OFFICE OF COMPLIANCE
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Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee Petitioner, and United States Capitol Police Employing Office	)	Case No. 16-LM-03 (NG)

Before the Board of Directors: Barbara L Camens, Chair; Alan V. Friedman, Roberta L. Holzwarth, Susan S. Robfogel, and Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This petition for review, involving six proposals, was filed by the Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee (Union) after the United States Capitol Police (USCP or Department) alleged the proposals were outside its duty to bargain. The petition for review comes before the Office of Compliance Board of Directors (the Board) pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (FSLMRS), as applied by § 220(c)(1) of the Congressional Accountability Act, 2 U.S.C. § 1351(c)(1). The Union is the certified representative of a unit of police officers employed by the USCP. The parties are governed by a collective bargaining agreement (CBA) that was to have expired on June 9, 2013, but remains in effect until superseded by a successor CBA.

I. Statement of the Case

Article 36, Outside Employment, Section 36.01, Consideration, of the parties' current CBA, states: "The Department recognizes that its current policy on outside employment may be too restrictive and agrees to work with the Union to makes revisions to its existing procedures, consistent with applicable laws, rules, regulations, and Congressional directives." Consistent with that provision and Article 8 of the current CBA, Changes in Conditions of Employment, the USCP provided the Union with draft Directive 2043.002, Outside Employment/Voluntary

Work.[1] Directive 2043.002 would replace the current Standard Operating Procedure (SOP) on this subject that has been in effect since May 2012. Union Proposal C would modify the text of the draft directive itself, while Proposals D, E, F, G, and H would modify Appendix A: Prohibited Activities I (Sworn Employees) of the draft directive, which lists the paid or voluntary activities that unit employees would be prohibited from performing.

II. Proposals In Dispute

Proposal C: Page 2, 11. 52-56 of draft Directive 2043.002 provides: "d. Employees must not exceed 64 hours of paid outside employment and official additional duty during any pay period nor exceed 16 hours of paid outside employment and official additional duty during any tour of duty." The Union proposes (additions in italics):

> d. Employees must not exceed 64 hours of paid outside employment and official additional duty during any pay period nor exceed 16 hours of paid outside employment and official additional duty during any tour of duty. *If an employee has been scheduled for official additional duty that would cause them to work beyond these thresholds, they shall notify their supervisor and their official additional duty shall be cancelled.*

Proposal D: Appendix A of the draft directive provides that unit employees are prohibited from performing paid or voluntary activities: "2. [w]hen an employee's position as a police officer might influence taking action which that member might not otherwise take." The Union proposes that the Department provide a non-exclusive example of the type of paid employment this provision is designed to prohibit.

Proposal E: Appendix A of the draft directive provides that unit employees are prohibited from performing paid or voluntary activities for: "7. An enterprise which is under contract to furnish goods or services to the Department." The Union proposed (additions in italics):

> 7. An enterprise which is under contract to furnish goods or services to the Department *if the paid employment would raise questions of favoritism. Upon request, the Department shall provide a list of enterprises which are under contract to furnish goods or services to the Department.*

Proposal F: Appendix A of the draft directive provides that unit employees are prohibited from accepting: "9. [e]mployment in establishments where the primary business of the establishment is serving alcoholic beverages." The Union proposed (additions in italics): "9. Employment in establishments where the primary business of the establishment is serving alcoholic beverages. *For purposes of this provision, 'primary business' means the business from which the establishment earns the greatest percentage of its revenue.*"

Proposal G: Appendix A of the draft directive provides that unit employees are prohibited from

[1] Unlike the Board's decision in 16-LM-02, issued on this same date, this negotiability appeal involves mid-term bargaining over a draft directive unrelated to the parties' current negotiations over a successor CBA.

accepting: "10. [e]mployment that requires maintaining a place of abode, temporarily or otherwise, at any facility (including a firehouse) other than at the sworn employee's official residence, unless specifically authorized by the Chief of Police." The Union proposes that the draft directive be clarified to address whether it applies to volunteer firefighters, who may be required to sleep at a firehouse on some occasions due to call volume or the requirements of their volunteer commitment, but who would not maintain their abode at that location.

Proposal H: Appendix A of the draft Directive provides that unit employees are prohibited from accepting: "13. [e]mployment or voluntary service while on sick or administrative leave, Continuation of Pay, or on Restricted Duty for medical reasons unless specifically authorized by the Chief of Police." The Union proposes the following: "13. [e]mployment or voluntary service while on sick ~~or administrative~~ leave, Continuation of Pay, or on Restricted Duty for medical reasons unless specifically authorized by the Chief of Police."

