

**72 FLRA No. 150**

NATIONAL TREASURY  
EMPLOYEES UNION  
(Union)

and

UNITED STATES  
DEPARTMENT OF HOMELAND SECURITY  
CUSTOMS AND BORDER PROTECTION  
(Agency)

0-NG-3528

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DECISION AND ORDER  
ON NEGOTIABILITY ISSUES

April 29, 2022

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

Decision by Member Abbott for the Authority

**I Statement of the Case**

This case arises from an Agency decision to reassign forty-seven bargaining-unit employees (BUEs) to different duty stations. The matter is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (Statute).<sup>1</sup> The petition for review (petition) involves two proposals.<sup>2</sup>

For the reasons that follow, we find that the two proposals are outside the duty to bargain. Accordingly, we dismiss the petition.

**II Background**

The Agency reassigned forty-seven BUEs to different duty stations as part of its decision to revamp the training model it uses. The Union requested to bargain over the reassignment of the BUEs.

The Union timely filed its petition concerning four proposals with the Authority on August 25, 2020,<sup>3</sup> serving it on both the Agency Head and the chief bargaining representative via certified mail. The Agency Head received the petition on September 1st.<sup>4</sup> The copy sent to the chief bargaining representative was not delivered due to an error in the mailing address. On September 8th, the chief bargaining representative asked the Union for a copy of the petition, and the Union provided a copy of the petition. On October 9th, the Agency Head forwarded the petition to the chief bargaining representative, and the chief bargaining representative filed the Agency's statement of position (statement) with the Authority.

On October 14th, the Agency filed a motion with the Authority requesting a waiver of the time limit for filing its statement. The Union filed an opposition to the Agency's request on October 30th.

Thereafter, an Authority representative conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority's Regulations,<sup>5</sup> at which the Union clarified the operation of Proposals 2 and 3.<sup>6</sup> Based on these clarifications, the Agency agreed that the proposals are negotiable.<sup>7</sup> The Union then requested to withdraw Proposals 2 and 3.<sup>8</sup> The Authority representative granted the requests, and the proposals were withdrawn without prejudice.<sup>9</sup>

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

<sup>2</sup> The parties refer to Proposal 1 as "Proposal 2" and Proposal 4 as "Proposal 8." Pet. at 3-4, 8.

<sup>3</sup> All dates occurred in 2020.

<sup>4</sup> Waiver Request at 2.

<sup>5</sup> 5 C.F.R. § 2424.23.

<sup>6</sup> PPC Record (Record) at 3-4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

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

The Union subsequently filed its timely response to the Agency's statement (response),<sup>10</sup> the Agency filed a timely reply to the response (reply),<sup>11</sup> and the Union filed a supplemental submission regarding the reply.<sup>12</sup>

### III. Preliminary Matters

- A. The Agency has failed to establish extraordinary circumstances to justify a waiver of the filing deadline for its untimely statement; therefore, we do not consider it.

Consistent with § 7117(c)(3) of the Statute,<sup>13</sup> § 2424.24(b) of the Authority's Regulations requires the Agency to file its statement within thirty days "after the date the *head of the agency* receives a copy of the petition."<sup>14</sup> Here, the Agency admits that the head of the agency received the petition on September 1st.<sup>15</sup> Therefore, the Agency's statement was due on October 1st.

The Agency argues that extraordinary circumstances exist warranting waiver of the time limit for filing its statement because it "has not received the [U]nion's service of the [petition], due to the [U]nion's failure to use the correct address."<sup>16</sup> The Agency also acknowledges that while the head of the agency "received timely service . . . their receipt of service was not made

known to or shared with [the chief bargaining representative] until October 9th."<sup>17</sup> As stated above, the filing deadline is determined by the date the *head of the agency* receives the copy of the petition. Furthermore, the Authority has held that internal agency error does not demonstrate extraordinary circumstances.<sup>18</sup> Similarly, extraordinary circumstances do not exist here simply because the head of the agency failed to expeditiously forward the petition to the chief bargaining representative. Accordingly, we find the statement untimely, and we do not consider it.<sup>19</sup>

- B. We dismiss those portions of the Agency's reply which are not properly before the Authority.

The Union argues that the Authority should not consider the Agency's reply because "it is outside the regulatory scope and all arguments raised in the reply should have been raised in [the Agency's] statement."<sup>20</sup> The Union is partially correct.

