with management rights.<sup>29</sup> 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.<sup>30</sup>

#### a. Proposal 2

The Union contends, and the Agency does not dispute, that the Agency currently expects bargaining-unit teachers to perform preparation work, as reflected in the parties’ current collective-bargaining agreement and their successor agreement.<sup>31</sup> According to the Union, “in addition to the additional work requirements that prompted the Authority to find [a similar proposal] to be an appropriate arrangement in” *Overseas Education Ass’n*<sup>32</sup> (*OEA*) – effectively, a “longer instructional day” and a “diminution of [the employees’] personal time”<sup>33</sup> – the Agency’s “continuing expectation . . . that employees will ‘perform additional preparational and professional tasks necessary to the completion of their work’ outside the employee workday continues to adversely impact unit employees.”<sup>34</sup> The Union further asserts that Proposal 2 “will provide a substantial benefit to employees by reducing the amount of work they are required to perform after the workday ends.”<sup>35</sup>

Management’s exercise of its rights to assign work and direct employees – by expecting employees to

perform preparation work outside of their duty hours – adversely affects employees by effectively extending their workday and diminishing their personal time.<sup>36</sup> Proposal 2 would ameliorate those adverse effects by requiring the Agency to make reasonable efforts to provide the employees with reasonable amounts of duty time to perform that work.

The Agency claims the proposal appears to be an arrangement for the parties’ negotiated agreement stating that employees are expected to perform these duties, not an arrangement for the exercise of statutory management rights.<sup>37</sup> But the Agency’s requirement that employees perform preparation work is an exercise of its statutory management rights, whether or not those rights also are set forth in the parties’ agreements. Therefore, the Agency’s claim lacks merit, and the proposal is intended to ameliorate the adverse effects of management’s exercise of its statutory rights. Further, because the proposal applies only to employees who are assigned to perform this work, it is tailored to apply only to employees who are adversely affected by management’s exercise of its rights.<sup>38</sup> Thus, we find Proposal 2 is an arrangement.

The Agency argues the arrangement is not appropriate because Proposal 2 fixes the amount of reasonable preparation time, thereby limiting the assignment of work “irrespective of the Agency’s immediate needs.”<sup>39</sup> However, the parties agree Proposal 2’s first sentence requires only that the Agency make “‘reasonable efforts, as determined by the Agency,’” to provide “reasonable amounts” of preparation time.<sup>40</sup> Proposal 2’s second and third sentences set forth what “‘approximately’” would be reasonable amounts of preparation time for elementary-school unit employees and secondary-school unit employees, respectively.<sup>41</sup> Additionally, the parties agree the Agency would have flexibility to vary the amounts of preparation time each day.<sup>42</sup> As the Union states, the proposal does not impose an unconditional requirement.<sup>43</sup>

<sup>26</sup> *NFFE, Loc. 1450, IAMAW*, 70 FLRA 975, 976 (2018) (*Loc. 1450*).

<sup>27</sup> *Fraternal Ord. of Police, DC Lodge 1, NDW Lab. Comm.*, 72 FLRA 377, 379 (2021) (*FOP*) (Member Abbott concurring).

<sup>28</sup> *NAGE, Loc. R14-87*, 21 FLRA 24, 31 (1986) (*KANG*); see also *NFFE, IAMAW, Fed. Dist. 1, Loc. 1998*, 69 FLRA 626, 629 (2016) (*Loc. 1998*) (Member Pizzella dissenting on other grounds).

<sup>29</sup> *Loc. 1450*, 70 FLRA at 976.

<sup>30</sup> *Id.* (quoting *KANG*, 21 FLRA at 31).

<sup>31</sup> *Resp.* at 4.

<sup>32</sup> 39 FLRA 153 (1991) (Proposal 7b).

<sup>33</sup> *Id.* at 168.

<sup>34</sup> *Resp.* at 4.

<sup>35</sup> *Id.*

<sup>36</sup> See *OEA*, 39 FLRA at 168.

<sup>37</sup> Reply at 3.

<sup>38</sup> See, e.g., *AFGE, Loc. 1547*, 65 FLRA 911, 915 (2011) (finding proposal tailored) (Member Beck dissenting), *pet. for review denied sub nom. U.S. Dep’t of the Air Force, Luke Air Force Base v. FLRA*, 680 F.3d 826 (D.C. Cir. 2012).

<sup>39</sup> Statement at 5.

<sup>40</sup> *Rec.* at 2 (emphasis added).

<sup>41</sup> *Pet.* at 6 (emphasis added).

<sup>42</sup> *Rec.* at 2.

<sup>43</sup> *Resp.* at 5. Our dissenting colleague’s conclusion that Proposal 2 excessively interferes with the management rights to direct employees and assign work fails to acknowledge the parties’ understanding of Proposal 2’s meaning, which we find to be consistent with its wording. Of course, it is this understanding upon which the Authority bases its negotiability determination. *AFGE, Loc. 1547*, 70 FLRA 303, 304 (2017)

When read as a whole, Proposal 2 requires the Agency make “reasonable efforts” – as defined by the Agency – to provide employees with “approximately” the amounts of preparation time set forth in the proposal.<sup>44</sup> As the Union contends, “that the proposal defines what a reasonable amount is does not make it any less negotiable[,]” because “[i]t would still be subject to the [first sentence’s] qualification . . . that the [A]gency need

---

(then-Member DuBester concurring); *NAIL*, *Loc. 7*, 67 FLRA 654, 655 (2014) (Member Pizzella concurring in part and dissenting in part on other grounds), *recons. denied*, 68 FLRA 133 (2014) (Member Pizzella dissenting); *NATCA*, 64 FLRA 161, 161 n.2 (2009); *see also Ass’n of Civilian Technicians Volunteer Chapter 103*, 55 FLRA 562, 564 n.9 (1999) (The meaning that the Authority adopts in resolving a negotiability case applies “in other proceedings, unless modified by the parties through subsequent agreement.”).

<sup>44</sup> Pet. at 6.

<sup>45</sup> Resp. at 5.

only make ‘reasonable efforts’ to provide” the approximate amounts of time.<sup>45</sup> The Authority finds qualifying terms such as those in Proposal 2 are relevant in assessing whether a proposal excessively interferes with management rights.<sup>46</sup> Thus, Proposal 2’s qualifying terms lessen the proposal’s burdens on management rights.