III. Positions of the Parties

A. Employing Office

The USCP contends that the Union's proposals are nonnegotiable because they improperly seek to negotiate on behalf of *all* employees, not just those in the bargaining unit.[2] It bases its contention on the fact that, as presented to the Union, draft Directive 2043.002 applies to all of the positions in the Department and not just those in the bargaining unit. It also alleges that Proposals C, D, F, and G are not "clear or specific" and should be rejected "unless the [Board] can make a definite determination of what is at issue."[3] More specifically, with respect to Proposal C, the USCP contends that it is unclear what the Union means by "these thresholds," as "the Department only has control over the work hours and does not control how many hours an employee chooses to work additional duty." The USCP also asserts that the Union's wording in Proposals D, E, and G are really not proposals at all but mere "suggestions" and, as such, should not be considered by the Board. In addition, the USCP notes that, as established by the Federal Labor Relations Authority (Authority), "a petition for review of a negotiability issue is only appropriate where the parties are in dispute over whether a proposal is inconsistent with law, rule, or regulation."[4] Since the wording in D, E, and G do not constitute proposals, the USCP argues that the Board also should reject them because there is no dispute between the parties over whether they are inconsistent with law, rule, or regulation. As to Proposal F, the USCP states that "it appears from the language that the Union requires the Department to request

[2] The USCP cites *United States Dep't of the Navy, Naval Aviation Depot, Cherry Point, NC v. F.L.R.A.*, 952 F.2d 1434, 1442 (D.C. Cir. 1992) (union is not permitted to bargain over the condition of employment of supervisory personnel or personnel not in the bargaining unit) to support its claim.

[3] *IFPTE Local 3 and Dep't of Navy, Philadelphia Naval Shipyard, Philadelphia, PA*, 51 F.L.R.A. 451, 459- 60 (1995) and *Nat'l Ass'n of Agric. Emp. and Dep't of Agric., APHIS, Plant Protection and Quarantine, Houston, TX*, 32 F.L.R.A. 1265 (1988), are cited by the USCP in this regard.

[4] To support its position, the USCP cites *AFGE. Local 12, AFL-CIO and Dep't of Labor*, 26 F.L.R.A. 768, 769 (1987) and *NAGE, Local R1-109 and United Slates Dep't of Veterans Affairs Med. Ctr., Newington, CN*, 38 F.L.R.A. 928, 931 (1990).

the revenue from an establishment where a bargaining unit employee wants to work" but fails to identify whether the revenue, for example, is for a corporate entity at the specific location where an employee is requesting to work or the entire corporation. Thus, the USCP concludes, the proposal "makes no sense" and also is not properly before the Board. Moreover, "the Union has not established that there is a change in conditions of employment" concerning Proposals D, E, G, and H, which the USCP asserts is a prerequisite under Authority precedent for the Board to find an obligation to negotiate "regarding either procedures or impact and implementation."[5] In this regard, the USCP states than the draft directive is "exactly the same" as the SOP it will replace concerning the prohibitions on outside employment and voluntary work addressed by those proposals.

In addition to the aforementioned defects, most of which generally apply to all of the Union's proposals, the USCP provides other specific grounds for why Proposals C, E, F, and H are nonnegotiable. In this regard, it contends that Proposal C is outside the scope of bargaining under the "covered by" doctrine "which holds that a proposal that expressly conflicts with a provision of the parties' CBA is 'covered by' the CBA and, thus, not negotiable."[6] Further, Section 3.0l.l(a)(2)(A) of the parties' current CBA provides that management has the right to assign work. The Union's proposal, according to the USCP, "seeks to interfere with management's rights by restricting its ability to assign work." It also conflicts with Section 18.02.9, which states that "[a]bsent unforeseen or emergency circumstances, and subject to operational needs employees generally will not be required to work more than sixty-four (64) hours of additional duty during any work period, nor more than sixteen (16) hours during any tour of duty." The USCP contends that, by requiring the cancellation of additional duty, Proposal C would limit management's right under the CBA to assign work during "unforeseen or emergency circumstances." Therefore, the USCP asserts that the proposal is nonnegotiable. Moreover, as stated above, a petition for review of a negotiability issue is only appropriate where the parties are in dispute over whether a proposal is inconsistent with law, rule, or regulation. Because the subject matter is covered by the parties' CBA, however, the USCP argues that "it does not meet the conditions governing review of negotiability issues and must be dismissed." Given the Authority precedent it has cited, the USCP also contends that the Board is prohibited from determining whether the proposal "is a valid procedure or appropriate arrangement as the Union has not alleged that the proposal is a procedure or an appropriate arrangement." *See* 5 U.S.C. § 7106(b). Even if the Union had made such allegations, the USCP's position is that the proposal would "impinge upon management prerogatives to an *excessive* degree" by preventing supervisors from assigning additional duty in some circumstances.[7]

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[5] In support of its position, the USCP cites *Dep't of the Navy, Supervisor of Ship-Building, Conversion and Repair, Groton, CN and AFGE, Local 2105, AFL-CIO,* 4 F.L.R.A. 578, 580 (1980).

[6] *Dep't of the Army Enlisted Records & Evaluation Ctr., Ft. Benjamin Harrison, IN and AFGE Local 1411*, AFL-CIO, 48 F.L.R.A. 31 (1993) is cited by the USCP.

[7] The USCP cites *AFGE, AFL-CIO, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983) (emphasis in original) to support this contention.

