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-05 (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 five 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 they were outside of 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by a collective bargaining agreement (CBA) that was to have expired on June 9, 2013, but remains in effect until superseded by a successor CBA.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

The five proposals in the Union's petition for review in this case arose, in accordance with Article 8, Changes in Conditions of Employment, of the parties' current CBA, after it was notified that the USCP intended to make certain changes to absence and leave procedures, as set forth in draft Directive 2053.004, Absence and Leave.[1] An Absence and Leave Policy has been in

[1] Unlike the Board's decision in 16-LM-02, issued on this same date, this negotiability appeal involves mid-term

place at the Department since 1996 and was reissued under Directive 2053.004 on April 5, 2013. In addition to Directive 2053.004, a number of articles in the CBA contain provisions relating to employee absences and leave. Other USCP policies governing aspects of absence and leave include its Leave Restriction Status Request Standard Operating Procedure (SOP AC-000-07) and Rules of Conduct (Directive 2053.013), which have been in place since April 10, 2007, and August 23, 2000, respectively.

II. Proposals In Dispute

The Union proposes the following five revisions to draft Directive 2053.004:

Proposal D: Page. 2, line 87 to page 3, line 2 of the draft Directive provides: "Excessive unscheduled leave can lead to leave restriction and/or disciplinary action up to and including termination of employment." The Union proposes that the sentence be changed to: "Excessive unscheduled leave can lead to leave restriction and/or disciplinary action."

Proposal E: Page 5, lines 66-71 of the draft Directive provides: "When there is an absence of four or more consecutive workdays—or for a lesser period when determined necessary—the supervisor shall require medical certification or other administratively acceptable evidence as to the reason for an absence." The Union proposes that the sentence be changed to: "When there is an absence of four or more consecutive workdays, the supervisor shall require medical certification or other administratively acceptable evidence as to the reason for an absence."

Proposal G: Page 10, lines 12-13 of the draft Directive provides: "Employees are subject to recall during meal periods and/or authorized breaks." The Union proposes to add, after the end of the sentence: "Employees will not be recalled during their unpaid meal periods absent extraordinary circumstances. Employees who are recalled during their unpaid meal periods will be compensated for the full duration of their unpaid meal periods."

Proposal H: Page 10, lines 75-77 of the draft Directive provides: "5. Forward requests for blocks of leave in excess of 120 hours to the Bureau Commander/Office Director for approval." The Union proposes to change the sentence to: "5. Forward requests for blocks of leave in excess of 120 hours to the Division Commander/Office Director for approval." The Union also proposes to move pg. 11, [lines] 17-18 to the end of Section beginning with "Division Commander," at pg. 11, [line] 1, and renumber to point "5." Renumber point "2" under "Bureau Commander/Office Director" to point "1."[2]

Proposal I: Page 11, lines 38-39, 49-51 of the draft Directive provides: "The following publications should be referenced in conjunction with this Policy Directive: ... 6. "Capitol Police Board Regulations Prescribing a Unified Leave System for Employees of the United States

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bargaining over a draft directive unrelated to the parties' current negotiations over a successor CBA.

[2] The Union's proposal to change the text on page 11 of the draft Directive would make the affected sections consistent with its proposal that blocks of leave in excess of 120 hours should be forwarded to the Division Commander/Office Director for approval.

Capitol Police." The Union proposes to make Capitol Police Board Regulations Prescribing a Unified Leave System for Employees of the United States Capitol Police available for employee review on PoliceNet.

