

71 FLRA No. 133

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE
(Agency)

0-NG-3411

DECISION AND ORDER
ON NEGOTIABILITY ISSUE

April 21, 2020

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting in part)

I. Statement of the Case

In this case, we consider the negotiability of a proposal that would allow eligible bargaining-unit employees to report to the office as little as once per week and telework up to eight days per pay period. The issues before us are whether the Telework Enhancement Act of 2010 (Act)¹ vests the Agency with sole and exclusive discretion to establish telework frequency and whether the proposal is contrary to management's rights to assign work and direct employees.² The Agency argues that the right to establish the frequency of telework—or in other words, the right to establish the “when” work will be performed at the duty station—is an inherent management right.³

We find that the proposal affects management's rights to assign work and direct employees. Because the Union has not established that the proposal falls within an exception under § 7106(b) of the Federal Service Labor-Management Relations Statute (the Statute),⁴ we find that the proposal is outside the duty to bargain.

¹ The Telework Enhancement Act of 2010, 5 U.S.C. §§ 6501-6506 (2010).

² Agency Statement of Position (Statement) Br. at 11.

³ *Id.* at 13-14; Agency Reply at 2.

⁴ 5 U.S.C. § 7106(b).

II. Background

During term bargaining, the parties exchanged several proposals regarding Article 20 of the parties' current collective-bargaining agreement. That article, as relevant here, allowed certain employees to telework up to six days per pay period. The Agency proposed to retain a section of Article 20 that requires employees who telework to report to the office a minimum of two workdays per week. The Union proposed to “expand” Article 20 to allow employees to report to the office as little as once per week, and under specified circumstances, to telework up to eight days per pay period.⁵

The Union requested a written declaration of nonnegotiability from the Agency over that proposal, and, when the Agency did not respond, the Union filed a negotiability appeal (petition) with the Authority under § 7105(a)(2)(E) of the Statute.⁶

The Agency subsequently filed a statement of position (statement), and the Union filed a response to the statement (response). Thereafter, an Authority representative conducted a post-petition conference with the parties pursuant to § 2424.23 of the Authority's Regulations,⁷ and the Agency filed a reply to the response (reply).

III. The Proposal**A. Wording⁸**

(2) Employees must be in the office a minimum of one (1) workday each week and a minimum of eight (8) hours each work day, taking into consideration telework and alternative schedule arrangements. In order to telework more than six (6) days per pay period (i.e., expanded), an employee must proceed as follows:

(a) Regular Telework: Employees who telework six (6) days or fewer per pay period must be in the office a

⁵ Pet. at 4.

⁶ 5 U.S.C. § 7105(a)(2)(E).

⁷ 5 C.F.R. § 2424.23.

⁸ At the post-petition conference, the Union clarified that the proposal's wording includes the word “pay” in subsection (b), to read, in relevant part, as: “seven (7) to eight (8) days per pay period.” Post-Pet. Conference Record (Record) at 1-2 (emphasis added). In the absence of any objection from the Agency, we consider the proposal clarified. *E.g.*, *AFGE, AFL-CIO, Local 2361*, 57 FLRA 766, 766 n.3 (2002) (citing *Ass'n of Civilian Technicians, Heartland Chapter*, 56 FLRA 236, 236 n.1 (2000)).

minimum of two (2) workdays each week and a minimum of eight (8) hours each work day, taking into consideration telework and alternative schedule arrangements. The eligibility requirements for regular telework are contained in Sections 20.02 and 20.03 above.

- (b) Expanded Telework: Eligibility for expanded telework (i.e., seven (7) to eight (8) days per pay period or the equivalent for an alternate work schedule) will be based on the employee meeting the following criteria: (i) The employee has teleworked at least six (6) days per pay period (or the equivalent for an alternate work schedule) for a year; and (ii) The employee has not had any performance (i.e., a performance improvement plan) or disciplinary issues over the same period;⁹
- (d) Employee requests for expanded telework will not be unreasonably denied.

B. Meaning

At the post-petition conference, the Union explained that the proposal would allow eligible employees to telework seven or eight days per pay period.¹⁰ The Union further explained that the proposal affords the Agency the discretion to deny an employee's telework request consistent with the parties' agreement.¹¹ The Agency agreed with the Union's explanation of the meaning and operation of the proposal.¹²

C. Analysis and Conclusion

- a. The Act does not give the Agency sole and exclusive discretion.

The Agency argues that the proposal is nonnegotiable because the Act gives the head of the Agency, the Secretary of Agriculture, sole and exclusive discretion to determine the telework policy of the Agency.¹³ Specifically, the Agency argues that the plain language of § 6502(a)(1)(A)¹⁴ and the legislative history of the Act demonstrate that Congress intended to give the Secretary of Agriculture unfettered discretion to set the Agency's telework policy.¹⁵

⁹ The proposal before the Authority does not include a subsection (c) because the Union withdrew it before filing the petition. Resp. at 2 n.4.