As to Proposal E, the USCP asserts that the Union's wording "interferes with management's right to discipline" under 5 U.S.C. § 7106(a)(2). In this regard, the proposal would qualify the draft directive's absolute prohibition on outside employment at enterprises under contract to furnish goods or services to the Department "if the paid employment would raise questions of favoritism." This "limits the supervisor's decision-making ability and, thus, excessively interferes with the Department's right to discipline."[8] The second sentence of the Union's proposal, according to the USCP, would limit disciplinary action "to only those items identified on the list," thereby also excessively interfering with management's rights under 5 U.S.C. § 7106(a)(2). Because the Union does not assert that sentence one or two of its proposal constitute procedures or appropriate arrangements, the USCP contends that the proposal is nonnegotiable.

Turning to Proposal F, the USCP contends that, even if its meaning were clear, it would restrict the USCP's rights under 5 U.S.C. § 7106(a)(2) "by limiting management's ability to discipline to only those businesses from which the establishment earns its greatest percentage of revenue." For example, an officer requesting to be a waiter at *Olive Garden* would be restricted by the Department policy because he is serving alcoholic beverages. However, with the Union's proposed language, the officer would be permitted to perform the outside employment because the food revenue may exceed the drink revenue. Thus, the USCP contends, "the proposal clearly excessively interferes with management's right to discipline not only its ability with regard to bargaining unit employees but all employees, and, as such, the proposal is non-negotiable." As with Proposal C, the USCP notes that the Union does not assert that the proposal is a procedure or appropriate arrangement under 5 U.S.C. § 7106(b). Finally, Proposal H also excessively interferes with management's right to discipline under 5 U.S.C. § 7106(a)(2) by limiting a supervisor's ability to prohibit outside employment or voluntary service when an employee is on administrative leave.[9] As was the case in some of the previous proposals, "the Union does not assert that the proposal is a procedure or appropriate arrangement." Accordingly, the USCP contends that the Board should find that Proposal F is outside the USCP's duty to bargain for the reasons provided.

B. Union

In response to the USCP's contention that its proposals are "improper" because they seek to negotiate on behalf of "all employees," the Union asserts that none of them "facially appl[y] to employees outside of the Union's bargaining unit." According to the Union, if this were a real concern the Department would have raised the issue initially when it rejected them as nonnegotiable. Moreover, the Union asserts that "if the Department had fulfilled its duty to negotiate in good faith" the parties would have executed an agreement, such as a memorandum of understanding (MOU), which "would have been inapplicable to non-bargaining unit

[8] The Authority's decision in *AFGE Local 1345 and Dep't of the Army, Ft. Carson & HQ, 4th Infantry Div., Ft. Carson, CO*, 48 F.L.R.A. 168, 198-99 (1993) (*Ft. Carson*) is cited by the USCP in this connection.

[9] Once again, the Union cites *Ft. Carson*, 48 F.L.R.A. at 178, to support this claim, where the Authority held that a proposal requiring action by an employee's immediate supervisor is non-negotiable under 5 U.S.C. § 7106(a)(2).

employees." Further, the Authority has previously found that union proposals regarding "all employees" are negotiable.[10] The Union also contends that the Department's argument that a number of the proposals are nonnegotiable because they address areas where there has been no change in conditions of employment "misses the point." Even though the Union acknowledges that portions of the draft directive are similar or identical to language contained in the current SOP concerning outside employment/voluntary work, it nonetheless maintains that its proposals are "clearly related to the Department's new outside employment/voluntary work directive." Under Authority case law, "it is well-established that an agency is obligated to bargain over proposals that are 'reasonably related' to the proposed change in conditions of employment."[11] Here, the Union contends that the Department presented it with an entirely new policy for negotiation, and not merely a change to one paragraph or section. Since the Union's proposals are "reasonably related" to the new outside employment/voluntary work directive, it maintains that they are within the scope of the proposed change and, therefore, negotiable.

Turning to the USCP's other arguments related to individual proposals, although the Department claims that the meaning of the term "these thresholds" in Proposal C is unclear, the Union responds that the term is sufficiently clear and specific in the context of the entire paragraph. In response to the USCP's argument that Proposal C is "covered by" the parties' CBA, the Union states that there is nothing in its proposal that conflicts with the parties' CBA. The Union further maintains that the USCP's related claim is specious that, by raising a "covered by" argument, there is no basis for a negotiability review. In this regard, it states that, when the Department initially responded to the proposal, the Department expressly stated that it was nonnegotiable because it is contrary to law. The Union claims that the USCP "has seemingly only raised this baseless argument here in an attempt to avoid review of its meritless non-negotiability arguments."