III. Positions of the Parties

A. Employing Office

The USCP contends that Proposals D, E, G, and I are nonnegotiable because "the Union has not established that there is a change in conditions of employment" involving any of the subjects they address, which it claims is a prerequisite under Federal Labor Relations Authority (Authority) precedent for the Board to impose "a duty to negotiate regarding either procedures or impact and implementation."[3] In particular, with respect to Proposal D, which would eliminate the phrase "up to and including termination of employment" from the draft Directive, management has proposed no change in policy concerning its ability to place a bargaining unit employee on leave restriction for excessive leave use, a matter covered by SOP AC-000-07. As to Proposal E, which would remove the phrase "or for a lesser period when determined necessary" from the draft Directive, the Department notes that SOP AC-000-07 specifically authorizes medical certification and documentation for "*any* unscheduled leave." (emphasis in original). Thus, supervisors have always been able to request medical certification for any suspected misuse of leave so there is no change for the parties to negotiate. It contends that Proposal G would restrict the Department's ability to assign work to employees when they are on an unpaid break by requiring it to demonstrate "extraordinary circumstances," and would provide compensation to employees for the full length of their unpaid meal break regardless of the amount of time spent on assigned tasks. The parties, however, have always recognized the importance of maintaining sufficient staffing at all times. The USCP cites section 19.01.2 of the CBA, which provides that "the Parties recognize the paramount importance of maintaining sufficient staffing to meet the mission and operational requirements of the Department at all times," and Directive 2052.006, Notification and Reporting for Duty in Emergency Situations, which states that employees will be notified of emergency situations and required to report for duty. Again, the USCP asserts, there is no change in working conditions so the issue presented is not appropriate for resolution in the Department's absence and leave directive. The Union's stated intent in Proposal I is to provide unit employees with "ready and easy access to the Department's internal systems regulations of the Capitol Police Board" (CPB). The CPB has statutory authority under 2 U.S.C. § 1923(b) to prescribe regulations establishing a leave system for USCP employees, which shall have the force and effect of law. Those regulations have remained unchanged since they were promulgated in October 1997. Accordingly, the USCP contends that the Union also has not established any change in conditions of employment regarding Proposal I.

In addition to the above, the USCP claims that the subject matter of Proposal D is

[3] 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).

covered by Section 19.03.3 of the parties' CBA.[4] Since 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, "the issue is not appropriate for a negotiability petition" and must be dismissed.[5] It also alleges that the Union's stated intent in Proposal D is "to notify Department officials that multiple forms of disciplinary action less severe than termination are available," and to prevent any confusion on the part of officials who believe termination is appropriate for any instance of excessive unscheduled leave. The USCP notes that a proposal requiring action by specified supervisors is non-negotiable under 5U.S.C. § 7106(a)(2).[6] Further, it asserts that proposals that prevent management from taking disciplinary action against employees directly interfere with management's right to discipline, under 5 U.S.C. § 7106(a)(2)(A) of the Statute.[7] In the USCP's view, Proposal D excessively interferes with its right to discipline because the Union's "stated purpose" is to restrict supervisors' disciplinary options.[8] As the Union has not alleged that the proposal is a procedure or an appropriate arrangement,[9] the proposal is outside the scope of bargaining.

According to the USCP, not only has the Union failed to identify any change in conditions of employment requiring negotiations over Proposal E but, by removing the *phrase* "or for a lesser period when determined necessary" from the draft Directive, the proposal also would prevent management from taking disciplinary action against employees under 5 U.S.C. § 7106(a)(2)(A). As the Authority has found, management's right to discipline includes placing an employee in a restricted leave use category.[10] The USCP contends that the proposal excessively interferes with the Department's right to discipline by restricting its "ability to

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[4] Section 19.03.3, Leave Restriction, states as follows:

> When counseling fails, an officer may be denied unscheduled leave and/or required to furnish medical certification or other administratively acceptable evidence for all unscheduled absences from work. Failure to provide such evidence may result in any absence being charged as absence without approved leave (AWOL), and may be grounds for disciplinary action.

[5] The USCP cites *AFGE, AFL-CIO, Local 2782 v. F.L R.A.*, 702 F.2d 1183, 1188 (D.C. Cir. 1983), and *NAGE, Local RI-109 and U.S. Dep't of Veterans Affairs Med. Ctr., Newington, CN*, 38 F.L.R.A. 928, 931 (1990) to support this contention.

[6] Here, the USCP cites 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*).