<sup>46</sup> *See, e.g., AFGE, Loc. 3137*, 44 FLRA 1570, 1570, 1580-81, 1594, 1596-97 (1992) (proposals including qualifier “[u]nder [n]ormal circumstances” were appropriate arrangements); *id.* at 1588, 1591-92 (proposal excusing management from complying “should the workload require it, and in abnormal, unusual or unforeseen circumstances,” was an appropriate arrangement); *AFGE, Loc. 1658*, 44 FLRA 1375, 1386, 1388-89 (1992) (*Loc. 1658*) (provision including qualifiers “[insofar] as possible” and “normally” was an appropriate arrangement); *NAGE, Loc. R5-82*, 43 FLRA 25, 37-40 (1991) (provision including qualifier “normally” was an appropriate arrangement); *AFGE, AFL-CIO, Loc. 53*, 42 FLRA 938, 943, 947-49 (1991) (provision including qualifier “every effort” was an appropriate arrangement); *Tidewater Va. Fed. Emps., Metal Trades Council*, 42 FLRA 845, 851, 854-55 (1991) (proposal including qualifier “[a]ttempts” was an appropriate arrangement); *NAGE, SEIU, AFL-CIO*, 40 FLRA 657, 668, 671-74 (1991) (*SEIU*) (provision including qualifier “normally” was an appropriate arrangement); *OEA*, 39 FLRA at 165, 168-69 (proposals including qualifier “every reasonable effort” were appropriate arrangements); *AFGE, Loc. 2024*, 37 FLRA 249, 253, 255-58 (1990) (proposal including qualifier “to the extent possible” was an appropriate arrangement); *NFFE, Loc. 2096*, 36 FLRA 834, 835, 842-44 (1990) (provision including qualifier “diligent effort” was an appropriate arrangement); *AFGE, AFL-CIO, Loc. 1931*, 32 FLRA 1023, 1035-37 (1988), *rev’d as to other matters sub nom. Dep’t of the Navy, Naval Weapons Station Concord, Cal. v. FLRA*, No. 88-7408 (9th Cir. Feb. 7, 1989) (provision including qualifier “definite effort” was an appropriate arrangement); *id.* at 1035-37 (provision including qualifier “reasonable effort” was an appropriate arrangement); *AFGE, AFL-CIO, Loc. 2635*, 30 FLRA 41, 43-45 (1987) (provision including qualifier “reasonable effort” was an appropriate arrangement); *NFFE, Loc. 284*, 29 FLRA 958, 958-61 (1987) (provision including qualifier “every reasonable effort” was an appropriate arrangement); *Cong. Rsch. Emps. Ass’n*, 25 FLRA 306, 306, 309-11 (1987) (proposals requiring agency to take certain actions whenever “practicable” or “possible,” were appropriate arrangements); *see also NTEU*, 55 FLRA 1174, 1174-76 (1999) (provision including qualifier “other reasonable efforts, if appropriate and possible,” was an appropriate arrangement); *POPA*, 41 FLRA 795, 841-44 (1991) (*POPA*) (provision including qualifier “whenever practicable” was an appropriate arrangement). *Cf. Nat’l Educ. Ass’n, Overseas Educ. Ass’n, Fort Rucker Educ. Ass’n*, 53 FLRA 941, 950-53 (1997) (provision that was interpreted as requiring management action only when “feasible” was an appropriate arrangement); *AFGE, Loc. 4041*, 45 FLRA 3, 12-13 (1992) (provision that was interpreted as allowing agency to take into account certain exigencies was an appropriate arrangement); *AFGE, Loc. 2024*, 30 FLRA 16, 17-18 (1987) (proposal that was found to have same effect as a provision that required an agency to make a reasonable effort was an appropriate arrangement).

Moreover, the parties agree the numbers set forth in the proposal's second and third sentences reflect the Agency's current practice.<sup>47</sup> This further supports a conclusion that Proposal 2's burdens on management rights are relatively limited.<sup>48</sup>

By contrast, Proposal 2's benefits to employees are substantial. The Agency's requirement that employees perform preparation work effectively extends the employees' workday and imposes upon their personal time. By requiring the Agency to make reasonable efforts to assign this work during the duty day, Proposal 2 would, as the Union states, "provide a substantial benefit to employees by reducing the amount of work they are required to perform after the workday ends."<sup>49</sup> Balancing these fairly substantial benefits against the relatively slight burdens on management rights, we find that Proposal 2 does not excessively interfere with management rights.<sup>50</sup>

In sum, we find that Proposal 2 is an appropriate arrangement and, thus, is within the duty to bargain.

#### b. Proposal 5

The Union claims Proposal 5 is intended as an arrangement for employees who are affected by the Agency's assignment of classroom set-up and close-down duties.<sup>51</sup> However, the Union does not identify what the alleged adverse effects are or explain how the Agency's exercise of a management right has caused any such effects.<sup>52</sup> In fact, the Union concedes the Agency already provides paid time for these activities.<sup>53</sup> Without evidence of an adverse effect, the Union's argument fails to establish that Proposal 5 is an arrangement.<sup>54</sup>

For the above reasons, we find Proposal 5 outside the duty to bargain.

## V. Proposal 3

### A. Wording

RAT orders for unit employees will not contain any requirement for employees to use the Commercial Travel Offices (CTO) or any other travel office assigned or designated by the Employer. Employees who do not use the CTO or any other travel office will be reimbursed up to the constructed cost for RAT travel to their home of record, and the employee will be responsible for any and all additional expenses related thereto, if any.

Unit Employees may use, but shall not be required to use, the Patriot Express or similar contracted flights for RAT travel.<sup>55</sup>

### B. Severance

The Union requests we separately consider the two paragraphs of Proposal 3 concerning RAT.<sup>56</sup> The Agency opposes this severance request<sup>57</sup> because it has withdrawn its allegation of nonnegotiability as to the second paragraph.<sup>58</sup> If a union supports its severance "request with an explanation of how each severed portion . . . may stand alone, and . . . operate,"<sup>59</sup> then the Authority severs the proposal and rules on the negotiability of its separate components.<sup>60</sup>

Under the second paragraph of Proposal 3, the Agency could not require employees to use Agency charter flights for RAT.<sup>61</sup> This portion of the proposal operates independently of the first paragraph, which concerns the general procedure that employees use to arrange, and seek

<sup>47</sup> Rec. at 2.

<sup>48</sup> See, e.g., *POPA*, 41 FLRA at 839-40 (in finding provision did not excessively interfere, Authority relied on facts that the provision reflected an existing agency practice and that the agency did not argue that the practice was burdensome); *SEIU*, 40 FLRA at 674 (relying on undisputed claim that provision reflected agency's current practice in finding provision did not excessively interfere). Cf. *NTEU v. FLRA*, 404 F.3d 454, 458 (D.C. Cir. 2005) (in criticizing the Authority's excessive-interference analysis, court stated that the Authority "must consider" evidence that, at some facilities, the agency's practice was consistent with the union's proposal).

<sup>49</sup> Resp. at 4; see also *OEA*, 39 FLRA at 168-69 (proposals "would offer benefits to employees by minimizing the demands on their off-duty time by allowing them opportunities during the duty day to perform preparational and other job-related activities that otherwise would have to be performed outside the duty day").

<sup>50</sup> See, e.g., *Loc. 1998*, 69 FLRA at 629 (finding that proposal did not excessively interfere with management rights).

<sup>51</sup> Resp. at 15.

<sup>52</sup> See *Nat'l Educ. Ass'n, Overseas Educ. Ass'n, Fort Bragg Ass'n of Educators*, 53 FLRA 898, 915 (1997) (finding proposal nonnegotiable where union did not identify "any adverse effects on employees, either actual or reasonably foreseeable, that flow from the exercise of management's rights").