In response to the Department's position that Proposal C excessively interferes with management's rights, the Union responds that the Authority has previously held that even where an issue is substantively nonnegotiable because it constitutes a management right, 5 U.S.C. § 7106(b)(2) & (3) "still require[s] an agency to negotiate over the impact and implementation and appropriate arrangements of the proposed change."[12] In this regard, a union proposal constitutes an appropriate arrangement under section 7106(b)(3) if it is: (1) intended as an arrangement for employees adversely affected by the exercise of a management right; and

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[10] The Union cites the following Authority decisions in this connection: *AFGE Local 12 and DOL*, 27 F.L.R.A. 363 (1987) (finding negotiable a proposal that all meeting areas would be equally accessible to "all employees"); *NTEU and Family Support Admin.*, 30 FLRA 677 (l987) (finding negotiable a proposal that required reimbursement for parking expenses of "all employees"); and *AFGE Local 1184 and Social Security Administration*, 65 F.L.R.A. 836 (20ll) (finding negotiable as an appropriate arrangement a proposal providing for additional adjudication time for "all employees").

[11] The Union cites *Patent Office Professional Association and U.S. Dept. of Commerce, U.S. Patent and Trademark Office*, 66 F.L.R.A. 247, 253 (2011) (*POPA*) and *U.S. Dept. of Homeland Sec., U.S. Customs and Border Protection*, 65 F.L.R.A. 870, 872-873 (2011) (*Customs and Border Protection*) in this regard.

[12] *Dep't of Veterans Affairs and AFGE, Local 2400*, 50 F.L.R.A. 220, 221 (1995) is cited by the Union to support its position.

(2) appropriate because it does not excessively interfere with the exercise of management rights. Under the "excessive interference test," the Authority weighs the benefits afforded employees under the proposed arrangement against the burden on the exercise of the management right.[13] The Union asserts that Proposal C is an appropriate arrangement for employees adversely affected by management's right to assign work because the draft directive may limit their ability to work scheduled additional duty with the Department or their outside employment/voluntary work. According to the Union, its proposal is intended to address how those employees who participate in outside employment/voluntary work will be affected if their work hours exceed the thresholds required by the Department. In addition, the Union contends that Proposal C does not excessively interfere with management's right to assign work because "the Department is still able to assign the work at issue to a qualified officer who has not met the Department's required thresholds, which is the exact same procedure as would occur if the reason an employee reached the Department's thresholds was due to excessive work for the Department." Therefore, the Union concludes, "the Department cannot demonstrate any interference with its ability to assign work, let alone excessive interference, and the Board should order the USCP to bargain over the Union's proposal.

With respect to the meaning of Proposal D, the Union states that, because the draft directive is vague, its wording would require the Department to provide one non-exclusive example bargaining unit employees can rely upon to determine if the outside employment/volunteer work for which they have applied is excluded. The Union further disputes that Proposal D is not simply a "suggestion," but is a response to the vagueness of the draft directive. This is illustrated by the following example: Department employees will be trained in observation and, as a result, may seek voluntary work with Global Explorer, an online platform where volunteers search satellite images for historic sites using space archeology techniques. Arguably, this could be a prohibited activity under the Department's policy. Thus, in Proposal D, the Union states that it "has made the most specific proposal available to it."

In addition to its disagreeing with the USCP that Proposal E improperly attempts to negotiate on behalf of all employees and does not concern a change in conditions of employment, the Union also disagrees with the USCP's assertion that it too is not a proposal but simply a "suggestion." To the contrary, the Union contends that, in light of the vagueness of the draft directive, the meaning of its proposal is clearly to allow bargaining unit employees to have a list of enterprises that fall under this prohibition, which would permit them to tailor their outside employment searches away from such enterprises. Furthermore, "depending on the size of the enterprise, it is not reasonable to prohibit all employment with such enterprises." In response to the Department's assertion that Proposal E interferes with management's right to assign work, the Union states that its proposal is an appropriate arrangement for those employees who are adversely affected by the USCP's prohibition on off-duty employment with enterprises under contract to furnish goods or services to the Department. Specifically, it would limit that prohibition to instances where there is "at least the specter of favoritism," and would allow employees to avoid wasting their time procuring employment at a prohibited enterprise by requiring the Department to provide a list of such enterprises available to bargaining unit employees.

[13] Here, the Union cites *AFGE Local 1345 and U.S. Dep't of the Army*, 64 F.L.R.A. 949, 951 (2010).

Once again, the Union contends that, because the Department's draft directive is vague, it sought clarification by offering Proposal F, which is intended "to allow bargaining unit employees to determine at which establishments they could not have outside employment/volunteer work, and would permit them to tailor their outside employment searches away from such enterprises." As it stated previously, the proposal does not improperly attempt to negotiate on behalf of all employees. As to the Department's claim that the proposal is unclear because it does not address whether revenues of corporate *Olive Garden* are to be analyzed or just revenues of a local *Olive Garden*, the Union's proposal is clear and specific "despite the Department's absurd example to the contrary." The Union stresses that the draft directive itself makes reference to an "establishment," a term the proposal merely "parrots." Thus, any lack of clarity or specificity in Proposal F "stems from the draft directive itself and not the Union's proposal." In response to the USCP's claims that the proposal places an undue burden on management and restricts the Department's right to discipline employees, the Union states that the contention of undue burden is "unsupported and unexplained." On its face, the proposal's wording "does not require management to take any action, let alone an unnamed but allegedly unduly burdensome action." Thus, the Union maintains that its proposal does not affect management's right to assign work to non-bargaining unit employees. The Department's claim that the Union's proposal would "restrict management's right to discipline" is "similarly confusing and baseless," according to the Union. The proposal has "nothing to do with disciplining employees," and affects that right only in the same general sense that all policies limit management's right to discipline employees to instances where those policies have been violated.