[7] In this regard, *AFGE, Local 987 and U.S. Dep't of the Air Force, Robins Air Force Base, GA*, 37 F.L.R.A. 197, 206 (1990) *petition for review filed sub nom. U S. Dep't of the Air Force v. FLRA*, 952 F.2d 446 (D.C. Cir. 1991), *rehearing denied* Feb. 26, 1992, is relied upon by the USCP.

[8] In support, the USCP cites *AFGE, Local 1426 and Dep't of the Army, Fort Sheridan, IL*, 45 F.L.R.A. 867 (1992) and *AFSCME, Local 3097 and Dep't of Justice*, 42 F.L.R.A. 412 (1991).

[9] *See* 5 U.S.C. § 7106(b).

[10] Here, the USCP cites *NFFE, Local 405 and U.S. Dep't of the Army, Army Information Sys. Command, St. Louis, MO*, 42 F.L.R.A. 1112, 1129 (1991).

manage leave abuse which is a pre-condition to discipline." In this regard, in *AFGE, Local 1156 and Dep't of the Navy, Navy Ships Parts Control Ctr., Mechanicsburg, Pennsylvania,* 42 F.L.R.A. 1157, 1161-62 (1991), the Authority reviewed a provision requiring management to give employees an improvement period and written notice that future requests for sick leave must be supported by medical documentation. It found that the provision interfered with management's right to discipline and was not an appropriate arrangement because it would preclude management from imposing sick leave restriction for initial incidents of suspected sick leave abuse. Similarly, the USCP asserts, Proposal E would prevent it from seeking medical documentation for periods of less than 4 days when this is deemed necessary. Since the Union has not alleged that the proposal is a procedure or an appropriate arrangement, the proposal is non-negotiable.

Proposal G is nonnegotiable, according to the USCP, not only because the Union has failed to establish any change in conditions of employment, but also because management retains the right to assign work to employees during their break periods under 5 U.S.C. § 7106(a)(2)(B).[11] Moreover, the Department contends that proposals that impose a substantive limitation on the exercise of management's right to assign work directly interfere with that right.[12] Additionally, management's right to assign work includes the right to determine when that work will be performed.[13] The first sentence of the Union's proposal, the USCP contends, excessively restricts the Department's ability to assign work to employees when they are on an unpaid break by requiring it to demonstrate "extraordinary circumstances." At the very least, this implies that work could only be assigned to an employee "in an unusual or highly remarkable situation." The USCP notes that, in *AFGE, Local 1760 and Dep't of Health and Human Serv., Soc. Sec. Admin. Office of Hearings & Appeals, Region II,* 46 F.L.R.A. 1285, 1288 (1993), however, the Authority found that a union proposal restricting management's right to assign work to employees during their break periods excessively interfered with management's rights under 5 U.S.C. § 7106(a). Therefore, the USCP maintains that Proposal G is outside the scope of bargaining for this reason as well.

According to the USCP, the second sentence of Proposal G would require the Department to compensate an employee for the full length of their unpaid meal break, typically 30 minutes, regardless of the amount of time the employee spent on assigned work tasks. In this regard, the Authority has ruled that proposals requiring an agency to assign a specified amount or number of hours of overtime, or precluding an agency from assigning a lesser amount or fewer hours, directly interfere with management's right to assign work under 5 U.S.C.

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[11] *Dep't of Health and Human Serv., Soc. Sec. Admin., Baltimore, MD,* 34 F.L.R.A. 765, 769 (1990) and *AFGE, AFL-CIO, Nat'l Council of Soc. Sec. Field Office Locals and Dep't of Health and Human Serv., Soc. Sec. Admin.,* 24 F.L.R.A. 842, 844 (1986) are cited by the USCP to support this proposition.

[12] The USCP relies on *AFGE, AFL-CIO, Local 53 and U S. Dep't of the Navy, Navy Material Trans. Office, Norfolk, VA,* 42 F.L.R.A. 938, 945 (1991) in this regard.