¹⁰ Record at 2.

¹¹ *Id.* The dissent reads the proposal as though it merely sets forth minimum requirements for telework, while allowing supervisors unlimited discretion to deny telework requests from eligible employees. Dissent at 11. But that reading cannot be squared with the proposal's plain wording, which creates a presumptive entitlement to 80% telework for employees who have teleworked at least six days per pay period the previous year and have "not had any performance (i.e., a performance improvement plan) or disciplinary issues over the same period." Pet. at 4. The proposal creates a strong presumption that all such requests will be granted by mandating that telework requests from eligible employees will not be "unreasonably denied." *Id.* In practice, this means that any manager who denies 80% telework to an eligible employee can expect to face a grievance alleging that the denial was unreasonable.

¹² Record at 2.

¹³ Statement Br. at 11, 21-25.

¹⁴ 5 U.S.C. § 6502(a)(1)(A) ("[T]he head of each executive agency shall—establish a policy under which eligible employees of the agency may be authorized to telework.")

¹⁵ Statement Br. at 21-22, 24-25; Statement, Attach. 13, H.R. 1722, 111th Cong. (2009); Statement, Attach. 14, Pub. L. No. 111-292; Statement, Attach. 15, Senate Report for S.707, S. Rep. No. 111-177 (2010).

In analyzing claims of sole and exclusive discretion, the Authority looks at the plain wording and the legislative history of the statute in question.¹⁶ While unfettered discretion is typically indicated by such phrases as “notwithstanding any law” or “without regard to the provisions of other laws,” such a signal is not required and the entire wording of the legislation must be considered.¹⁷ In the absence of any indication that Congress intended the agency’s discretion to be sole and exclusive, the exercise of discretion through collective bargaining is consistent with law.¹⁸

In a recent, instructive case, *Luke Air Force Base*, the U.S. Court of Appeals for the District of Columbia Circuit found the Secretary of Defense had sole and exclusive discretion over access to commissaries and exchanges because the language of the section governing commissaries and exchanges was almost identical to the language in the section that authorized Branch Secretaries to “‘prescribe regulations to carry out [their] functions, powers, and duties under this title,’ *subject only to* ‘the authority, direction, and control of the Secretary of Defense.’”¹⁹

¹⁶ *NAGE, Local R5-136*, 56 FLRA 346, 348 (2000); *see also Ill. Nat’l Guard v. FLRA*, 854 F.2d 1396, 1402 (D.C. Cir. 1988) (where the governing statute provided that the agency head was required to grant compensatory time for overtime work instead of paying overtime pay and prescribe duty hours for employees “notwithstanding any other provision of law,” court found that agency head had sole and exclusive discretion); *Ass’n of Civilian Technicians, Mile High Chapter*, 53 FLRA 1408, 1412 (1998) (finding that even though the plain language did not indicate sole and exclusive discretion, the legislative history could demonstrate that Congress intended the agency to possess sole and exclusive discretion).

¹⁷ *U.S. Dep’t of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957, 961-63 (D.C. Cir. 2016) (*Luke Air Force Base*) (finding that Congress is not required to use a specific phrase to grant an agency unfettered discretion).

¹⁸ *POPA*, 53 FLRA 625, 648 (1997) (Absent an indication in the statutory language or the legislative history that the agency’s discretion is sole and exclusive, the exercise of that discretion is subject to bargaining.); *IAMAW, Franklin Lodge No. 2135*, 50 FLRA 677, 692 (1995); *NAGE*, 43 FLRA 1008, 1009-10 (1992) (finding that the proposal was negotiable because there was no indication in the language of the statute or the legislative history that the agency had unfettered discretion); *see also U.S. Dep’t of Energy, W. Area Power Admin.*, 71 FLRA 111, 111-12 (2019) (Member DuBester dissenting) (“If a law indicates that an agency’s discretion over a matter is ‘sole and exclusive’ . . . then the agency is not obligated under the Statute to exercise that discretion through collective bargaining.”) (citations omitted); *U.S. DHS, U.S. ICE*, 67 FLRA 501, 502 (2014) (Member Pizzella dissenting) (stating that “[m]atters concerning conditions of employment over which an agency has discretion are negotiable if the agency’s discretion is not sole and exclusive”).

¹⁹ *Luke Air Force Base*, 844 F.3d at 961 (emphasis added).

Here, however, the plain wording of the Act does not support a conclusion that the Agency has sole and exclusive discretion.²⁰ Congress clearly delegated to each Agency head the role of determining telework policy; however, we could not find—nor did the Agency identify—a particular word or phrase that evoked unfettered discretion. As an administrative agency, we must presume that when Congress legislates, it does so in full knowledge of the laws already enacted,²¹ which would include the Statute and the Civil Service Reform Act.²² Congress had the opportunity to revisit the Authority’s history of finding various aspects of telework negotiable, but it does not appear that it did so.