Section 2424.24(a) of the Authority's Regulations requires the Agency, in its *statement*, to "supply *all* arguments and authorities in support of its position."<sup>21</sup> As discussed above, we do not consider the Agency's untimely statement of position. However, the Authority has held that it will consider arguments raised in an allegation of nonnegotiability when an agency fails to timely file its statement.<sup>22</sup> In its allegation of nonnegotiability, the Agency asserted that Proposal 1 impermissibly infringes on management's right to determine its organization,<sup>23</sup> and that Proposal 4 impermissibly infringes on management's right to retain employees.<sup>24</sup> Thus, we consider those management rights arguments.

Furthermore, § 2424.26 of the Authority's Regulations provides that the Agency "is required in [its] reply to . . . provide the reasons why the proposal . . . does not fit within any exceptions to management rights that were asserted by the [union] in its response,"<sup>25</sup> but "must limit [its] reply to matters that the

<sup>10</sup> We note that the response is timely because the Authority granted the Union a two-week extension of time to file its response. *See* Record at 4.

<sup>11</sup> We note that the reply is timely because the Authority granted the Agency an extension of time to file its reply. *See* Order Granting Extension of Time at 1.

<sup>12</sup> The Union requests leave to file its supplemental submission in order to "address the Agency's improper responses included in [its] [r]eply." Union's Motion at 2. The Authority's Regulations do not provide for the filing of supplemental submissions, but § 2429.26(a) of the Authority's Regulations provides that the Authority may, in its discretion, "grant leave to file other documents" as it deems appropriate. 5 C.F.R. § 2429.6(a). Because the Union requested leave to file its supplemental submission, and the submission addresses issues the Union could not have raised in earlier filings, we grant leave and consider the Union's supplemental submission. *Cf. IFPTE, Loc. 4*, 70 FLRA 20, 21 (2016) ("Where a party seeks to raise issues that it could have addressed, or did address, in a previous submission, the Authority ordinarily denies requests to file supplemental submissions concerning those issues.").

<sup>13</sup> 5 U.S.C. § 7117(c)(3) ("On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition . . . , the agency shall . . . file with the Authority [its] statement . . . setting forth in full its reasons supporting [its] allegation [of nonnegotiability].").

<sup>14</sup> 5 C.F.R. § 2424.24(b) (emphasis added).

<sup>15</sup> Waiver Request at 2.

<sup>16</sup> *Id.*

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

<sup>18</sup> *See U.S. Dep't of VA, John J. Pershing VA Med. Ctr.*, 71 FLRA 426, 427 (2019) (then-Member DuBester concurring).

<sup>19</sup> Because the Agency's allegation of nonnegotiability is part of the record, and the response and reply are timely, we consider them. *AFGE, Loc. 997*, 66 FLRA 499, 500 (2012) (*Loc. 997*); *id.* at 500 n.1 (citing *Am. Fed'n of Tchrs., Indian Educators Fed'n, Loc. 4524*, 63 FLRA 585, 585 (2009)).

<sup>20</sup> Union's Supplemental Submission at 3-4.

<sup>21</sup> 5 C.F.R. § 2424.24(a) (emphasis added).

<sup>22</sup> *Loc. 997*, 66 FLRA at 499-500.

<sup>23</sup> *Pet., Attach. 1, Declaration of Nonnegotiability* at 2.

<sup>24</sup> *Id.* at 5.

<sup>25</sup> 5 C.F.R. § 2424.26(a).

[union] raised for the first time in its response.”<sup>26</sup> The Agency, for the first time in its reply, argues that the proposals are contrary to government-wide regulations.<sup>27</sup> Because the Agency did not raise these arguments in its allegation of nonnegotiability, and its statement is untimely, it cannot now raise them in its reply. However, the Union made new arguments in its response regarding why Proposals 1 and 4 are allegedly appropriate arrangements.<sup>28</sup> Thus, we do consider the Agency’s arguments that the proposals are not appropriate arrangements because the Authority’s regulations allow these arguments to be raised in the reply.<sup>29</sup>

Accordingly, we dismiss the Agency’s contrary-to-government-wide-regulation arguments, but consider the Agency’s arguments that the proposals impermissibly affect management rights and are not appropriate arrangements.