[13] In support, the USCP cites *NAGE, SEIU, AFL-CIO and Veterans Admin., Veterans Admin. Med. Ctr., Dep't of Memorial Affairs,* 40 F.L.R.A. 657, 670-71 (1991).

§ 7106(a)(2)(B).[14] The effect of the Union's proposal is identical to the one found nonnegotiable in that case. As the Union has not alleged that the proposal is a procedure or an appropriate arrangement, consistent with Authority precedent, the USCP contends that Proposal G excessively interferes with the Department's right to assign and direct work under the CBA, Article 3 and 5 U.S.C. § 7106 and, therefore, is outside the scope of bargaining.[15]

Finally, regarding Proposal H, the USCP argues that the Union seeks to change the supervisory approval authority for leave requests in excess of 120 hours from the Bureau Commander to a Division Commander, allegedly because the latter is "more accessible to bargaining unit employees than the Bureau Commander and likely to be familiar with staffing needs of the Division."[16] The proposal is nonnegotiable, the USCP contends, because it seeks to negotiate on behalf of all employees, not just those who are represented by the Union.[17] The proposal also concerns the job responsibilities of Division Commanders who are outside the bargaining unit, which the Authority found nonnegotiable under 5 U.S.C. § 7106(a)(2) in *Fort Carson* because it requires action by specified supervisors. Because the proposal seeks to change management's assignment of duties from one management official to another, the Department concludes that the proposal is non-negotiable.

B. Union

According to the Union, Proposal D would "prevent any confusion from officials who believe termination is appropriate for any instance of excessive unscheduled leave usage." Contrary to its claim that the Board should find the proposal nonnegotiable because it is unrelated to any change in conditions of employment, the USCP has presented "an entirely new policy" for negotiation "and has agreed that the policy is negotiable." Moreover, there is no other policy at the Department expressly providing that employees may be subject to discipline for excessive unscheduled leave usage. In this regard, the Union contends that neither SOP AC-000-07 nor the parties' Rules of Conduct directly address disciplining employees for excessive use of unscheduled leave.[18] Since the draft Directive provides an entirely new basis for

[14] *AFGE, AFL-CIO, Local 1625 and Dep't of the Navy, Naval Air Station, Oceana, VA*, 30 F.L.R.A. 1105, 1106-07 (1988), is relied upon by the USCP here.

[15] *See Nat'l Assn. of Agric. Employees and Animal and Plant Health Inspection Serv.*, 51 F.L.R.A. 843, 852-53 (1996), where the USCP alleges the Authority found a proposal requiring the agency to assign non-inspection duties to fill out a tour of duty that otherwise would be terminated because of lack of inspection duties, interfered with management's right to assign work and was not an appropriate arrangement.

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[16] The USCP explains that Department's operations are distributed among five bureaus each headed by a Bureau Commander, and that the majority of bargaining unit employees are located within the Uniformed Services Bureau (USB). There are Division Commanders under each Bureau Commander that oversee specific operations. For example, USB has Division Commanders for the House, the Senate, the Library of Congress, and the Capitol.

[17] The USCP cites *U.S. 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.

[18] Additionally, the Union contends that the redacted materials in Attachment 5 of the USCP's statement of position do not demonstrate that employees previously have been terminated for violating their leave restriction status. The

discipline, it represents a "significant change to employee working conditions." According to the Union, the USCP's contention should be rejected that the proposal is nonnegotiable because the Union's intent is to communicate with Department officials about their job responsibilities, as the Union's intent "is irrelevant [as] to whether [the proposal] is negotiable." In addition, the Union states, Proposal D "*does not* require action by specified supervisors," nor does it prevent management from taking disciplinary actions against employees. (Emphasis in original).

The Union also asserts USCP's contention must fail that the proposal is "covered by" Section 19.03(3) of the parties' CBA. Although Article 19 of the CBA addresses leave and leave restriction, it does not provide that an employee may be disciplined for excessive leave usage. Rather, the Union notes, it states that ''failure to provide [] evidence [for unscheduled absences] may result in any absence being charged an absence without approved leave (AWOL), and may be grounds for disciplinary action." Thus, the Union contends, the provision only addresses an employee's failure to provide required evidence for unscheduled absences when on leave restriction, so it is not nearly as wide-reaching as Proposal D.