²⁰ Compare 5 U.S.C. § 6502(a)(1) (“the head of each executive agency shall—establish a policy under which eligible employees of the agency may be authorized to telework; determine the eligibility for all employees of the agency to participate in telework; and notify all employees of the agency of their eligibility to telework.”), with *AFGE, Local 3295*, 47 FLRA 884, 894-96 (1993) (finding sole and exclusive discretion where the legislation stated: “The Director shall fix the compensation and number of, and appoint and direct, all employees of the [agency] notwithstanding section 301(f)(1) of Title 31. Such compensation shall be paid *without regard to the provisions of other laws applicable to officers or employees of the United States.*”) (emphasis added), and *U.S. DHS, Border & Transp. Sec. Directorate, Transp. Sec. Admin.*, 59 FLRA 423, 423-24, 428 (2003) (finding sole and exclusive discretion where the legislation stated: “*Notwithstanding any other provision of law*, the [head of the Agency] may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service . . . as [he or she] *determines to be necessary* to carry out . . . section 44901 of title 49, [U.S.C.]”) (emphasis added).

²¹ *Orton Motor, Inc. v. U.S. Dep’t of HHS*, 884 F.3d 1205, 1214 (D.C. Cir. 2018) (citing *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988)) (stating that “[c]ourts presume that Congress legislates against the backdrop of existing statutes”); *see also U.S. v. Langley*, 62 F.3d 602, 605 (4th Cir. 1995) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267-68 (1992); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979)).

²² Civil Service Reform Act of 1978, Pub. L. No. 95-494, 92 Stat. 1111.

Furthermore, despite the Agency's arguments and comparisons of legislative reports,²³ we do not find the legislative history of the Act to indicate that Congress intended to provide the Agency with sole and exclusive discretion.²⁴ Unlike *NTEU*, where the Authority found the agency had sole and exclusive authority to set the pay of employees because the House Report emphasized that "all personnel-related matters including determinations regarding pay are within the 'exclusive authority of the [Agency] to determine,'"²⁵ here, there is no such indication by Congress.²⁶ Therefore, we find that the Act does not provide sole and exclusive discretion.²⁷

- b. The proposal affects the management rights to assign work and direct employees under § 7106(a)(2)(B) and § 7106(a)(2)(A), respectively.

The Agency argues that the proposal affects management's right to assign work under § 7106(a)(2)(B) of the Statute because management's right to assign work should include the right to tell employees the physical location at which they will perform work.²⁸ In other words, the Agency argues that this proposal affects an inherent management right to tell an employee *when* that employee must report to the duty station.²⁹ While the proposal at issue would establish an elaborate framework

to allow for telework nearly eight days a pay period, the proposal begins by establishing that an employee is only obligated to be at the duty station one day per week; the Agency's management rights arguments focus on this frequency.³⁰

The Authority has held previously that the right to assign work includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.³¹ Upon review of our prior caselaw and the arguments presented here, we determine that the frequency of telework—the "when" an eligible employee may perform his or her duties away from the duty station and "when" that eligible employee must report to the duty station—is inherent to management's right to assign work.

²³ Statement Br. at 21-22 (arguing that the removal of the phrase "an agency shall not be considered to be in compliance with the requirements of this chapter unless the employees of such agency . . . were permitted to telework for at least 20 percent of the hours that they worked in every 2 administrative workweeks from the final version of the legislation signaled that Congress intended to grant agency heads "unlimited authority to allow as much or as little telework as they want within their own agencies"); *id.* at 24-25 (arguing that the Senate Report for S.707—a previous version of the Act—supported the conclusion that Congress intended the agency head to have sole and exclusive discretion because the report provides that the Telework Enhancement Act of 2010 would "leav[e] each agency ample discretion to tailor and implement the policy in a way that best serves its own particular circumstances").

²⁴ See generally 156 Cong. Rec. H7560-01 (November 18, 2010); S. Rep. No. 111-177 (May 2010); 156 Cong. Rec. H5577-02 (July 14, 2010); H.R. Rep. No. 111-474 (May 2010).

²⁵ 59 FLRA 815, 817-18 (2004) (Member Pope dissenting).

²⁶ See generally 156 Cong. Rec. H7560-01 (November 18, 2010); S. Rep. No. 111-177 (May 2010); 156 Cong. Rec. H5577-02 (July 14, 2010); H.R. Rep. No. 111-474 (May 2010).

²⁷ We also note that OPM guidance provides that "Federal agencies will ensure that appropriate collective[-]bargaining obligations are satisfied with employee representatives on agency telework policies." OPM, *Guide to Telework in the Federal Government* 7 (2011).