#### IV. Proposal 1

##### A. Wording of Proposal 1

Reassignment Without Relocation. To mitigate the adverse impact of relocating employees outside of their current commuting area, management agrees to reassign each position as identified in Appendix A but allow employees to remain at their current location to the greatest extent possible. To that extent, management has determined that: a. BPA Employees. There are currently ten (10) bargaining unit positions for BPA Employees, of which, four (4) are vacant. The ten (10) bargaining unit positions within BPA will be reassigned to Artesia, NM. The six (6) current BPA Employees

identified in Appendix A will have the option of relocating within the commuting distance of the BPA or may continue to work remotely from their current location. The remaining four (4) bargaining unit vacancies will be located at BPA and will support on-site operations in addition to their instructor duties. Once the six (6) current BPA Employees’ positions have been vacated through separation or retirement, the position will not be subject to the same remote work identified above. b. DLC Employees. The DLC Employees identified in Appendix A will be reassigned to Harpers Ferry, WV, but will be allowed to work remotely from their current locations. c. TSD Employees. TSD Employees identified in Appendix A will be reassigned to Harpers Ferry, WV but will be allowed to work remotely from their current locations.<sup>30</sup>

##### B. Meaning of Proposal 1

At the PPC, the Union confirmed that the term “BPA” referred to Border Patrol Academy, “DLC” referred to Distance Learning Center, “TSD” referred to Training Support Division, and that “Appendix A” referred to Appendix A of the MOU.<sup>31</sup>

Regarding the proposal’s operation, the parties agreed that the proposal is “intended to meet the [A]gency’s interest of having on-site training staff and mitigate . . . current BPA employees from having to relocate”; and “allow the [A]gency to exercise its right to assign [DLC and TSD] employees to the proposed duty location, but mitigate the impact of relocation by allowing [DLC and TSD] employees to telework and/or work at current [Agency] facilities . . . within their current commuting areas.”<sup>32</sup> Therefore, the proposal would permit the Agency to fill vacancies at the new locations, but allow employees currently occupying those positions to telework – or remote work from their current Agency facility – rather than relocate.<sup>33</sup>

<sup>26</sup> *Id.* § 2424.26(c).

<sup>27</sup> Reply at 13-14; *id.* at 14-18.

<sup>28</sup> The Union first asserted in its petition that each of these proposals are “intended to be . . . appropriate arrangement[s] pursuant to 5 U.S.C. § 7106(b)(3).” Pet. at 5 (Proposal 1), 9 (Proposal 4). However, the Union reserved its legal arguments in support of that assertion for its response. *Id.* Thus, the Union asserts facts and makes arguments “for the first time in [its] response” concerning why Proposals 1 and 4 are allegedly arrangements, and why those arrangements are allegedly appropriate. 5 C.F.R. § 2424.26(a); *see Resp.* at 6-12 (Proposal 1), 16-19 (Proposal 4).

<sup>29</sup> 5 C.F.R. § 2424.26(a) (permitting an agency, in its reply, to “inform the Authority and the exclusive representative whether and why it disagrees with any facts or arguments made for the first time in the exclusive representative’s response,” including the “reasons why the proposal[s] . . . do[] not fit within any exceptions to management rights that were asserted by the exclusive representative in its response”).

<sup>30</sup> Pet. at 3-4. At the PPC, the Union modified the language of subsection C of the proposal to correct an error. Record at 2 (changing “Harpers Ferry, VA” to “Harpers Ferry, WV”).

<sup>31</sup> Record at 2; Pet. at 4.

<sup>32</sup> Pet. at 5; *see also* Record at 2 (“[T]he parties agreed to the operation of the proposal as explained by the Union.”).

<sup>33</sup> *See* Record at 2.

### C. Analysis and Conclusion

A proposal that affects management's rights under § 7106(a) may nevertheless be a mandatory subject of bargaining if the proposal is an appropriate arrangement under § 7106(b)(3) of the Statute.<sup>34</sup> The Union concedes that the proposal affects management's right to determine its organization,<sup>35</sup> and the Agency does not dispute that the proposal is an arrangement.<sup>36</sup> Therefore, we find that the proposal is an arrangement,<sup>37</sup> and only analyze whether the arrangement is appropriate.

<sup>34</sup> 5 U.S.C. § 7106(b)(3) ("Nothing in this section shall preclude any agency and any labor organization from negotiating . . . appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.").