The Union contends that that Proposal E falls within the duty to bargain because it "is an attempt to clarify various vague terms in the draft Directive." For example, the phrase "or for a lesser period when determined necessary," would permit Sergeants and other first-line supervisors to determine that medical certification is "necessary" for a 1-day absence when most unit employees would not visit a medical provider if they were sick for such a short period of time. The Union contends that the draft Directive is also unclear as to who would make the determination, or what factors would be considered, concerning whether medical certification is "necessary" for an absence of less than 4 days. It contends that the wording in the draft Directive contradicts Section 19.02.2.C. of the parties' CBA, which states that "for periods of incapacitation of four (4) consecutive workdays or more, to include scheduled additional duty, a medical certificate will be required immediately upon returning to duty." As with Proposal D, the Union claims that the USCP "has already admitted to the negotiability of this issue *by negotiating it with the Union.*" (Emphasis in original). Additionally, it "cannot present a proposal that falls squarely within the 'covered by' doctrine, and then claim it is nonnegotiable in an effort to get around its previous bargain" because, under that doctrine, a proposal that expressly conflicts with a provision of a negotiated agreement is "covered by" and therefore nonnegotiable.[19] Nor, according to the Union, is there any merit to the USCP's assertion that Proposal E prevents management from taking disciplinary action against employees, or excessively interferes with its right to discipline, under 5 U.S.C. § 7106(a)(2)(A). The provision "has *nothing* to do with discipline" since it deals only with an employee's obligation to provide medical certification when absent from work. In this regard, the Union contends, "by the plain language" of the CBA "the parties have already

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management official involved at the time recommended the employee's termination because of his use of unscheduled leave and general unsatisfactory performance, but he resigned before being terminated. If an employee had actually been disciplined for excessive leave usage the Department should have provided those materials instead of Attachment 5.

[19] The Union cites *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) to support its position.

reached agreement over this issue," demonstrating that Proposal E "is both negotiable and an attempt to prevent the Department from changing the parties' previous agreement."

According to the Union, Proposal G means that unit employees on an unpaid break "will not normally be called back to work, and if they are required to perform work during their unpaid meal periods, they should be compensated for that work." While the USCP contends that there is no duty to negotiate over the proposal because there is no change to an employee's working conditions, the Union argues that it has not identified a policy or procedure for bringing employees on break back to duty. Moreover, contrary to the USCP's position that the proposal violates the right to assign work under 5 U.S.C. § 7106(a)(2)(B), the Union notes that the first sentence of the proposal does not prohibit management from recalling employees when necessary but, consistent with Authority precedent, is an appropriate arrangement for employees who are being recalled from their breaks.

In this regard, "even where an issue itself is not negotiable because it constitutes a management right, 5 U.S.C. § 7106(b)(2) and (3) still require an agency to negotiate over the impact and implementation and appropriate arrangements of the proposed change."[20] Under 5 U.S.C. § 7106(b)(3), a union proposal constitutes an appropriate arrangement if it is: (1) intended as an arrangement for employees adversely affected by the exercise of a management right; and (2) appropriate because it does not excessively interfere with the exercise of management rights. As it indicated in *Veterans Affairs*, the Union continues, the Authority determines whether an arrangement will excessively interfere with a management right by "weighing the benefits afforded employees under the proposed arrangement against the burden on the exercise of the right." It contends that the first sentence of Proposal G "clearly constitutes an appropriate arrangement for employees who are adversely impacted by the Department's exercise of its right to assign work." The USCP's argument also should be rejected, the Union argues, because the proposed wording constitutes a procedure for employees "who are negatively impacted by the Department's decision to assign work" when they are on an unpaid break. Finally, Union claims that the second sentence of Proposal G simply restates the USCP's obligations pursuant to the Fair Labor Standards Act (FLSA) to compensate employees for work they perform, noting that it is well-established that proposals incorporating statutory requirements are negotiable.[21]