<sup>53</sup> Resp. at 15.

<sup>54</sup> See *AFGE, Loc. 1164*, 54 FLRA 1327, 1333 (1998) (where union failed to establish adverse effects, proposal was not an arrangement).

<sup>55</sup> Pet. at 8.

<sup>56</sup> *Id.* at 10.

<sup>57</sup> Statement at 14.

<sup>58</sup> *Id.* at 4, 14.

<sup>59</sup> 5 C.F.R. § 2424.22(c).

<sup>60</sup> *NATCA*, 61 FLRA 658, 660 (2006).

<sup>61</sup> Pet. at 9; Rec. at 3.

reimbursement for, such travel.<sup>62</sup> Accordingly, we grant the Union's request to sever the second paragraph.<sup>63</sup> Because the Agency has withdrawn its allegation of nonnegotiability for this paragraph, we dismiss the petition as to the severed proposal and consider only the first paragraph of Proposal 3.<sup>64</sup> All references to Proposal 3 below refer to the first paragraph.

### C. Meaning

Proposal 3 concerns RAT: a benefit under which the Agency reimburses employees for travel to and from their home of record between periods of contracted employment outside the United States.<sup>65</sup> Prior to the travel, the Agency provides employees with travel orders that dictate, among other things, how this travel is to be arranged.

The parties agree that Proposal 3 would require the Agency to issue travel orders that do not mandate the use of the Agency's commercial travel office to arrange RAT.<sup>66</sup> This would allow employees to arrange for such travel by other means and request reimbursement from the Agency at the completion of the travel.<sup>67</sup> The Agency would then reimburse employees up to the amount of the constructed cost, which is what the Agency determines the trip would have cost if the commercial travel office had booked the travel.<sup>68</sup> The Union emphasizes that employees could not be reimbursed for any costs they incur above that amount.<sup>69</sup>

### D. Analysis and Conclusions

The Agency argues Proposal 3 is contrary to the Federal Travel Regulation (FTR).<sup>70</sup> The Authority finds a proposal is outside the duty to bargain when it is contrary to law, including the FTR.<sup>71</sup>

Section 301-50.3 of the FTR states that, except in limited situations not at issue here,<sup>72</sup> Department of Defense employees "must arrange [their] travel in accordance with [their] agency's [Travel Management Service]."<sup>73</sup> It is undisputed the Agency's commercial travel office is such a service and that the Agency requires employees to use it to arrange RAT.<sup>74</sup> Proposal 3 is inconsistent with the FTR because it allows employees to arrange RAT through means other than the Agency's commercial travel office.<sup>75</sup>

The Union argues the proposal accords with a paragraph in the Agency's travel regulations that applies when the commercial travel office "is available but not used."<sup>76</sup> The Agency's regulations state, in this situation, the reimbursement of an employee's travel expenses is limited to the constructed cost.<sup>77</sup> However, this paragraph does not explicitly authorize employees to *choose* whether to use the commercial travel office,<sup>78</sup> which is what Proposal 3 permits.<sup>79</sup> And so, the plain language of the Agency's travel regulations contradicts the Union's claim

Accordingly, we find Proposal 3 outside the duty to bargain.

## VI. Proposal 4

### A. Wording

The school year for unit employees is 186 working days. If the Employer extends the school year beyond 186 working days for any unit employee, including early return/late departure, the employee(s) will be compensated at their daily rate for the 187th and any subsequent days thereafter.<sup>80</sup>

<sup>62</sup> Rec. at 2-3.

<sup>63</sup> See *FOP*, 72 FLRA at 378 (granting request to sever where portion of provision could "stand alone").

<sup>64</sup> See *AFGE, Loc. 1709*, 56 FLRA 549, 555 (2000) (noting Authority practice of dismissing portion of petition to which agency had withdrawn allegation of nonnegotiability).

<sup>65</sup> Rec. at 2.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Pet. at 9; Resp. at 7.

<sup>70</sup> Statement at 7.

<sup>71</sup> E.g., *Fed. Union of Scientists & Eng'rs, NAGE*, 26 FLRA 284, 286 (1987) (*NAGE*).

<sup>72</sup> See 41 C.F.R. § 301-50.4 (stating that an agency may grant individual exceptions to avoid burdening the agency's mission, compromising national security, or endangering life).

<sup>73</sup> *Id.* § 301-50.3; see also *id.* § 300-3.1 (defining "Travel Management Service" as a "service for booking common

carrier . . . , lodging accommodations, and car rental services; [and] fulfilling (i.e. ticketing) reservations").

<sup>74</sup> See Rec. at 2 (stating Agency uses commercial travel office to book renewal-agreement travel); Pet. at 9 (noting Agency has a contract with a commercial travel office "to provide booking and ticketing services for civilian employees who are travelling at [A]gency expense").

<sup>75</sup> See *NAGE*, 26 FLRA at 286 (proposal that provided different per diem calculations than FTR was nonnegotiable as inconsistent with that regulation).

<sup>76</sup> Resp. at 7 (quoting Joint Travel Regulations (JTR), para. 020207.E, at 2-16, available at <https://www.defensetravel.dod.mil/Docs/perdiem/JTR.pdf>).

<sup>77</sup> JTR at 2-16.

<sup>78</sup> See *id.*

<sup>79</sup> See Rec. at 2.

<sup>80</sup> Pet. at 10.

B. Meaning

Proposal 4 concerns the length of the school year, which is the number of days that employees must normally report for duty.<sup>81</sup> Under the proposal, the length of the school year would be set at 186 days, and the Agency would provide additional compensation for any days it requires employees to work beyond the 186th day.<sup>82</sup> This additional compensation is the daily rate, which, under Proposal 4, would be the employee’s salary divided by 186.<sup>83</sup> The proposal would not alter how or when employees are paid or limit the Agency’s ability to extend or shorten the school year.<sup>84</sup> The parties agree on the meaning and operation of the proposal.<sup>85</sup>

C. Analysis and Conclusions

The Agency argues Proposal 4 affects the rate of basic compensation and, therefore, conflicts with<sup>86</sup> the Department of Defense Overseas Pay and Personnel Practices Act (the Act).<sup>87</sup> The Union counters, arguing Proposal 4 is within the duty to bargain because the Act gives the Secretary of Defense (the Secretary) discretion to determine the length of the school year.<sup>88</sup>

Section 902(a) of the Act states:

[T]he Secretary . . . shall prescribe and issue regulations to carry out the purposes of this [Act]. Such regulations shall govern –

. . . .

(2) the fixing of basic compensation for teachers and teaching positions at rates equal to the average of the range of rates of basic compensation for similar positions of a comparable level of duties

and responsibilities in urban school jurisdictions in the United States of 100,000 or more population; [and]

. . . .