<sup>35</sup> Pet. at 5 ("This proposal is intended to be an appropriate arrangement pursuant to 5 U.S.C. § 7106(b)(3)."); Resp. at 4 (claiming that the proposal constitutes an appropriate arrangement). Our colleague argues that the Union did not concede that the proposal affects a management right. Dissent at 11. However, not only did the Union explicitly state that the "proposal is intended to be an appropriate arrangement" in its Petition, but the sentence our colleague relies on from the Union's Response is under the section heading "Proposal [1] is appropriate because the benefit to employees . . . outweighs the impact on management's right to determine its organization." Resp. at 8 (emphasis added). Furthermore, the Authority holds a party to concessions made in its filings. See *NTEU*, 71 FLRA 1235, 1237 (2020) (then-Member DuBester dissenting) (finding the union conceded in its petition that a proposal was inconsistent with an executive order). The cases relied on by our colleague are distinguishable from the instant case because those cases did not involve explicit concessions that the proposal affected management rights. See Dissent at 11 n.4 (citing *NFFE*, *IAMAW*, *Fed. Dist. 1*, *Loc. 1998*, 69 FLRA 626, 633 (2016) (*Loc. 1998*) (Member Pizzella dissenting on other grounds); *Fraternal Ord. of Police, DC Lodge 1*, *NDW Lab. Comm.*, 72 FLRA 377, 378-79 (2021) (*DC Lodge 1*) (Member Abbott concurring); *NTEU*, 70 FLRA 701, 703-04 (2018) (*NTEU*), *pet. for review denied*, *NTEU v. FLRA*, 943 F.3d 486 (D.C. Cir. 2019)). But see *DC Lodge 1*, 72 FLRA at 378-79 ("The [a]gency argues that the proposal affects management's right to determine the [a]gency's organization . . . [and] management's right to assign work . . . . In its response, the [u]nion asserts that the proposal constitutes an appropriate arrangement . . ." (emphasis added)); *NTEU*, 70 FLRA at 704 ("The [u]nion asserts that even if [p]roposal 1 affects management's rights to direct employees and assign work, the proposal is an appropriate arrangement . . ." (emphasis added)). Finally, we note that regardless of whether the Union conceded the point, we agree with our colleague that Proposal 1 affects the management right to determine its organization. Dissent at 12; see also *NAGE*, *Loc. R1-109*, 53 FLRA 526, 531-32 (1997) (*Loc. R1-109*) (proposal precluding agency from consolidating certain functions at one facility affected the right to determine organization).

<sup>36</sup> See Reply at 10-13.

<sup>37</sup> *Loc. 1998*, 69 FLRA at 629 (citing *NAIL*, *Loc. 5*, 67 FLRA 85, 87 (2012) (*Loc. 5*); *NATCA*, *Loc. ZHU*, 65 FLRA 738, 740-42 (2011)) (finding that, because the agency did not dispute

In determining whether an arrangement is appropriate, the Authority weighs the benefits afforded to employees under the arrangement against the proposal's burden on the exercise of management's rights.<sup>38</sup> Further, the Authority has held that an appropriate arrangement "may not 'negate' the exercise of a management right by reversing management's substantive decision altogether."<sup>39</sup>

The Union argues that the proposal is an appropriate arrangement under § 7106(b)(3) of the Statute because it "completely obviates the need for employees to relocate to another state while also meeting [the Agency's] interest."<sup>40</sup> The Agency argues that the proposal excessively interferes with management's right to determine its organization by preventing it from "implement[ing] the organization it has determined better promotes the good and efficient use of Agency resources."<sup>41</sup>

An agency's right to "determine its organization" includes "the geographic locations in which an agency will provide services or otherwise conduct its operations [and] how various responsibilities will be distributed among the agency's organizational subdivisions."<sup>42</sup> The Agency's new organization decision involves moving all BPA, DLC, and TSD employees from their current locations to locations the Agency determined "better promote[d] the good and

that the proposals were arrangements, the proposals constituted arrangements).

<sup>38</sup> *NTEU*, 70 FLRA at 704 (citing *Loc. 5*, 67 FLRA at 87).