²⁸ Statement Br. at 11, 17.

²⁹ Reply at 2.

³⁰ *Id.*

³¹ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 443 (2018) (Member DuBester concurring) (citing *U.S. EPA*, 65 FLRA 113, 115 (2010)); *NFFE, IAMAW, Fed. Dist. 1, Fed. Local 1998*, 69 FLRA 586, 591-92 (2016) (Member Pizzella concurring in part, dissenting in part) (finding a proposal—the [employee] may contact local management at any time regarding questionable emergency-passport requests—affected management's right to assign work, specifically, management's right to determine when work would be completed); *Int'l Ass'n of Fire Fighters*, 59 FLRA 832, 833-34 (2004) (*Fire Fighters*); *Prof'l Airways Sys. Specialists*, 59 FLRA 485, 487-88 (2003) (*Airways*).

In *International Ass'n of Fire Fighters*, the Authority held that a proposal dictating the work schedules of three employees was nonnegotiable because it affected management's right to assign work, specifically, management's right to determine when work would be performed.³² The Authority also found nonnegotiable a proposal allowing employees to complete work at home because it affected management's right to determine when work would be completed.³³ Therefore, the right to assign work must also include the right to determine "when" an employee is required to report to the duty station to fulfill his or her duties, here, the frequency of telework.³⁴ And, a proposal that dictates to management how often the Agency can require an employee to perform work at the duty station impermissibly affects management's right to assign work. Because this proposal establishes that a telework-eligible employee could report to the duty station as little as one day per week, the proposal affects management's right to assign work. We will no longer follow cases holding otherwise.³⁵

As noted above, the Agency also argues that the proposal affects management's right to direct employees under § 7106(a)(2)(A).³⁶ The Authority has not previously addressed whether a proposal concerning the frequency of telework affects the right to direct employees under § 7106(a)(2)(A). But the Authority has long held that this right includes the right to "supervise and guide [employees] in the performance" of

their job duties,³⁷ and proposals that preclude management from using a particular method of supervising employees' work performance affect management's right to direct employees.³⁸

Here, the proposal imposes substantive restraints on management's "right to determine the methods used to evaluate and supervise its employees."³⁹ By allowing eligible employees to spend up to 80% of each pay period outside of the office, the proposal effectively (1) *requires* management to employ computer- and telephone-based supervision techniques and, correspondingly, (2) *precludes* management from regularly using in-person methods of supervision, such as unannounced visits or spot checks. As a result, the proposal interferes with the Agency's right to choose the method that it deems "most appropriate" for supervising employee performance.⁴⁰ Management has the right to provide its supervisors with in-person access to employees for the purpose of directing, monitoring, and evaluating their work. Accordingly, consistent with Authority precedent, we find that this proposal affects the right to direct employees under § 7106(a)(2)(A).⁴¹

Again, to demonstrate that a proposal is contrary to § 7106, the agency must establish that the proposal affects a management right.⁴² When the agency does so, then the Authority will examine any union arguments that the proposal falls within an exception set forth in § 7106(b).⁴³ Therefore, we now consider whether the Union has argued that the proposal falls within an exception in § 7106(b).⁴⁴

³² *Fire Fighters*, 59 FLRA at 833-34.

³³ *Airways*, 59 FLRA at 487-88 (finding a proposal that would allow employees to take work home to complete was nonnegotiable because it affected management's right to determine when work would be completed).

³⁴ Member Abbott notes that the 2010 Act plainly requires that an agency's telework policy "shall ensure that telework does not diminish employee performance or agency operations." 5 U.S.C. § 6502(b)(1). This language inherently requires an agency to have control over when an employee must be at his or her duty station to ensure that agency operations are not diminished. Member Abbott also notes that the record contains a message from the Agency head discussing an amended telework policy. See Statement, Attach. 11, email dated January 4, 2018, at 2 ("[a]mend our telework policy to one that works for the American taxpayer and for our colleagues who come to the office each day.").

³⁵ *U.S. HHS, Ctrs. for Medicare & Medicaid Servs., Balt., Md.*, 57 FLRA 704, 707 (2002) (finding an award—based on a violation of the parties' agreement—requiring the agency to allow the grievant to telework two days per week was not contrary to management's right to assign work); see also *U.S. Food & Drug Admin., Detroit Dist.*, 59 FLRA 679, 682-83 (2004) (finding an award—based on a violation of the parties' agreement—allowing employees to telework nine out of ten days did not affect management's right to assign work).

³⁶ Statement Br. at 11. Member Abbott notes that the Agency did not extensively argue that the proposal affects management's right to direct employees.

³⁷ See, e.g., *AFGE, Local 1712*, 62 FLRA 15, 16 (2007) (*Local 1712*) (citing *POPA*, 41 FLRA 795, 834 (1991)).