With regard to Proposal G, the Union states that, because the draft directive is vague, it proposed wording to clarify whether it applies to volunteer fire fighters, who may be required to sleep at a fire house on some occasions due to call volume or the requirements of their volunteer commitment, but who would not maintain their abode at that location. In addition to the meritless claims that the proposal does not concern any change in working conditions and improperly attempts to negotiate on behalf of all employees, the Department asserts, as it does elsewhere, that Proposal G is not a proposal, but simply a "suggestion." The Union states that the wording of the draft directive has been altered from the previous SOP, making it unclear whether an employee who volunteers for an overnight shift at the local fire station is temporarily maintaining his or her place of abode at that fire station. Far from being merely a suggestion, "because of the vagueness of the draft directive, the Union has made the most specific proposal available to it."

Finally, the Union asserts that Proposal H is intended to ensure that employees who have been placed on administrative leave can continue to perform outside employment/volunteer work while they are in that status. In addition to disagreeing with the Department that the proposal improperly attempts to negotiate on behalf of all employees and does not address a change in employees' conditions of employment, the Union also disagrees with the assertion that it excessively interferes with management's rights. Even assuming that Proposal H interferes with management's rights to assign work, "which it does not because it affects only employees who are on administrative leave," the Union maintains that Proposal H is an appropriate arrangement. In this regard, "the Department places employees on administrative leave for a variety of

reasons, but that action prohibits them from working additional duty." According to the Union, prohibiting those same employees from outside employment/voluntary work will have a doubly negative effect on employees who may be on administrative leave through no fault of their own. Thus, the Union states, limiting the negative effect of the Department's unilateral action is an appropriate arrangement. As is the case with its other five proposals, the Union concludes that the Board should find that Proposal H is negotiable and order the Department to bargain in good faith with the Union.

IV. Analysis and Conclusions[14]

Preliminarily, we note that the Authority's negotiability regulations define two general types of disagreements that parties may have concerning the duty to bargain over a union proposal. Under 5 C.F.R. § 2424.2(a), a *bargaining obligation dispute* means a disagreement between an exclusive representative and an agency concerning whether, "in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable."[15] Under 5 C.F.R. § 2424.2(c), a *negotiability dispute* means a disagreement between an exclusive representative and an agency concerning "the legality of a proposal or provision."[16] Moreover, under section 2424.2 of the Authority's Regulations, the Authority will consider a petition for review of a negotiability dispute only when the parties disagree "concerning the legality of a proposal." Where a proposal raises both a bargaining obligation dispute and a negotiability dispute, the Authority may resolve both disputes, but where a proposal involves only a bargaining obligation dispute, the Authority has held that such a dispute may not be resolved in a negotiability proceeding.[17]

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[14] When deciding negotiability issues, we have been guided by cases decided by the Authority, which is the executive branch agency responsible for resolving issues arising under the FSLMRS. See, *e.g.*, *Plumbers Local 5, United Ass'n of Journeymen & Apprentices and Office of the Architect of the Capitol*, 2002 WL 34661693, 02-LMR-03,-04,-05 & -06 (CAOC 10/7/2002); *Int'l Brotherh'd of Electrical Workers, Local 26 and Office of the Architect of the Capitol*, 2001 WL 36175211, 01-LMR-02 (CAOC 11/23/01).

[15] The Authority provides the following non-exclusive examples of bargaining obligation disputes, e.*g.*, where an agency claims that: (1) A proposal concerns a matter that is covered by a collective bargaining agreement; and (2) Bargaining is not required over a change in bargaining unit employees' conditions of employment because the effect of the change is *de minimis.*

[16] Here the Authority's Regulations state:

> Examples of negotiability disputes include disagreements between an exclusive representative and an agency concerning whether a proposal or provision:
>
> (1) Affects a management right under 5 U.S.C. 7106(a);
> (2) Constitutes a procedure or appropriate arrangement, within the meaning of 5 U.S.C. 7106(b)(2) and (3), respectively; and
> (3) Is consistent with a Government-wide regulation.

5 C.F.R. § 2424.2.

[17] *Nat'l Fed. of Fed. Employees, Int'l Assoc. of Machinists and Aerospace Workers, Federal District 1, Local 1998 and U.S. Dep't of State, Passport Services*, 69 F.L.R.A. No. 90 (Sep. 28, 2016) (*Passport Services*), citing 5 C.F.R. § 2424.2(c), § 2424.30(b)(2), and § 2424.2(d), respectively.