In Proposal H, the Union would change the approving official for unit employee requests for blocks of leave in excess of 120 hours from the Bureau Commander to the Division Commander because the latter "is more accessible . . . and [] more likely to be familiar with the staffing needs" of the unit employee's Division than the Bureau Commander. The USCP contends that the proposal is improper because it 'seeks to negotiate on behalf of all employees" but the Union responds that the USCP has failed to explain how it

[20] In this connection, *Dep't of Veterans Affairs and AFGE, Local 2400*, 50 F.L.R.A. 220, 221 (1995) (*Veterans Affairs*) is cited by the Union.

[21] The Authority decisions cited in this regard are *NTEU Chap. 213 and Dept. of Energy*, 32 FLRA 578 (1988); *NLRB Professional Ass'n and NLRB*, 62 F.L.R.A. 397 (2008); and *Prof. Airways Sys. Specialists and U.S. Dept. of Trans., FAA*, 64 F.L.R.A. 474, 478 (2010).

would affect employees outside of the bargaining unit. The Authority, the Union notes, has found negotiable proposals made by unions regarding "all employees."[22] According to the Union, the USCP's argument "is belied by the fact that the Department accepted one of the Union's initial proposals that were not tailored specifically on their face to just bargaining unit employees." Once again, the Union states, the USCP has not shown that Proposal H is nonnegotiable because it "is simply an attempt to develop a procedure for employees to request leave."

Finally, the Union states that Proposal I "means that [bargaining unit employees] will have ready and easy access on the Department's internal system to regulations by which they are bound." The USCP's contention that the proposal does not correspond to any change in working conditions should be rejected by the Board because, the Union contends, "for the first time, bargaining unit employees are *expressly* responsible for following the Capitol Police Board Regulations." Since the proposal is merely an attempt to give employees access to the regulations by which they are bound through the USCP's internal computer system, the Union's position is that it is fully negotiable.

IV. Analysis and Conclusions

As the Board stated in its decision in 16-LM-03, also issued on this date, the Authority's negotiability regulations define two general types of disagreements that parties may have concerning the duty to bargain over a union proposal.[23] 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."[24] 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."[25] Moreover,

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[22] Here the Union relies upon *AFGE Local 12 and DOL,* 27 FLRA 363 (1987); *NTEU and Family Support Admin.,* 30 FLRA 677 (1987); and *AFGE Local 1184 and Social Security Administration,* 65 FLRA 836 (2011) to support its view.

[23] 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).

[24] 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.*

[25] 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);

under § 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, that dispute may not be resolved in a negotiability proceeding.[26]

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 D, E, G, H, and I as follows:

Turning first to Proposal D, the USCP argues, among other things, that the proposal is covered by Section 19.03.3 of the parties' CBA (*see* footnote 3). We adopt the 2-prong test for determining whether a contract provision precludes further bargaining because it covers a matter in dispute established by the Authority in *HHS, SSA, Baltimore, MD and AFGE, National Council of SSA Field Office Locals, Council 220*, 47 FLRA 1004 (1993) (*SSA*). Thus, we first determine whether the matter is expressly contained in the CBA.[27] In this examination, we do 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. Applying the first prong of the "covered-by" test in the circumstances of this case, we conclude that the matter in dispute in Proposal D, *i.e.*, whether termination should be removed from the draft Directive as potential discipline for excessive use of unscheduled leave, is expressly covered by the parties' CBA. In this regard, Section 19.03.3 provides, among other things, that failure to furnish medical certification or other administratively acceptable evidence for all unscheduled absences from

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> (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(c).

[26] *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 (September 28, 2016) (*Passport Services*), citing 5 C.F.R. § 2424.2(c), § 2424.30(b)(2), and § 2424.2(d), respectively.