³⁸ See, e.g., *id.* at 16-17; *NAGE, Local RI-203*, 55 FLRA 1081, 1085 (1999) (*NAGE*).

³⁹ See *Local 1712*, 62 FLRA at 17.

⁴⁰ *NFFE, Local 1263*, 29 FLRA 61, 63 (1987) (the right to direct employees includes the right to audit employees' work "by the methods [that] management deems most appropriate").

⁴¹ See *Local 1712*, 62 FLRA at 17 ("[P]roposals that, in effect, preclude management from auditing employees' work by the use of unannounced[, and in-person,] visits and spot checking of employees' work directly affect management's rights to direct employees"); see also *NAGE*, 55 FLRA at 1085 ("Proposals that preclude management from using a particular method of monitoring employees' work performance affect management's right to direct employees . . . under section 7106(a)(2)(A) . . .").

⁴² *NTEU*, 70 FLRA 101, 101 (2016) (*NTEU*) (citing *AFGE, Local 2058*, 68 FLRA 676, 677 (2015) (*Local 2058*)); see also *AFGE, Local 1547*, 70 FLRA 303, 304-05 (2017) (Member DuBester concurring).

⁴³ *NTEU*, 70 FLRA at 101 (citing *Local 2058*, 68 FLRA at 677; *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 931-32 (2012)).

⁴⁴ See *id.* at 103.

Under § 2424.25(c)(1) of the Authority's Regulations, a union "must" set forth its arguments and supporting authorities for any assertion that its proposal constitutes an exception to a management right, including "[w]hether and why the proposal" constitutes a negotiable procedure, under § 7106(b)(2), or an appropriate arrangement, under § 7106(b)(3).⁴⁵ Here, the Union states that "[w]here a case includes an issue concerning whether there is an impermissible effect on a management right under § 7106(a), the Authority may consider whether the contract provision or proposal at issue falls within an exception to management's rights negotiated under § 7106(b)."⁴⁶ While the Union asserts *generally* that the Authority may consider § 7106(b), it does not *specifically* argue, with supporting authorities, that its proposal constitutes a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3). Accordingly, we find that the Union fails to state whether and why the proposal constitutes an exception to management's rights under § 7106(b), as required by § 2424.25.⁴⁷

As the proposal affects management's rights to assign work and direct employees, and the Union does not establish that the proposal is otherwise negotiable, we conclude that the proposal is outside the duty to bargain.⁴⁸

Thus, we dismiss the Union's petition.⁴⁹

IV. Order

We dismiss the Union's petition.

⁴⁵ 5 C.F.R. § 2424.25(c)(1)(ii)-(iii).

⁴⁶ Resp. at 12.

⁴⁷ See *AFGE, Local 997*, 66 FLRA 499, 500-01 (2012) (*Local 997*) (where the union did not "specifically argue" that its proposal fell within an exception to management's rights, the Authority found that the union "fail[ed] to state whether and why the proposal enforces an applicable law, as required by § 2424.25"); see also *Local 2058*, 68 FLRA at 683 (Authority does not consider whether a proposal that affects a management right constitutes an exception to management's rights under § 7106(b) if the union does not make that argument); *NTEU*, 66 FLRA 584, 585-86 (2012) (*NTEU I*) (same); *AFGE, Local 2145*, 64 FLRA 231, 234 (2009) (same).

⁴⁸ See *NTEU I*, 66 FLRA at 585-86 (finding a proposal outside the duty to bargain where the proposal affected a management right and the union failed to assert that the proposal was either a procedure or an appropriate arrangement under § 7106(b)); see also *Local 997*, 66 FLRA at 501 (finding a proposal that affected management's right to discipline outside the duty to bargain where the union did not argue that the proposal fell within an exception to management's rights under § 7106(b)).

⁴⁹ Because we set aside a portion of the award on contrary-to-law grounds, we do not reach the Agency's remaining arguments pertaining to that portion of the award. *NFFE, Local 1450, IAMAW*, 70 FLRA 975, 977 (2018) (finding it unnecessary to address the remaining arguments when an award has been set aside); Statement Br. at 12-13 (arguing that the proposal is contrary to agency-wide regulation); *id.* at 15-16 (arguing the proposal is contrary to management's rights to determine its organization or mission under § 7106(a)(1) of the Statute).

Member DuBester, dissenting in part:

I agree that the Telework Enhancement Act of 2010 does not vest the Agency with sole and exclusive discretion to determine its telework policy. But contrary to the majority, I would conclude that the proposal does not affect management's right to assign work and direct employees under § 7016(a)(2) of the Federal Service Labor-Management Relations Statute (the Statute).¹ I would therefore find that the proposal is negotiable.