While the Board generally has been guided by Authority case law when deciding negotiability issues, we note that our negotiability regulations differ from those of the Authority. In this regard, contrary to the requirements of 5 C.F.R. § 2424.2, we have determined that it is in the best interests of the parties and the collective bargaining process to resolve all of their disagreements in this negotiability petition regardless of whether they involve only bargaining obligation disputes. Consistent with this determination, we resolve all of the parties' disagreements with respect to Proposals C, D, E, F, G and H as follows:

Proposal C

The USCP alleges that Proposal C: (1) is not clear or specific; (2) seeks to bargain over the conditions of employment of non-unit employees; (3) is "covered by" Sections 3.0l.l(a)(2)(A) and 18.02.9 of the parties' current CBA; and (4) "would impinge upon management prerogatives to an *excessive degree*" by preventing it "from assigning additional duty in some circumstances."[18] The first three allegations involve bargaining obligation disputes while the fourth implicates management's right to assign work under § 7106(a)(2)(B) of the FSLMRS.[19] Contrary to the view set forth by the USCP, read within the context of the previous sentence in the draft directive, the meaning of the term "these thresholds" in Proposal C is sufficiently clear. It would require an employee's supervisor to cancel "official additional duty" if the employee reaches the 64-hour per pay period/16-hour per day work limits.[20] Thus, there is no merit to the USCP's claim that the proposal "is neither clear nor specific and is not properly before the [Board]." Similarly, the USCP's contention that Proposal C is "improper as it seeks to negotiate on behalf of all employees" is not well-taken. In our view, the argument is premature. Even assuming that Proposal C could be so construed, the Union has clarified in its pleadings that it only seeks to negotiate on behalf of its bargaining unit. On the assumption that bargaining over the draft directive will resume once the Board issues this decision, the parties will then negotiate an MOU limiting its scope to unit employees. If the Union does not agree to limit the scope of any subsequent agreement to unit employees, the USCP may choose to litigate the matter in an appropriate forum. Consequently, at this point the argument provides no basis for finding Proposal C outside the USCP's duty to bargain.

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[18] While the USCP asserts in its statement of position that the Union has not claimed that the proposal is an appropriate arrangement, it nevertheless makes the latter argument "even if" the Union had made that claim. In the Union's response to the USCP's statement of position, however, it asserts that Proposal C is an appropriate arrangement for employees adversely affected by management's right to assign work.

[19] In addition to raising this argument in its statement of position, the USCP's initial July 21, 2016, response to the Union states that "the proposal excessively interferes with the Department's right to assign and direct bargaining unit employees and assign work under the CBA, Article 3, and 5 U.S.C. Section 7106 and, therefore, is outside the scope of bargaining."

[20] We note in this regard the USCP's statement that "the Department only has control over the work hours and does not control how many hours an employee chooses to work additional duty." As indicated above, however, the USCP also states that management is entitled to assign additional duty "in some circumstances." It appears from Article 18 of the parties' CBA that in some cases employees may volunteer for additional duty while in others the performance of additional duties may be required by management.

Before addressing the USCP's "covered by" argument, it is helpful to review the framework set forth by the Authority in *HHS, SSA, Baltimore, MD and AFGE, National Council of SSA Field Office Locals, Council 220*, 47 F.L.R.A. 1004 (1993) for establishing whether a contract provision covers a matter in dispute. Initially, the Authority determines whether the matter is expressly contained in the CBA. In this examination, it does not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute. If the provision does not expressly encompass the matter, it next determines whether the subject is "inseparably bound up with and . . . thus [is] plainly an aspect of . . . a subject expressly covered by the contract." Here, the Authority determines whether the subject matter of the proposal is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter, regardless of whether it is expressly articulated in the provision. If so, the Authority concludes that the subject matter is covered by the contract provision. Applying the framework set forth by the Authority, we conclude that the subject matter in Proposal C is expressly covered by Section 18.02.9 of the parties' CBA. As confirmed by the Union, the subject matter of the proposal is the unconditional cancellation of "official additional duty" if an employee reaches the 64-hour per pay period/16-hour per day work limits referenced in the draft directive.[21] As noted above, however, Section 18.02.9 states that "[a]bsent unforeseen or emergency circumstances, and subject to operational needs employees generally will not be required to work more than sixty-four (64) hours of additional duty during any work period, nor more than sixteen (16) hours during any tour of duty." In other words, Proposal C seeks cancellation of official additional duty if it would cause employees to exceed these thresholds even though the parties have already negotiated wording addressing the conditions under which the thresholds may be exceeded. Therefore, the proposal clearly conflicts with Section 18.02.9.[22]

Because we have resolved the parties' bargaining obligation dispute over Proposal C by concluding that the subject matter is expressly covered by Section 18.02.9, it is unnecessary to address their negotiability dispute concerning the Union's contention that the proposal is an appropriate arrangement that does not excessively interfere with management's right to assign work. Accordingly, the Union's petition/appeal with respect to Proposal C shall be dismissed.