[27] As the Authority stated in *SSA* when it adopted the covered-by doctrine for resolving federal sector bargaining obligation disputes, its underling goal was to:

> [B]e sensitive both to the policies embodied in the [FSLMRS] favoring the resolution of disputes through bargaining and to the disruption that can result from endless negotiations over the same general subject matter. Thus, the stability and repose that we seek must provide a respite from unwanted change to both parties: upon execution of an agreement, an agency should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining; similarly, a union should be secure in the knowledge that the agency may not rely on that agreement to unilaterally change terms and conditions that were in no manner the subject of bargaining.

work "*may be grounds for disciplinary action*." (Emphasis added.) Since termination is clearly a type of disciplinary action, the parties have already negotiated concerning this matter. Moreover, the Union has provided no evidence that the parties have agreed to bargaining ground rules where the USCP has waived its right to raise a "covered-by" argument. Consequently, the USCP has no duty to engage in mid-term bargaining over Proposal D.

As to Proposal E, in its response to the USCP's arguments, the Union contends that the wording in the draft Directive contradicts Section 19.02.2.C. of the parties' CBA, which states that "for periods of incapacitation of four (4) consecutive workdays or more, to include scheduled additional duty, a medical certificate will be required immediately upon returning to duty." It also affirms that "by the plain language" of Section 19.02.2.C. of the CBA "the parties have already reached agreement over this issue." Rather than establishing the negotiability of Proposal E, however, the Union misconstrues the outcome the "covered-by" doctrine requires in such circumstances. By its own admission, the matter addressed in the proposal is expressly covered by the parties' CBA. Consequently, we conclude that the USCP has no duty to bargain over Proposal E.[28]

Next we address the first sentence of Proposal G, which states that "employees will not be recalled during their unpaid meal periods absent extraordinary circumstances." The USCP argues that this wording excessively interferes with management's right to assign work, pursuant to 5 U.S.C. § 7106(a)(2)(B). While it concedes that the sentence interferes with the right to assign work, the Union contends that it constitutes a negotiable appropriate arrangement for employees adversely affected by that right. Assuming, for the purpose of this analysis, that the sentence constitutes an arrangement, we agree with the USCP that it is nonnegotiable because it excessively interferes with the right to assign work. Applying the Authority's excessive interference test, we conclude that, although the benefits afforded to employees under the proposed arrangement are considerable, they are outweighed by the burden on management's right to assign work. In our view, prohibiting management from calling employees back to work unless the circumstances are extraordinary very nearly negates that right.

With respect to the second sentence of Proposal G, which provides that "employees who are recalled during their unpaid meal periods will be compensated for the full duration of their unpaid meal periods, the parties dispute its meaning. According to the USCP, it would require the Department to compensate employees for the full length of their unpaid meal break**s** regardless of the amount of time they spend on assigned work tasks. The Union's only explanation of the meaning of the sentence is that, "if [employees] are required to perform work during their unpaid meal periods, they should be compensated." Where parties dispute the meaning of a proposal, and in accordance with Authority precedent, we look to the proposal's plain wording and any union statement of intent.[29] If the union's explanation is consistent with the proposal's plain wording, then we will adopt that explanation for the purpose

[28] The Union's admission does not mean that it is without recourse in such circumstances. If it believes that this section of the draft Directive is an attempt by the USCP to change mid-term the parties' current agreement in Section 19.02.2.C. it can file a grievance under the procedure negotiated in the CBA.

[29] *NAIL, Local 7*, 67 F.L.R.A. 654, 655 (2014) (citing *NAGE, Local R-109*, 66 F.L.R.A. 278, 278 (2011)).

of assessing the proposal's legality.[30]

In this case, we find that the Union's explanation of the meaning of the second sentence of Proposal G is inconsistent with its plain wording. While it is true that the wording would require employees to be compensated if they perform work during their unpaid meal periods, in agreement with the USCP, it goes beyond the Union's explanation by requiring such compensation for the full length of their unpaid meal break regardless of the amount of time spent on assigned tasks.[31] In addition, the Union has failed to substantiate its claim that the sentence "simply restates the USCP's obligations pursuant to the [FLSA] to compensate employees for work they perform." For these reasons, we conclude that the second sentence of Proposal G is outside the USCP's obligation to bargain. Because we have concluded that both sentences of the proposal are nonnegotiable, we shall dismiss the Union's petition/appeal as to Proposal G in its entirety.