The majority's conclusion on this point is flawed on several levels. It fundamentally misinterprets the Union's proposal. It relies upon an argument that was never raised by the Agency. And, in concluding that the Union's proposal affects the Agency's right to assign work and direct employees, it discards governing Authority precedent in favor of decisions that have little relevance to the proposal. Accordingly, I dissent.

The majority concludes that the Union's proposal affects the Agency's right to assign work because it "establish[es] that an employee is only obligated to be at the duty station one day per week."² This is simply not true.

Instead, the proposal merely seeks to expand the number of days that *otherwise eligible* employees may be allowed to telework under Article 20 of the parties' bargaining agreement. Specifically, the proposal would allow employees who have teleworked for at least six days per pay period for a year – and who have not had any performance or disciplinary issues over the same period – to apply for an additional one or two days of telework during the pay period.

During the parties' post-petition conference, the Union explained that the proposal would "operate in conjunction with the criteria set out in subsection 20.02 [of the parties' agreement] – Eligibility for Telework, [subsection] 20.03 [of the parties' agreement] – Requests for Telework, and [subsection] 20.06(1) [of the parties' agreement] – Other Considerations for Approval of Telework Request."³ These provisions set forth additional criteria by which the Agency may deny telework requests based upon its operational needs.

For instance, subsection 20.02 establishes the standards by which the Agency can determine whether an employee's position is eligible for telework, including whether the position's duties "require the employee's physical presence to perform particular tasks that can

only be performed at the worksite on a daily basis."⁴ This subsection also sets forth numerous eligibility requirements specific to the requesting employee's performance and disciplinary record.⁵

Subsection 20.03(2), in turn, establishes criteria by which a supervisor "may approve an eligible employee's request for telework," including whether the employee possesses sufficient experience in his or her current job and the ability to perform successfully in a telework arrangement.⁶ The supervisor must also assess whether the employee has "defined work that can be measured or otherwise evaluated in terms of timeliness, quality and/or quantity."⁷

More importantly, subsection 20.06(1) clarifies that the "approval or disapproval of an employee's request for telework will be based upon whether the approval of the telework request will interfere with the [Agency's] ability to accomplish its work."⁸ And subsection 20.06(3) makes it clear that, "once a telework request is approved, the [Agency] reserves the right to make changes in an employee's telework schedule, if it is determined that a change in an employee's telework schedule is necessary for the [Agency] to accomplish its work."⁹

The Union's brief reiterates that its proposal is intended to create a "progression framework under which employees may become *eligible* to telework" additional days,¹⁰ and that it would preserve the Agency's ability to determine that an employee is ineligible for telework based on the "litany of criteria" set forth in Article 20 of the parties' agreement.¹¹ And as the majority notes, the Agency agreed with the Union's explanation that the proposal "affords the Agency the discretion to deny an employee's telework request consistent with the parties' agreement."¹²

Indeed, the Agency could not have been clearer on this point in its SOP. Citing Article 20, it specifically rebutted any notion that, under the parties' existing bargaining agreement, bargaining unit employees "are routinely and automatically permitted to telework six out of ten days in each pay period," and explained that employees are currently allowed to telework to this extent

¹ 5 U.S.C. § 7106(a)(2).

² Majority at 6.

³ Record at 2.

⁴ Agency's Statement of Position (SOP), Attach. 1, Collective-Bargaining Agreement (CBA) at 71.

⁵ *Id.* at 71-72.

⁶ *Id.* at 72.

⁷ *Id.*

⁸ *Id.* at 74.

⁹ *Id.*

¹⁰ Union's Resp. to the SOP at 2 (emphasis added).

¹¹ *Id.* at 3.

¹² Majority at 3.

“only under ideal circumstances where the relevant supervisor determines that telework will not interfere with the accomplishment of work.”¹³

This understanding of the Union’s proposal is important because the Authority has previously found that a proposal merely establishing eligibility requirements for telework does not affect management’s rights to “assign and direct employees.”¹⁴ The Authority has also consistently held that awards enforcing telework agreements, where an agency fails to show a relationship between the job location and the job duties, do not affect management’s right to assign work.¹⁵ Applying this precedent, I would find that the proposal has no effect on management’s right to assign work or direct employees, and that it is therefore unnecessary to determine whether the proposal falls within an exception to § 7106(b) of the Statute.¹⁶

¹³ SOP Br. at 5-6. The majority’s assertion that the proposal “creates a strong presumption that all [requests for expanded telework] will be granted” is oddly inconsistent with the Agency’s characterization of the proposal. Majority at 3 n.11. More puzzling is the majority’s observation that “[i]n practice . . . any manager who denies [a request for expanded telework] can expect to face a grievance alleging that the denial was unreasonable.” *Id.* While the majority has not explained the relevance of this observation to its decision to dismiss the Union’s petition, it certainly bears no relation to the negotiability of the Union’s proposal. Indeed, if the mere ability of a union to grieve management’s violation of a contract provision weighed against its negotiability, it is hard to imagine a proposal that would survive such a standard.