(7) the length of the school year or school years applicable to teaching positions[.]<sup>89</sup>

Section 902(a)(7) of the Act directs the Secretary to set the length of the school year for overseas teachers.<sup>90</sup> The U.S. Court of Appeals for the District of Columbia (D.C. Circuit) has twice interpreted this section of the Act to mean the Agency has discretion in setting the length of the school year.<sup>91</sup> In accordance with these holdings, the length of the school year is a matter over which the Agency has discretion, placing Proposal 4 within the duty to bargain, unless is it otherwise inconsistent with law.<sup>92</sup>

The Agency argues Proposal 4 is inconsistent with the Act because it seeks to increase the rate of basic compensation.<sup>93</sup> Authority precedent holds the Act’s detailed formula<sup>94</sup> means the Agency is without discretion in fixing basic compensation because it is “obligated to follow specific procedures.”<sup>95</sup> Accordingly, proposals concerning the basic compensation of overseas teachers that fail to “comport[] with statutorily prescribed procedures” are nonnegotiable.<sup>96</sup>

Based on this precedent, the Agency argues Proposal 4 is outside the duty to bargain because it would increase the rate of basic compensation, which is a fixed amount, by decreasing the “number of days an [employee] must work to earn [it].”<sup>97</sup> According to the Agency, the number of workdays “is inherent to th[e] determination” of basic compensation.<sup>98</sup> However, when considering a proposal to set the number of hours in the school *day* – another temporal factor that also arguably affects the rate

<sup>81</sup> Rec. at 3.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Statement at 9; Reply at 8.

<sup>87</sup> 20 U.S.C. §§ 901-907.

<sup>88</sup> Resp. at 9-10.

<sup>89</sup> 20 U.S.C. § 902(a)(2), (7); *see also id.* § 903(c) (providing that the Secretary “shall fix the basic compensation for teachers and teaching positions in the Department of Defense” according to the requirements of § 902(a)(2)).

<sup>90</sup> *See id.* § 902(a)(7).

<sup>91</sup> *See March v. United States*, 506 F.2d 1306, 1319 & n.64 (D.C. Cir. 1974) (finding that § 902(a)(7) of the Act “certainly confers [on the Agency] discretion in determining the length of the school year” and noting that the Agency “might reasonably provide” for a longer school year); *Overseas Fed’n of Tchrs. v. United States*, 674 F.2d 34, 38 (D.C. Cir. 1982) (finding that the

Secretary is not limited by educational considerations in determining the length of the school year).

<sup>92</sup> *IFPTE, Loc. 4, Chapter 1*, 71 FLRA 1135, 1136-37 (2020) (then-Member DuBester concurring) (“In the absence of any indication that Congress intended the agency’s discretion to be sole and exclusive, the exercise of discretion through collective bargaining is consistent with law.”); *NTEU*, 71 FLRA 808, 810-11 (2020) (then-Member DuBester concurring) (finding negotiable a proposal concerning matter over which agency had discretion).

<sup>93</sup> Reply at 8.

<sup>94</sup> *See* 20 U.S.C. § 902(a)(2) (authorizing the Secretary to regulate “the fixing of basic compensation” “at rates equal to the average of the range of rates” in certain domestic school districts); *id.* at § 903(c)-(d) (same).

<sup>95</sup> *Overseas Educ. Ass’n*, 29 FLRA 485, 500 (1987).

<sup>96</sup> *Id.*

<sup>97</sup> Reply at 8.

<sup>98</sup> *Id.*

of basic compensation under the Act – the Authority rejected this argument.<sup>99</sup> The Authority found that proposal was within the duty to bargain because the agency failed to prove the length of the school day was “an integral part of basic compensation determinations made under [the Act].”<sup>100</sup>

The D.C. Circuit came to a similar conclusion in *Overseas Federation of Teachers v. FLRA*.<sup>101</sup> There, the union argued the agency had violated the Act’s pay-parity requirement because the overseas school year was longer than the domestic average.<sup>102</sup> The court recognized that, while the length of the school year had a connection to the rate of basic compensation, it was one of several relevant factors impacting that rate.<sup>103</sup> Because the length of the school year did not alter the statutorily prescribed formula to determine basic compensation, the D.C. Circuit held the school year set by the agency was consistent with § 902(a)(2) of the Act.<sup>104</sup> Likewise, we find the issue of school-year length, while related to the issue of basic compensation, does not affect the determination of basic compensation such that it is outside of the duty to bargain.<sup>105</sup>

The Agency also argues Proposal 4 is contrary to law because it would require the Agency to pay employees twice for the 187th through 190th days worked, because Agency regulation currently sets the school year at 190 days.<sup>106</sup> This argument is unpersuasive because nothing in the proposal precludes the Agency from revising its regulations to set the school year at 186 days, eliminating the risk of double payment.<sup>107</sup>

As Proposal 4 covers a matter over which the Agency has discretion, and the Agency has not demonstrated the proposal is inconsistent with law, we find that it is within the duty to bargain.

<sup>99</sup> *Overseas Educ. Ass’n*, 29 FLRA 734, 842-45 (1987).

<sup>100</sup> *Id.* at 843.

<sup>101</sup> 674 F.2d at 37.

<sup>102</sup> *Id.* (explaining union’s argument that the 190-day school year required overseas teachers to “work . . . longer for less pay” than domestic teachers, whose school year averaged about 186 days).

<sup>103</sup> *Id.* (noting that the rate of compensation was also impacted by “the length of the school day, leave time allowances,” “the length of lunch periods and recesses,” and “many more factors which . . . touch to some degree on the length and rigor of a teacher’s work”).

<sup>104</sup> *Id.* at 37-38.

<sup>105</sup> *Id.* at 37 (finding that the length of the school year is one of several factors that affect basic compensation).

<sup>106</sup> Statement at 9 (citing DOD Educ. Activity, Regul. 1400.13 (2022), available at <https://www.dodea.edu/Offices/PolicyAndLegislation/upload>

## VII. Proposal 6

### A. Wording

In order to allow for unit employees to have sufficient time to adjust summer and/or RAT travel plans, the Employer will inform any unit employee who is directed to perform early return/late release no later than one hundred twenty (120) days before the end of the school year.<sup>108</sup>

### B. Meaning

Proposal 6 would require the Agency to provide an employee with at least 120 days of notice before the end of a given school year if the Agency plans to direct that employee to work after the school year ends or before the next school year begins.<sup>109</sup> The school year consists of the days employees are required to report for regular duty.<sup>110</sup> Early return is when the Agency directs employees to start working before the school year begins, and late release is when the Agency directs employees to continue working after the school year is over.<sup>111</sup> As discussed above, RAT stands for renewal-agreement travel, which occurs in the break between employment contracts.<sup>112</sup> The parties agree on Proposal 6’s meaning and operation.<sup>113</sup>

### C. Analysis and Conclusions

The Agency argues Proposal 6 is contrary to management’s rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute, respectively.<sup>114</sup> The Union argues the proposal constitutes a negotiable procedure under § 7106(b)(2) because the proposal requires only *notice* of Agency action.<sup>115</sup>

Even assuming Proposal 6 affects management’s rights as alleged, we find the proposal is within the duty to bargain as a procedure under § 7106(b)(2).<sup>116</sup>

/RG-1400-13-Salaries-and-Personnel-Practices-CH-1-4-Apr-2022.pdf).