Proposals D and G

A careful examination of the parties' positions reveals that their disagreements over Proposals D and G involve only bargaining obligation disputes. In this regard, the USCP has asserted that the wording proposed by the Union in these two instances is not within its duty to bargain because they: (1) constitute suggestions, rather than proposals; (2) seek to bargain over the conditions of employment of non-unit employees; and (3) do not address areas in the draft

[21] The wording applies when an employee has been scheduled for "official additional duty" and is silent as to whether the employee volunteered for, or management required, such duty.

[22] *See, e.g., Nat. Air Traffic Controllers Assoc. and U.S. Dep't. of Trans., Fed. Aviation Admin., Washington, DC*, 61 FLRA 437, 441 (2006), where the Authority found that the subject matter of a proposal is expressly contained in a contract provision when the proposal would modify or conflict with the express terms of the contract provision.

directive where management has proposed any changes in bargaining unit employees' conditions of employment. We reject the USCP's argument that the proposals constitute mere suggestions, rather than proposals as a conclusory or cursory argument that the Board need not consider.[23] In addition, we have already considered and rejected the claim that the Union is seeking to bargain over the conditions of employment of non-unit employees when analyzing Proposal C. As to the Department's third allegation, the Union accurately points out that the Authority's test for determining whether an agency has an obligation to bargain over a proposal that purports to address a change in conditions of employment is whether the proposal is "reasonably related" to the change.[24] In this case, the USCP did not merely present the Union with revisions to the existing SOP, but with a new draft directive. Accordingly, we find that Proposals D and G are reasonably related to the change initiated by the USCP when it issued draft Directive 2043.002. Since there is no merit to any of the USCP's bargaining obligation arguments, we shall order the USCP to negotiate over Proposals D and G.

Proposal E

The USCP contends that Proposal E is nonnegotiable because it: (1) improperly seeks to negotiate on behalf of *all* employees, not just those in the bargaining unit; (2) is not really a proposal but merely a "suggestion," so there is no dispute between the parties over whether it is inconsistent with law, rule, or regulation; (3) does not address an area in the draft directive where management has proposed any changes in unit employees' conditions of employment; and (4) interferes with management's right to discipline under 5 U.S.C. § 7106(a)(2). With respect to the latter argument, it claims that the phrase "if the paid employment would raise questions of favoritism" limits a supervisor's decision-making ability, thereby excessively interfering with the Department's right to discipline, while the second sentence of the proposal also excessively interferes with that right by limiting disciplinary action to only those items identified on the list. Moreover, the USCP claims that, because the Union does not assert that the sentences constitute procedures or appropriate arrangements, the proposal is nonnegotiable.

The USCP's first three contentions concern bargaining obligation disputes that have already been addressed by the Board in our analyses of the negotiability of Proposals C, D, and G and they are rejected here for the same reasons. Turning to the parties' *negotiability dispute*, contrary to the USCP's contention, the Union asserts in its response to the USCP's statement of position that the proposal is an appropriate arrangement for those employees who are adversely affected by the USCP's prohibition on off-duty employment with enterprises under contract to furnish goods or services to the Department.[25] More importantly, however, we find unpersuasive the USCP's argument that both sentences of Proposal E interfere with the Department's right to discipline. In this regard, we fail to see how the phrase "if the paid employment would raise

[23] *Architect of the Capitol v. Ihoha*, 2014 WL 3887569, 12-AC-30, 13-AC-03 (CAOC 7/30/14), n. 14 (citing *Herbert v. Office of the Architect of the Capitol*, 839 F.Supp.2d 284, 297-98 (D.D.C. 2012); *Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (*en banc*).

[24] *E.g.*, *POPA*, 66 F.L.R.A. 247, 253 (2011).

[25] *Response of U.S. Capitol Police Labor Committee* at 9.

questions of favoritism" directly affects a supervisor's right to discipline employees. While it would modify Appendix A, item 7's absolute prohibition on paid employment at an enterprise under contract to furnish good or services to the Department, it appears to be no more than a work rule limiting the circumstances under which employees would be prohibited from engaging in off-duty employment. Additionally, the second sentence of the proposal merely requires the USCP to provide the Union with information, *i.e.*, a list of enterprises which are under contract to furnish the Department goods or services. As neither sentence in Proposal E directly interferes with management's right to discipline employees, it is unnecessary to address the parties' competing claims concerning whether they excessively interfere with management's rights. Accordingly, we conclude that Proposal E is within the USCP's duty to bargain.

Proposal F

According to the USCP, Proposal F is nonnegotiable because it: (1) improperly seeks to negotiate on behalf of *all* employees, not just those in the bargaining unit; (2) is not clear and specific; (3) places an undue burden on the Department by infringing on management's right to assign work to employees not in the bargaining unit; and (4) excessively interferes with management's right to discipline employees, under 5 U.S.C. § 7106(a)(2). As to the latter argument, it asserts that the proposal would limit management's right to discipline employees to only those cases "from which the establishment earns the greatest percentage of revenue." The USCP also claims that the Union has failed to assert that the proposal is a procedure or appropriate arrangement.