<sup>39</sup> *Ass'n of Civilian Technicians, Ky. Long Rifle Chapter & Bluegrass Chapter*, 70 FLRA 968, 970 (2018) (*ACT*) (then-Member DuBester dissenting). We note that the dissent continues to misconstrue the Authority's decision in *ACT*. Dissent at 12. Contrary to the dissent's assertion, we made it clear in *ACT* that we were not abandoning "the balancing test set forth in *NAGE*, *Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*)," but rather were "rely[ing] on [Authority] precedent that recognize[d] that there were no benefits to employees that could, on balance, render an arrangement 'appropriate' if it totally negates management's substantive decision." *ACT*, 70 FLRA at 970 n.27 (citing *NTEU*, 70 FLRA 100, 104 (2016)). We further note – contrary to the dissent's assertion that the Authority's decision in *ACT* "has no foundation in the Statute or the Authority's case law" – that *ACT* relied on Authority precedent from 1986, 2001, and 2011. See *id.* at 970 n.25 (citing *AFGE*, *Loc. 1164*, 66 FLRA 112, 117 (2011) (*Loc. 1164*); *AFGE*, *Nat'l Council of Field Lab. Locs.*, *Loc. 2139*, 57 FLRA 292, 294-95 (2001); *NAGE*, *Loc. R7-23*, 23 FLRA 753, 759 (1986)).

<sup>40</sup> Resp. at 8.

<sup>41</sup> Reply at 10.

<sup>42</sup> *AFGE*, *Loc. 3509*, 46 FLRA 1590, 1605 (1993) (*Loc. 3509*); see *Loc. R1-109*, 53 FLRA at 531-32 (right to determine organization includes "where organizationally [certain] function[s] shall be established and where the duty stations of the positions providing those functions shall be maintained").

efficient use of [A]gency resources.”<sup>43</sup> The plain language of the proposal – allowing existing employees to work remotely from their current locations *indefinitely* – effectively negates the Agency’s substantive decision to reorganize because it prevents the Agency from fully implementing the reorganization.<sup>44</sup> Accordingly, the proposal is not an appropriate arrangement, and therefore, is outside the Agency’s duty to bargain.<sup>45</sup>

## V. Proposal 4

### A. Wording of Proposal 4

VERA/VSIP. Voluntary Early Retirement and/or Voluntary Separation Incentive Pay (VERA/VSIP) will be offered to the 47 affected employees. The terms and conditions for VERA/VSIP will be governed by individual agreements between the Employer and the

<sup>43</sup> Reply at 4; *see also id.* at 5 (“[The] reorganization plan calls for the reassignment and relocation of [the affected BPA employees] from their current duty stations in Laguna Niguel, CA; Orlando, FL; Lorton, VA; and Tucson, AZ to Artesia, NM, which is where the BPA is located and the duty station where all other BPA employees are assigned.”); *id.* at 5-6 (“[The] reorganization plan calls for the reassignment of [the affected DLC employees] from their current duty stations in Detroit, MI; Lorton, VA; and Springfield, VA to Harpers Ferry, WV, which is where the DLC is located on the [Advanced Training Center] campus and the duty station where the rest of the DLC team is assigned.”); *id.* at 6-7 (“[The] reorganization plan calls for the reassignment of [the affected TSD employees] from their current duty stations in Lorton, VA to the employee’s choice of any [Office of Training and Development] duty stations, since that is where TSD’s customers . . . work.”).

<sup>44</sup> ACT, 70 FLRA at 970 (finding a proposal allowing employees to choose their own uniform was not an appropriate arrangement because it negated the agency’s decision to require employees to wear certain uniforms); *Loc. 3509*, 46 FLRA at 1606 (proposal that would “nullify[]” agency’s decision to place a position in a particular office “would require the [a]gency to forego the functional structure that it has deemed best promotes efficient and effective operations” and, thus, excessively interfered with right to determine organization); *see also AFGE, Loc. 1164*, 65 FLRA 836, 841 (2011) (proposal that “absolutely requires” management to exercise its right in a particular manner without “allowing the agency to assess the effect of the proposal’s requirements on the agency’s ability to conduct its operations effectively and efficiently” places a “significant burden on the agency” (alterations omitted) (quoting *Overseas Educ. Ass’n.*, 39 FLRA 153, 161 (1991))).