¹⁴ *NAGE, Local R1-144, Fed. Union of Scientists & Eng’rs*, 65 FLRA 552, 554 (2011) (proposal concerning union officials’ eligibility to telework up to twenty hours per week does not affect management rights because it “does not require the Agency to allow Union officials to telework”).

¹⁵ See, e.g., *U.S. Food & Drug Admin., Detroit Dist.*, 59 FLRA 679, 683 (2004) (*FDA*) (concluding that award ordering agency to reinstate employees’ telework agreements did not affect the agency’s right to assign work where nothing in the award “would preclude the [a]gency from assigning an employee duties that could only be performed in the office setting and modifying a flexiplace agreement accordingly”); *U.S. Dep’t of HHS, Ctrs. For Medicare & Medicaid Servs., Balt., Md.*, 57 FLRA 704, 707 (2002) (*HHS*) (concluding that award requiring agency to allow the grievant to telework two days per week does not affect the agency’s right to assign work because the award “concerns the location where work that has previously been assigned . . . will be performed” and “does not concern the assignment of those duties to the grievant” or “preclude management from exercising its right to determine how many work hours the grievant needs to spend” on assigned duties).

¹⁶ 5 U.S.C. § 7106(b).

The majority is undeterred by our long-standing precedent.¹⁷ Instead, it labors to devise two novel bases for dismissing the Union’s petition. Neither withstands scrutiny.

First, the majority concludes that the proposal affects the Agency’s right to assign work because it affects “‘when’ an eligible employee may perform his or her duties away from the duty station and ‘when’ that eligible employee must report to the duty station.”¹⁸ But the cases cited by the majority¹⁹ to support this conclusion bear no relevance to the proposal before us.

Specifically, in *NFFE, IAMAW, Federal District 1, Federal Local 1998*,¹⁸ the proposal at issue was found to affect the Agency’s right to assign work because it “permits employees to unilaterally decide whether to delay the performance of their assignments.”¹⁹ Similarly, the proposal at issue in *International Association of Fire Fighters*²⁰ was found to affect the right to assign work because it affected the agency’s “determination of . . . employees’ daily starting and quitting times” and “when during the day assigned work will be performed.”²¹ And in *Professional Airways Systems Specialists*,²² the proposal at issue would permit employees who failed to complete their assigned tasks during the workday to “take their work assignments home to complete them during evening hours or on weekends,” and thus would “determine when work assignments will occur, including when overtime will be performed.”²³ Finally, in *U.S. DOJ, Federal BOP, Federal Correctional Institution, Big Spring, Texas*,²⁴ the majority concluded that an award excessively interfered with the prison’s right to assign work and determine its internal security because it required the prison to “always staff the third floors of [its] housing units.”²⁵

The majority fails to establish the relevance of these decisions to the Union’s proposal, which – unlike the proposals and provisions addressed in the cited cases – does not affect the Agency’s ability to require employees to perform their work during assigned hours,

¹⁷ Majority at 7 & n.35 (concluding that it will “no longer follow” the Authority’s decisions in *HHS*, 57 FLRA 704 and *FDA*, 59 FLRA 679).

¹⁸ *Id.* at 6.

¹⁹ *Id.* at 6 n.31.

¹⁸ 69 FLRA 586 (2016) (Member Pizzella concurring in part, dissenting in part).

¹⁹ *Id.* at 592.

²⁰ 59 FLRA 832 (2004).

²¹ *Id.* at 833.

²² 59 FLRA 485 (2003).

²³ *Id.* at 487.

²⁴ 70 FLRA 442 (2018) (Member DuBester concurring).

²⁵ *Id.* at 444.

and certainly does not affect the Agency's right to decide whether to fill a particular position. Indeed, the Union's proposal preserves the Agency's ability under the parties' agreement to deny an employee's request for expanded telework – and to make changes to an employee's existing telework schedule – if, among other reasons, the employee's work cannot be performed at home or if denying the request is necessary for the Agency to accomplish its work.

The majority's conclusion that the proposal affects the Agency's right to direct employees under § 7106(a)(2)(A) is equally flawed. In its statement of position, the Agency never raised the arguments upon which the majority relies to find that the Union's proposal affects its right to direct employees.²⁶ Under the Authority's Regulations, an agency "has the burden of raising and supporting arguments that the proposal or provision is . . . contrary to law," and its "[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument."²⁷ Consistent with these provisions, I would find that the Agency has not demonstrated that the Union's proposal affects management's right to direct employees on this basis alone.²⁸

²⁶ The Agency's SOP contains only cursory references to the right to direct employees, and it provides no argument or explanation regarding how the Union's proposal would affect this right. SOP at 11, 12, 14.