<sup>107</sup> See 20 U.S.C. § 902(a)(7) (directing Agency to “prescribe and issue regulations” that “govern . . . the length of the school year”).

<sup>108</sup> Pet. at 13.

<sup>109</sup> Rec. at 4.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 2.

<sup>113</sup> *Id.* at 4.

<sup>114</sup> Statement at 13.

<sup>115</sup> Resp. at 17.

<sup>116</sup> See *NAIL, Loc. 5*, 67 FLRA 85, 91 (2012) (assuming that proposal affected management rights but finding that it was a procedure).

Generally, proposals or provisions requiring agencies to give advance notice before exercising their management rights constitute negotiable procedures under § 7106(b)(2) of the Statute.<sup>117</sup> Further, where an otherwise procedural proposal or provision does not specify the consequences of a failure to comply with its terms, the

proposal or provision constitutes a procedure under § 7106(b)(2).<sup>118</sup>

Here, Proposal 6 would require the Agency to notify employees, at least 120 days before the end of school year, whether they will be required to stay beyond the end of the current school year or to return before the

<sup>117</sup> See, e.g., *Am. Fed'n of Tchrs, Indian Educators Fed'n*, Loc. 4524, 63 FLRA 585, 586 (2009) (proposal requiring agency to notify employees of their contract renewal or non-renewal "not less than [sixty] days prior to the end of the school year[]"); *AFGE*, Loc. 12, 61 FLRA 209, 219-20 (2005) (proposal requiring agency to post proposed details to higher-graded positions for ten days prior to the details' effectuation); *U.S. DOD, Tex. Nat'l Guard, Austin, Tex.*, 59 FLRA 437, 439 (2003) (Member Pope dissenting in part on other grounds) (provision requiring at least two days' advance notice to employees of an assignment falling outside the employees' workweek); *POPA*, 47 FLRA 10, 72-73 (1993) (provision obligating rating officials to notify employees of the scheduled date and time of formal appraisal meetings); *Loc. 1658*, 44 FLRA at 1381-82 (provision requiring agency to notify employees of overtime assignments outside the basic work week no later than the start of the affected employee's lunch period on the next-to-last day of the preceding basic work week); *NFFE, Council of Veterans Admin. Locs.*, 31 FLRA 360, 443-44 (1988), *remanded without decision*, No. 88-1314 (D.C. Cir. Sept. 27, 1988), *pet. dismissed on other grounds on remand*, 33 FLRA 349 (1988) (proposal requiring agency to give reasonable advance notice of "training seminars, workshops, etc."); *id.* at 434 (proposal requiring agency to notify union at least forty-five days before implementing a reduction-in-force (RIF)); *AFGE, Loc. 85*, 30 FLRA 400, 402-03 (1987) (*Loc. 85*) (proposal requiring agency to give employees two days' advance notice of scheduled overtime assignments); *W. Point Elementary Sch. Tchrs. Ass'n, NEA*, 29 FLRA 1531, 1540, 1548-49 (1987), *pet. for review granted in part and denied in part on other grounds*, 855 F.2d 936 (2d Cir. 1988) (proposal requiring, among other things, advance notice of furloughs and other actions); *Loc. 3, IFPTE, AFL-CIO*, 25 FLRA 714, 720-21 (1987) (provisions requiring, among other things, that employees "will normally" be given forty-eight hours' notice of a meeting to discuss impending disciplinary action); *IRS, Cincinnati Dist. Off.*, 24 FLRA 288, 290-91 (1986) (provision requiring activity to give employees five days' notice of a furlough "whenever possible[]"); *NAGE, Loc. R4-75*, 24 FLRA 56, 58-60 (1986) (provision requiring advance notice before disciplining employees); *NFFE, Loc. 108*, 16 FLRA 807, 809-10 (1984) (provision stating that specific notice of a RIF will be thirty days and may not be extended); *AFGE, AFL-CIO, Loc. 32*, 15 FLRA 825, 826-27 (1984) (proposal requiring agency to give employees at least ten workdays' notice of any change in duties or work assignments); *NAGE*, 14 FLRA 280, 281-82 (1984) (provision requiring agency to give notice of a change in shift assignments or duty hours two weeks in advance of the change, absent emergency circumstances); *AFGE, AFL-CIO, Loc. 2272*, 9 FLRA 1004, 1019-21 (1982) (proposal stating that a forty-eight hour notice, "at least, should be given[]" before sending certain employees on special details and certain trips); *NTEU*, 6 FLRA 508, 512-15 (1981) (proposal requiring agency to provide copy of amended position description to the union and the affected employees at least four weeks in advance of proposed implementation).

<sup>118</sup> See, e.g., *NFFE, Loc. 1438*, 47 FLRA 812, 815-18 (1993) (provision that established a standard of timeliness governing the agency's completion of the steps of the disciplinary process but did not bar the agency from taking disciplinary action if that standard was not met); *NTEU*, 47 FLRA 705, 717 (1993) ("Where a provision is silent concerning what penalty or remedy will result from its violation, speculation that a remedy may result that infringes on management's right does not provide a basis for finding that the particular provision interferes with management's rights."); *id.* at 719-20 (provision was "silent with respect to the consequences of any failure to comply with the requirements that adequate documentation be maintained and divulged to the subject employee," and, thus, the provision was a procedure under § 7106(b)(2)); *Loc. 1658*, 44 FLRA at 1383 (provision requiring advance notification of certain overtime assignments was a procedure where, among other things, "there [was] no indication in either the language of the provision or the [u]nion's explanation to suggest that the provision was designed to permit employees to refuse overtime assignments made without sufficient notice[,] and "there [was] nothing in either the provision or the record to suggest that the [a]gency would be limited in any manner from assigning overtime work because it was unaware of the need for overtime sufficiently in advance to enable it to provide the requisite notice[]"); *Loc. 85*, 30 FLRA at 403 (proposal requiring two days' advance notice of scheduled overtime assignments was a procedure where, among other things, "there [was] nothing in the proposal or in the record [that] indicate[d] that the [a]gency would in any manner be limited in assigning overtime work in circumstances where the [a]gency did not provide the [two] days' advance notice because the [a]gency did not have knowledge of the need for overtime more than [two] days in advance"); see also *POPA*, 48 FLRA 129, 142-43 (1993) (distinguishing proposals "that bar an agency from taking an action that constitutes a protected exercise of its management rights based on a failure to comply with a procedural requirement" from those "that merely require that an agency provide employees with documentation and information relating to the exercise of a management right and do not place any substantive limitations on the exercise of those rights"). Cf. *U.S. DOJ, Fed. BOP, Fed. Det. Ctr., Honolulu, Haw.*, 66 FLRA 858, 861 (2012) (Chairman Pope dissenting in part on other grounds) (arbitration award not deficient where arbitrator directed parties to "bargain time limits in order to assure that disciplinary investigations and adverse action[s] with discipline are dealt with expeditiously," but "did not direct the parties to implement time limits that would prohibit the [a]gency from disciplining employees in the event that it does not administer discipline within a particular timeframe[]").

next school year begins.<sup>119</sup> The Union contends the proposal does not “prescribe a penalty for failure to provide notice when notice cannot be given,”<sup>120</sup> and that interpretation does not conflict with the proposal’s plain wording.<sup>121</sup> It follows the proposal would not preclude the Agency from requiring late release or early return if it is unable to provide the 120-day notice.<sup>122</sup> Further, none of the court decisions the Agency cites are relevant here.<sup>123</sup>

Accordingly, applying the clear Authority precedent discussed above, we find Proposal 6 is within the duty to bargain as a procedure under § 7106(b)(2) of the Statute.<sup>124</sup>

### VIII. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, negotiate with the Union over Proposals 2, 4, and 6.<sup>125</sup> We dismiss the petition as to Proposals 3 and 5, as well as the severed portion of Proposal 3.