Proposal H would change draft Directive 2053.004 by requiring a unit employee's Division Commander to approve leave requests in excess of 120 hours instead of the employee's Bureau Commander. In *Fort Carson*, however, the Authority reaffirmed that proposals that require the assignment of specific duties to identified individuals, including management officials, directly interfere with management's right to assign work under 5 U.S.C. § 7106(a)(2)(B).[32] Moreover, as confirmed by the Union's statement concerning the meaning of the proposal, it would not merely require the USCP to assign certain responsibilities to an individual of its choosing in the supervisory structure because the function described in the proposal is to be performed by the affected employee's Division Commander. Consequently, the effect of Proposal H is to assign a specific function to a particular management official. Accordingly, the proposal directly interferes with management's right to assign work.[33] Although the Union claims that its proposal "is simply an attempt to develop a procedure for employees to request leave" under 5 U.S.C. § 7106(b)(2), it presents no argument or authority to support that claim. In our view, because the Union's argument is conclusory or cursory it need

[30] *Id.*

[31] Moreover, it is well-established that, with some exceptions that do not apply here, under federal law employees may only be compensated for work that they actually perform. In addition, the Authority has found that management's right to assign work, under 5 U.S.C. § 7106(a)(2)(B), includes the right not to assign work. *See, e.g.*, *NAGE Local R12-33 and Navy, Pacific Missile Test Center, Point Mugu, CA*, 40 F.L.R.A. 479 (1991). Again, by its plain terms, the second sentence of Proposal G would require the USCP to compensate employees for the full duration of their unpaid meal periods even if management has decided not to assign work during some portions of that unpaid period.

[32] *See also National Treasury Employees Union and U.S. Department of the Treasury, Customs Service, Washington, D.C.*, 46 F.L.R.A. 696, 763 (1992).

[33] *See, e.g., National Treasury Employees Union and Department of Agriculture, Food and Nutrition Service*, 35 F.L.R.A. 254, 260-61 (1990).

not be considered by the Board.[34] For these reasons, we conclude that Proposal H is outside the USCP's duty to bargain.

Because we have found that: (1) Proposals D and E are expressly covered by the parties' CBA; (2) the first sentence of Proposal G excessively interferes with management's right to assign work and the Union's explanation of the meaning of the second sentence of Proposal G is inconsistent with its plain wording; and (3) Proposal H directly interferes with management's right to assign work and the Union's argument that the proposal constitutes a procedure is conclusory, it is unnecessary to address any of the parties' other bargaining obligation and negotiability disputes concerning the USCP's duty to bargain over these proposals.

Finally, the USCP's only argument concerning Proposal I is that the Union has not established that there is a change in conditions of employment over whether unit employees should have electronic access to "[CPB] Regulations Prescribing a Unified Leave System for Employees of the United States Capitol Police," as those regulations have remained unchanged since October 1997. According to the Union, the contention should be rejected because, under the draft Directive, unit employees for the first time are expressly responsible for following the CPB Regulations. In this regard, 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.[35] In our view, Proposal I is reasonably related to the change initiated by the USCP when it issued draft Directive 2053.004. Accordingly, we find it is within the USCP's duty to bargain.

I. ORDER

The Union's petition for review/appeal concerning Proposals D, E, G, and H is hereby dismissed. The USCP shall, upon request, or as otherwise agreed to by the parties, bargain over Proposal I.[36]

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

[34] *Architect of the Capitol v. Ihoha*, 2014 WL 3887569, 12-AC-30, 13-AC-03 (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*).

[35] *E.g.*, *POPA*, 66 FLRA 247, 253 (2011).

[36] In finding Proposal I to be negotiable, we make no judgment as to its merits.