²⁷ 5 C.F.R. § 2424.32(b)-(c); see also *id.* § 2424.24(c)(2) (an agency must "[s]et forth in full [its] position on any matters relevant to the petition that [it] want[s] the Authority to consider in reaching its decision"); *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 128 (2011) (rejecting argument that proposal affects management's right to determine internal security as a bare assertion) (citing *AFGE, Nat'l Council of Field Labor Locals, Local 2139*, 57 FLRA 292, 295 n.7 (2001) (Authority summarily dismissed "bare assertion" that proposal interfered with management's right to determine its mission because the agency made no arguments in support of the claim)); *AFGE, Local 1547*, 63 FLRA 174, 176 (2009) (rejecting argument that proposals affected management's right to determine internal security as bare assertion) (citations omitted); *NTEU*, 60 FLRA 367, 380 (2004) (Authority declined consideration of an argument where agency presented "no explanation of how [the proposal] would affect its right to assign work").

²⁸ The Agency's omission is particularly salient because the majority's dismissal of the Union's petition is based upon its finding that the *Union* failed to argue how its proposal constitutes an exception to management's rights. Majority at 8 ("While the Union asserts *generally* that the Authority may consider § 7106(b), it does not *specifically* argue, with supporting authorities, that its proposal constitutes a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3)."). We should hardly expect the Union to have addressed an argument that was never made by the Agency in its SOP.

Moreover, the proposals addressed by the decisions upon which the majority relies for its conclusion bear no resemblance to the Union's proposal. In *AFGE, Local 1712*,²⁹ the proposal would have required the agency to allow certain employees to work in an office "behind a closed and locked door during business hours."³⁰ The Authority found that the proposal would affect management's right to direct employees because it would, "prevent . . . for the most part, any supervisory oversight of the [employees] whatsoever."³¹ The proposal at issue in *NAGE, Local R1-203*³² would have precluded the agency from "monitoring the amount of time that employees spend using their computers for the purpose of evaluating their productivity."³³ And in *NFFE, Local 1263*,³⁴ the proposal at issue would have prohibited the agency from conducting unannounced audits to assess the performance of teachers in a classroom.³⁵

The majority concludes that the Union's proposal similarly infringes upon the Agency's right to direct employees because it "effectively . . . requires" management to remotely supervise its teleworking employees, thereby precluding it from using in-person supervisory methods such as spot checks.³⁶ But the Union's proposal does nothing of the sort.

Rather, the proposal simply defines the conditions under which the Agency may decide whether to allow employees who have already been deemed eligible for telework to increase the number of days on which they can telework. As noted, the proposal does not require the Agency to approve expanded telework for any employee who has had performance or disciplinary issues; who has not demonstrated "the ability to perform successfully in the telework arrangement;"³⁷ or whose work is not amenable to a telework arrangement. And more importantly, the proposal preserves the Agency's

²⁹ 62 FLRA 15 (2007).

³⁰ *Id.* at 15.

³¹ *Id.* at 17.

³² 55 FLRA 1081 (1999).

³³ *Id.* at 1085 (noting that "proposals that prohibit management from using information derived from its computer system to monitor employee production have been held to directly interfere with these rights") (citing *NFFE, Local 1482*, 44 FLRA 637, 665-70 (1992)).

³⁴ 29 FLRA 61 (1987).

³⁵ *Id.* at 64-65 (distinguishing the proposal from a prior proposal that had been found negotiable because the prior proposal, unlike the proposal at issue, "did not inhibit the [a]gency from employing more vigorous scrutiny of employees' work when closer review was warranted") (citing *AFGE, AFL-CIO, Gen. Comm. of AFGE for SSA Locals*, 23 FLRA 329 (1986) (Proposal 1)).

³⁶ Majority at 7 (emphasis omitted).

³⁷ CBA at 72 (citing § 20.03(2)(b)).

discretion to deny a request for expanded telework if approval of the request would interfere with the Agency's "ability to accomplish its work."³⁸ These same features dispel any suggestion by my colleague that the Union's proposal is inconsistent with the requirement in 5 U.S.C. § 6502(b)(1) "that an agency's telework policy 'shall ensure that telework does not diminish employee performance or agency operations.'"³⁹

In sum, the majority's decision mischaracterizes the meaning and effect of the Union's proposal. Moreover, it overturns Authority precedent governing the negotiability of telework agreements based upon decisions bearing little relevance to the Union's proposal, as well as argument that was never raised by the Agency. I therefore strongly disagree with its decision to dismiss the Union's petition.

³⁸ *Id.* at 74 (citing § 20.06(1)).

³⁹ Majority at 7 n.34 (quoting 5 U.S.C. § 6502(b)(1)).