<sup>119</sup> Rec. at 4.

<sup>120</sup> Resp. at 17.

<sup>121</sup> See, e.g., *NFFE, IAMAW, Fed. Dist. 1, Fed. Loc. 1998*, 69 FLRA 586, 594 (2016) (Member Pizzella concurring in part and dissenting in part) (adopting union’s explanation of proposal where explanation did not conflict with proposal’s plain wording).

<sup>122</sup> In concluding that Proposal 6 is not a procedure under § 7106(b)(2) of the Statute because it provides “no exception to [its] 120-day notice requirement,” Dissenting Opinion at 22, our dissenting colleague fails to acknowledge our adoption of the Union’s interpretation of the proposal in this respect.

<sup>123</sup> Reply at 11. See *ACT, P.R. Army Chapter v. FLRA*, 534 F.3d 772 (D.C. Cir. 2008) (upholding Authority finding that provision requiring reimbursement of employees for certain personal expenses was not an appropriate arrangement); *AFGE, AFL-CIO, Loc. 1923 v. FLRA*, 819 F.2d 306 (D.C. Cir. 1987) (enforcing Authority order finding outside the duty to bargain a proposal that would have prohibited an agency supervisor from recommending the discharge of an employee for unacceptable performance unless the supervisor found the employee would be incapable of performing any other position at the agency); *NTEU v. FLRA*, 691 F.2d 553 (D.C. Cir. 1982) (affirming Authority finding that promulgation of performance standards and identification of critical elements was outside the duty to bargain).

<sup>124</sup> As such, it unnecessary to resolve the Union’s claim, see Resp. at 18, that Proposal 6 is an appropriate arrangement under § 7106(b)(3) of the Statute. See, e.g., *NTEU*, 68 FLRA 334, 335 (2015) (finding it unnecessary to address an appropriate-arrangement argument after finding proposal was a procedure).

<sup>125</sup> In finding that Proposals 2, 4, and 6 are within the duty to bargain, we make no judgment as to their merits. See, e.g., *NTEU*, 64 FLRA 395, 397 n.7 (2010) (Member Beck dissenting). Further, we note that “requiring negotiations over a proposal does not require agreement” to the proposal. *Id.* at 397 n.5.

**Member Kiko, concurring, in part, and dissenting, in part:**

I agree that § 2424.30(a) of the Authority's Regulations<sup>1</sup> does not bar the petition and that Proposals 3 and 5 are outside the duty to bargain. I write separately to (1) express my view that Proposal 4 affects the Agency's right to determine its mission, and (2) dissent as to Proposals 2 and 6.

**I. Proposal 4**

Section 7106(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) states, in relevant part, that management has the right "to determine the mission . . . of the agency."<sup>2</sup> Proposal 4 – which sets the length of the school year at 186 days<sup>3</sup> – affects this right. Although neither party addresses the issue, I do so now because I believe it is important.

Two cases are particularly significant to this issue: *West Point Elementary School Teachers Ass'n, NEA (West Point)*<sup>4</sup> and *Fort Bragg Ass'n of Educators, NEA (Fort Bragg)*.<sup>5</sup> *West Point* involved a proposal that permitted the union to negotiate the school-year starting and ending dates, and when holiday breaks would be scheduled.<sup>6</sup> The Authority found that these matters concerned "when instructional services are to be provided to students" and, therefore, the proposal was "mission[ ]related."<sup>7</sup> Similarly, in *Fort Bragg*, the Authority held that "decision[s] as to when instructional services [are] to be provided to students [i]s clearly mission related."<sup>8</sup> Because the proposal in *Fort Bragg*

concerned school-day starting and ending times, the Authority concluded that the proposal affected the agency's right to determine its mission.<sup>9</sup>

Here, educating children of active duty military and Department of Defense civilian families is the Agency's stated mission.<sup>10</sup> The parties agree that Proposal 4 concerns the number of days in a school year.<sup>11</sup> The number of days in a school year is a critical factor for the Agency in determining when it will provide its services to the public – instructing students.<sup>12</sup> In accordance with *West Point* and *Fort Bragg*, Proposal 4 affects the Agency's right to determine its mission.<sup>13</sup> Nevertheless, the Agency did not raise this management right. Therefore, I am constrained to find that Proposal 4 is negotiable for the reasons that the majority provides.<sup>14</sup>

**II. Proposals 2 and 6**

A. Proposal 2 excessively interferes with the management right to direct employees and assign work.

Although I agree with the majority's conclusion that Proposal 2 affects the rights to direct employees and assign work,<sup>15</sup> I disagree with the majority's holding that the proposal is "appropriate" within the meaning of § 7106(b)(3) of the Statute.<sup>16</sup> As relevant here, Proposal 2 requires the Agency to make reasonable efforts to provide employees with a "reasonable amount" of paid time to conduct teaching-preparation activities.<sup>17</sup> But, Proposal 2

<sup>1</sup> 5 C.F.R. § 2424.30(a).

<sup>2</sup> 5 U.S.C. § 7106(a)(1).

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

<sup>4</sup> 29 FLRA 1531, 1536-38 (1987).

<sup>5</sup> 30 FLRA 508, 516-17 (1987) (Chairman Calhoun and Member McKee concurring), *rev'd on other grounds sub nom. Fort Bragg Ass'n of Educators, NEA v. FLRA*, 870 F.2d 698 (D.C. Cir. 1989).

<sup>6</sup> *West Point*, 29 FLRA at 1537.

<sup>7</sup> *Id.* at 1537-38.

<sup>8</sup> *Fort Bragg*, 30 FLRA at 517.

<sup>9</sup> *Id.*

<sup>10</sup> See DOD Educ. Activity, Fact Sheet at 2 (2020) (available at [https://www.dodea.edu/newsroom/publications/upload/DoDEA\\_FactsSheet\\_2020.pdf](https://www.dodea.edu/newsroom/publications/upload/DoDEA_FactsSheet_2020.pdf)) (stating that the Agency's mission is to "[e]ducate . . . military-connected students").

<sup>11</sup> Record of Post-Pet. Conf. (Record) at 3.

<sup>12</sup> See *Overseas Educ. Ass'n*, 29 FLRA 485, 495 (1987) (linking number of instructional days to length of school year when considering compensation proposal).