We conclude that the USCP's first *bargaining obligation* contention is without merit for the same reason stated in our foregoing analysis concerning the negotiability of Proposal C. Furthermore, while it may be true that the proposal does not specify whether the term "establishment," for example, refers to a corporate entity at a specific location or the corporation as a whole, item 9 in Appendix A of the draft directive suffers from the same alleged defect. It is precisely this lack of clarity that the Union is attempting to address in offering the proposal. As is evident throughout this case, further discussion of the meaning of various portions of the draft directive, as well as the Union's proposals, would have benefited both sides and may even have avoided the filing of the Union's petition for review. In this regard, clarification of the written documents that govern the parties' relationship could prevent the filing of unnecessary grievances, for example, and is one of the primary functions of collective bargaining. In any event, we conclude that the meaning of Proposal F is sufficiently clear for us to proceed to address the parties' *negotiability disputes*.

Generally, arguments that a proposal would place an undue burden on management go to its merits rather than whether it is outside an agency's duty to bargain. In this case, the USCP argues that Proposal F places an undue burden on the Department by infringing on management's right to assign work to employees not in the bargaining unit. On its face, however, the proposal does not require management to do anything. If the USCP were to agree to adopt it, management may have to take some action to enforce the provision, such as determining whether an establishment earns the greatest percentage of its revenue from the sale of alcohol, or to defend itself if the Union files a grievance on behalf of an employee that management has disciplined for violating the provision. The USCP, however, would have to do

as much with respect to item 9 even if Proposal F is not adopted. Moreover, to the extent the USCP is claiming that the proposal interferes with management's right to assign work simply because it requires the agency to take some action, the Authority has found that this "would completely nullify the obligation to bargain because no obligation of any kind could be placed on management through negotiations."[26] For these reasons, we conclude that the proposal does not directly interfere with the Department's right to assign work.

Finally, with respect to the USCP's claim that the proposal excessively interferes with management's right to discipline employees, while it is true that the Union has not asserted that its proposed wording is a procedure or appropriate arrangement, there is no need for it to do so. In essence, Proposal F is an attempt to define the meaning of the term "primary business" contained in Appendix A, item 9 of the draft directive. As such, it does not directly affect management's right to discipline employees under the FSLMRS much less excessively interfere with that right. Consequently, we conclude that Proposal F is within the USCP's duty to bargain.

Proposal H

As it has in connection with a number of other proposals, the USCP argues that Proposal H is outside its duty to bargain because it: (1) improperly seeks to negotiate on behalf of *all* employees, not just those in the bargaining unit; (2) does not address an area in the draft directive where management has proposed any changes in unit employees' conditions of employment; (3) infringes on management's right to assign work to employees not in the bargaining unit; and (4) excessively interferes with management's right to discipline employees, under 5 U.S.C. § 7106(a)(2), by limiting a supervisor's decision-making ability when an employee is on administrative leave. It also contends that the Union has failed to assert that the proposal is a procedure or appropriate arrangement. The first two arguments involve *bargaining obligation disputes* that we have found to be without merit in our previous analyses and are rejected here for the same reasons.

The USCP's third and fourth arguments involve *negotiability disputes*. In this regard, the contention that Proposal H infringes on management's right to assign work to employees not in the bargaining unit was also raised by the USCP concerning Proposal F. We conclude that the argument is without merit for the same reason, *i.e.*, on its face, Proposal H does not require management to do anything. Unlike Proposal F, however, where the USCP attempted to explain that the wording would impinge on its right to assign work to supervisors by placing an undue burden on them, it does not provide any support for its allegation with respect to Proposal H. Hence, we reject the claim on the additional ground that it is a conclusory or cursory argument. Finally, contrary to the USCP's allegation, on page 11 of its response the Union states that, even assuming that Proposal H "interferes with management's right[] to assign work . . . it is an appropriate arrangement." Although its response appears to be inapposite because the USCP alleges that the proposal excessively interferes with management's right to discipline employees and not to assign work, it is unnecessary for us to apply the Authority's excessive interference

[26] *NFFE Local 2099 and Navy, Naval Plant Representative Office, St. Louis, MO*, 35 F.L.R.A. 362, 366 (1990), citing *National Labor Relations Board Professional Association and General Counsel, National Labor Relations Board*, 32 F.L.R.A. 557, 564 (1988).

test regarding any of the management rights cited by the USCP in its statement of position for the following reason. Proposal H essentially modifies Appendix A, item 13 of draft Directive 2043.002 by permitting employees to engage in outside employment or voluntary service while on administrative leave. By its plain terms, it would apply only where management has already decided to place an employee on administrative leave, whether for disciplinary or other reasons. Since it does not affect management's right to discipline or assign work at all, the USCP's argument is without merit. Accordingly, Proposal H is within the USCP's duty to bargain.

V. ORDER

The Union's petition/appeal with respect to Proposal C is hereby dismissed. The USCP shall, upon request, or as otherwise agreed to by the parties, bargain over Proposals D, E, F**,** G and H.[27]

Issued, Washington, D.C., March 20, 2017.

[27] In finding Proposals **D, E,** F**, G** and H to be negotiable, we make no judgment as to their merits.