<sup>13</sup> See *West Point*, 29 FLRA at 1537-38 (finding "the decision as to when instructional services are to be provided to students is mission[ ]related"); *Fort Bragg*, 30 FLRA at 517 (stating that "the decision as to the starting and ending time[s] of each instructional day is . . . mission related"); see also *Dep't of the Air Force, Lowry Air Force Base, Colo.*, 16 FLRA 1104, 1105-06 (1984) (finding change in store hours "was a management prerogative insofar as the mission of the agency is to provide commissary services").

The *West Point* and *Fort Bragg* holdings are in tension with the subsequent finding in *U.S. DOD, Fort Bragg Dependents Schs., Fort Bragg, N.C.*, 49 FLRA 333 (1994), that a proposal to set the length of a normal school day concerned only compensation, and did not affect the agency's right to determine its mission. See *id.* at 349-50. But because I disagree with that later finding, it does not affect my analysis here.

<sup>14</sup> See 5 C.F.R. 2424.32(c)(1) ("[F]ailure to raise . . . an argument will . . . be deemed a waiver of such argument.").

<sup>15</sup> Majority at 4. The right to assign work includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *AFGE, Council of Prison Locs. 33, Loc. 506*, 66 FLRA 819, 823 (2012).

<sup>16</sup> 5 U.S.C. § 7106(b)(3).

<sup>17</sup> Record at 2-3.

specifically defines what constitutes a “reasonable amount” of time for those activities.<sup>18</sup>

Regarding Proposal 2’s benefits to employees versus its burden on management’s exercise of its rights, the Union argues that the proposal benefits employees by reducing the amount of work that they must perform outside of the workday.<sup>19</sup> Conversely, the Agency contends that, because Proposal 2 fixes the amount of reasonable preparation time, it limits the Agency’s ability to assign work “irrespective of the Agency’s immediate needs.”<sup>20</sup>

In *Overseas Education Ass’n (OEA)*,<sup>21</sup> the Authority found that a preparation-time proposal with the effect of minimizing demands on employees’ personal time benefitted employees more than it burdened the exercise of the agency’s rights.<sup>22</sup> However, that proposal allowed the agency to decide how much preparation time was appropriate.<sup>23</sup> Here, the parties agree that Proposal 2 defines the amount of preparation time that is considered reasonable.<sup>24</sup> Even if the Agency currently provides the amounts of preparation time listed in the proposal,<sup>25</sup> the proposal would constrain the Agency’s ability to alter its assignment of preparation time. In other words, the Agency would be required to attempt to assign preparation time in the amounts specified in Proposal 2 even if it no longer considers those amounts reasonable. The Authority has held that this sort of limitation is a “substantial” burden on the right to assign work.<sup>26</sup>

The majority holds that Proposal 2’s “qualifying terms” – such as “reasonable effort” and “approximately” – lessen the proposal’s burdens on the management rights.<sup>27</sup> Although the Authority has found that qualifying language can be a factor for finding a proposal negotiable, none of the cases that the majority cites involve a proposal like the one at issue here – one that would require an agency to attempt to assign specific duties for a predetermined amount of time each week.<sup>28</sup> And in each case cited by the majority, the agency retained critical decision-making discretion consistent with § 7106.<sup>29</sup> Given the defined nature of the numerical requirements within the proposal,<sup>30</sup> the so-called “qualifying terms” do not make Proposal 2 any less intrusive on the Agency’s discretion.<sup>31</sup>

By contrast, I find Proposal 2’s benefit to employees limited. In *OEA*, the Authority found the preparation-time proposal appropriate, in part because the proposal was “prompted by a [thirty]-minute increase in the school day”<sup>32</sup> that constituted “a diminution of [employee’s] personal time that detrimentally affected those particular employees.”<sup>33</sup> There is no evidence here that the Union’s proposal was prompted by an increase to the employees’ duty hours. Moreover, the Union concedes that the Agency already provides employees with the amounts of preparation time contained in the proposal.<sup>34</sup> Thus, contrary to the majority’s assertion, the proposal would not “reduc[e]” the amount of work that employees are required to perform after the workday.<sup>35</sup>

<sup>18</sup> Pet. at 6 (“For Elementary School unit employees, a reasonable amount of time is approximately 225 minutes each week during the school year. For Secondary school unit employees, a reasonable amount of time is approximately two (2) periods in a cycle of seven (7) instructional periods, or the equivalent thereof, which will be built into the master schedule.”); see also Record at 4.

<sup>19</sup> Resp. at 4.

<sup>20</sup> Statement at 5.

<sup>21</sup> 39 FLRA 153 (1991).

<sup>22</sup> *Id.* at 169.

<sup>23</sup> *Id.* at 165 (requiring agency to make efforts to “provide a reasonable amount of preparation time”).

<sup>24</sup> See Record at 2 (stating that the second and third sentences “describe a reasonable allocation” of preparation time); see also Pet. at 7 (explaining that second sentence “defines what a reasonable amount of prep[aration]time is”).

<sup>25</sup> See Record at 2 (Union explaining Agency’s current practice).

<sup>26</sup> *NAGE, Loc. R12-105*, 37 FLRA 462, 467 (1991) (finding proposal providing for up to three hours of physical fitness activities per week impermissibly interfered with management right to assign work); see also *Fort Knox Tchrs. Ass’n*, 22 FLRA 815, 816-17 (1986) (finding proposal limiting assignment of instructional duties during certain times impermissibly interfered with right to assign work).

<sup>27</sup> Majority at 7.

<sup>28</sup> See, e.g., *NAGE, Loc. R5-82*, 43 FLRA 25, 36 (1991) (proposal “normally” limiting details to three months); see also *OEA*, 39 FLRA at 165 (proposal requiring agency to make efforts to “provide a reasonable amount of preparation time,” but not defining that amount).

<sup>29</sup> See, e.g., *AFGE, AFL-CIO, Loc. 53*, 42 FLRA 938, 948 (1991) (provision requiring agency to make “every effort” to assign employees work during reduced operations reserved to management “the judgment as to the availability of work that could be performed and the qualifications of employees needed to perform the work”).

<sup>30</sup> Pet. at 6 (“225 minutes each week during the school year” and “two (2) periods in a cycle of seven (7) instructional periods, or the equivalent thereof”).

<sup>31</sup> See *AFGE, Loc. 2879*, 49 FLRA 279, 295 (1994) (Member Armendariz concurring) (finding provision interfered with right to assign work because it obligated management “to make an effort to provide a specified amount of time to perform [certain] duties”); *NFFE, Council of Veterans Admin. Locs.*, 31 FLRA 360, 429-30 (1988) (*VA Locs.*) (presence of word “normally” in overtime-notice requirement did not preserve sufficient management discretion).

<sup>32</sup> 39 FLRA at 167.

<sup>33</sup> *Id.* at 168.

<sup>34</sup> Record at 2.

<sup>35</sup> Majority at 7.

On balance, the burden that Proposal 2 places on the Agency's exercise of its statutory right outweighs the limited benefit to employees. Accordingly, even assuming that Proposal 2 is an arrangement,<sup>36</sup> I would find the proposal is not appropriate and, thus, nonnegotiable.

B. Proposal 6

1. Proposal 6 is not a procedure under § 7106(b)(2) of the Statute.

I disagree with the majority's conclusion that Proposal 6 is negotiable as a procedure. Under Proposal 6, if the Agency plans to direct an employee to work after the school year ends (late release) or before the next school year begins (early return), then the Agency must notify that employee at least 120 days before the end of the school year.<sup>37</sup>

The majority correctly notes that, generally, proposals requiring agencies to give advance notice before exercising a management right constitute negotiable procedures under § 7106(b)(2).<sup>38</sup> However, in analyzing whether a particular notice requirement is negotiable as a procedure, the Authority also considers the agency's ability to know of a need in advance of the notice deadline.<sup>39</sup>

Here, the Union contends that the Agency knows whether it will need to assign "additional training" more than 120 days before the end of the school year.<sup>40</sup> But "additional training" is not the only reason that early return and late-release duties could be assigned. As the Agency points out, other reasons include "natural disasters [and] emerging public health issues."<sup>41</sup> Such situations cannot be anticipated and could occur within the last four months

of a school year or during summer break – after the proposal's 120-day deadline.

The majority asserts that the proposal "would not preclude the Agency from requiring late release or early return if it is unable to provide the 120-day notice."<sup>42</sup> I do not agree with this conclusion because it contradicts the plain wording of the proposal.<sup>43</sup> Critically, the wording of the proposal provides no exception to the 120-day notice requirement.<sup>44</sup> Thus, if an emergency pandemic dictates that the Agency assign early return duties to some employees during summer break, then the Agency's assignment of those duties would violate this proposal—it would be impossible for the Agency to provide the requisite 120-day notice. In other words, even during an emergency, there is no contractually authorized way for the Agency to assign early return or late-release duties during the last four months of the school year or during the summer break.<sup>45</sup>

Accordingly, I would find that Proposal 6 does not constitute a procedure.<sup>46</sup>

2. Proposal 6 is not negotiable as an appropriate arrangement under § 7106(b)(3).

Based on its finding that Proposal 6 is a procedure under § 7106(b)(2), the majority finds it unnecessary to address the Union's alternative argument that Proposal 6 is an appropriate arrangement under § 7106(b)(3).<sup>47</sup> Because I disagree with the majority's § 7106(b)(2)

<sup>36</sup> See *NFFE, Loc. 1450, IAMAW*, 70 FLRA 975, 976 (2018) (*Loc. 1450*) (assuming proposal was an arrangement for purposes of analysis).

<sup>37</sup> Record at 4.

<sup>38</sup> Majority at 14-15; see also *NTEU*, 70 FLRA 100, 104 n.82 (2016).

<sup>39</sup> See *VA Locs.*, 31 FLRA at 430; *AFGE, Loc. 1658*, 44 FLRA 1375, 1383 (1992).

<sup>40</sup> Resp. at 17.

<sup>41</sup> Reply at 11.

<sup>42</sup> Majority at 16. The majority bases this conclusion on the Union's statement that Proposal 6 does not "prescribe a penalty for failure to provide notice when notice cannot be given." *Id.*

<sup>43</sup> See *AFGE, Council 119*, 72 FLRA 63, 66-67 (2021) (Member Abbott dissenting in part) (when determining whether a proposal is within the duty to bargain, the Authority does not adopt interpretations that are inconsistent with the proposal's plain wording). The plain language of Proposal 6 states that the Agency "will inform" employees of early return and late release

assignments "no later than" 120 days prior to the end of the school year and fails to specify any exceptions for situations where notice cannot be given. See Pet. at 13. The parties agreed that this language imposes a requirement upon the Agency. See Rec. at 4 (agreeing that Proposal 6 "would require the Agency to notify employees" within the specified timeframe (emphasis added)).

<sup>44</sup> See Pet. at 13.

<sup>45</sup> See Record at 4 (stating that "the proposal would require the Agency to notify employees [about early return and late release] at least 120 days before the end of the school year").

<sup>46</sup> Compare *AFGE, Loc. 85*, 30 FLRA 400, 403 (1987) (finding negotiable a provision that required two-day notice for scheduled overtime but also addressed treatment of unscheduled, emergency overtime), with *VA Locs.*, 31 FLRA at 430 (finding nonnegotiable a proposal requiring two-day notice for all overtime).

<sup>47</sup> Majority at 17 n.123.

finding, and because the proposal affects the right to assign work,<sup>48</sup> I address the Union's alternative argument.

The Union claims that Proposal 6 is an appropriate arrangement for employees "required to cut their summer vacation short" when the Agency assigns early return or late-release duties.<sup>49</sup> According to the Union, the proposal benefits employees by giving them "sufficient time to adjust their summer travel plans to accommodate the[] additional days of work."<sup>50</sup> The Union argues that this benefit outweighs the "minor burden" of "requir[ing] the Agency to plan sufficiently in advance in order to provide the requisite notice."<sup>51</sup>

However, Proposal 6 significantly burdens the right to assign work by prohibiting the Agency from assigning early return or late-release duties at any point after the 120-day deadline. This restriction, which is without exception,<sup>52</sup> impedes the Agency's ability to respond to an unexpected occurrence – including a natural disaster or public-health emergency – at any time during the last four months of the school year or over the summer break.<sup>53</sup> Assuming that a normal summer break is three months, the proposal prohibits the Agency from assigning early return or late-release duties for a seven-month period each year. This weighty burden on the management right outweighs the benefit of convenience to the employees. Therefore, even assuming that Proposal 6 is an arrangement,<sup>54</sup> it is not appropriate.<sup>55</sup> Accordingly, I would find the proposal nonnegotiable under § 7106(b)(3).

---

<sup>48</sup> The Agency's assignment of early return and late-release duties concerns what, when, and to whom specific work duties are assigned. As such, the assignment of these additional duties is included in management's right to assign work. See *NATCA*, 66 FLRA 658, 661-62 (2012) (*NATCA*) (then-Member DuBester dissenting) (proposal to limit how overtime work was distributed affected management right to assign work). Moreover, the Authority previously found that a proposal requiring two days of notice for all overtime, without any emergency exception, affected the right to assign work because the proposal "would apply in circumstances where management is unlikely to know . . . in advance that overtime work will be necessary." *VA Locs.*, 31 FLRA at 430.

<sup>49</sup> Resp. at 18.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Record at 4 (noting that Agency would be "required" to provide notice, and providing no exceptions).

<sup>53</sup> See *VA Locs.*, 31 FLRA at 430 (proposal requiring two-day notice for all overtime was nonnegotiable because it applied even when the agency was unlikely to know of overtime needs in advance).

<sup>54</sup> See *Loc. 1450*, 70 FLRA at 976 (assuming proposal was an arrangement for purposes of analysis).

<sup>55</sup> See *NATCA*, 66 FLRA at 661-62 (finding that the burden of a proposal that "completely prohibit[ed]" assignment of overtime in certain situations outweighed benefits to employees).