<sup>45</sup> The Union requested severance of Proposal 1 in its response pursuant to 5 C.F.R. § 2424.25(d). Resp. at 12-14. Because we find all portions of the proposal outside the duty to bargain, we need not address the Union’s request for severance. *See NLRB Union, NLRB Pro. Ass’n*, 62 FLRA 397, 403 n.12 (2008) (citing *AFGE, Loc. 3240*, 58 FLRA 696, 698 n.3 (2003)).

employees. Employees who are eligible for VERA/VSIP, will be notified of their eligibility at the same time the reassignment is announced pursuant to section 1 above. Eligibility will be separated into three categories: 1) optional retirement and VSIP; 2) early retirement and VSIP; and 3) VSIP with resignation. Employees will be provided two opportunities to request their VERA/VSIP: 1) within thirty (30) calendar days of the announcement of the reassignment; and 2) within thirty (30) calendar days after receiving directed reassignment letters. If an employee elects VERA/VSIP, the employee will be provided no less than sixty (60) calendar days to submit the respective personnel action (i.e. retirement or resignation). Nothing will preclude an employee from seeking reassignment pursuant to this Agreement, then electing VERA/VSIP if the employee does not receive his/her first ranked reassignment option.<sup>46</sup>

### B. Meaning of Proposal 4

At the PPC, the Union confirmed that “VERA” referred to the Voluntary Early Retirement Authority granted by the Office of Personnel Management (OPM), and that “VSIP” referred to the Voluntary Separation Incentive Pay authorized by OPM.<sup>47</sup>

Regarding the operation of the proposal, the parties agreed that the proposal would require the Agency to obtain VERA and VSIP authority, and offer VERA and VSIP to the impacted employees who qualified for these programs.<sup>48</sup> The parties also agreed that the proposal provides mechanisms for employees to choose VERA/VSIP within thirty days, starting the day after being notified of the reassignment or after receiving a directed reassignment letter.<sup>49</sup> Finally, the parties agreed that the proposal gave the employee up to sixty days, starting the day after the employee elected VERA/VSIP, to submit the resignation or retirement personnel action.<sup>50</sup>

<sup>46</sup> Pet. at 8. At the PPC, the Union modified the language of subsection C of the proposal to correct an error. Record at 4 (changing “received” to “receive”).

<sup>47</sup> Record at 4.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

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

### C. Analysis and Conclusion

As stated above, a proposal that affects management's rights under § 7106(a) may nevertheless be a mandatory subject of bargaining if the proposal is an appropriate arrangement under § 7106(b)(3) of the Statute.<sup>51</sup> The Union concedes that the proposal affects management's right to retain employees,<sup>52</sup> and the Agency does not dispute that the proposal is an arrangement.<sup>53</sup> Therefore, we find that the proposal is an arrangement,<sup>54</sup> and only analyze whether the arrangement is appropriate.

In determining whether an arrangement is appropriate, the Authority weighs the benefits afforded to employees under the arrangement against the proposal's burden on the exercise of management's rights.<sup>55</sup>

The Union argues that the proposal is appropriate because "the benefit to employees in avoiding an out-of-state relocation and/or a transfer of function outweighs the impact on management's right to retain its employees."<sup>56</sup> The Agency argues that the proposal excessively interferes with management's right to retain employees by "depriving [it] of the services of employees who perform work necessary to accomplish [its] mission."<sup>57</sup>

While the benefits to employees identified by the Union are significant, they do not outweigh the burden on the Agency's exercise of its right to retain employees. The Agency, which seeks to keep all of the employees covered by the proposals,<sup>58</sup> would instead be forced to incentivize employee retirements and separations. This would then require the Agency to hire new employees in order to carry out its mission.<sup>59</sup> Unlike, *AFGE, Local 1827*, where proposals requiring an agency to provide VERA/VSIP were appropriate

arrangements because the agency eliminated the "functions and positions of the employees covered by the proposals,"<sup>60</sup> here, the Agency is not eliminating the positions. Accordingly, we find that the proposal excessively interferes with the Agency's right to retain employees, and therefore, is not an appropriate arrangement.<sup>61</sup>

Because we find that the proposal is not an appropriate arrangement, it impermissibly affects management's right to retain employees, and is outside the Agency's duty to bargain.<sup>62</sup>

## VI. Order

We dismiss the Union's petition.

<sup>60</sup> 58 FLRA 344, 347 (2003) (*Loc. 1827*) (Chairman Cabaniss concurring; Member Armendariz dissenting in part).

<sup>61</sup> *NFFE, Loc. 1450, IAMAW, 70 FLRA 975, 976* (2018) (*Loc. 1450*) (finding a proposal preventing the agency from obtaining information from certain individuals regarding a BUE's performance was not an appropriate arrangement because "[t]he proposal's burden on management's rights [was] significant"); *Loc. 5, 67 FLRA at 87-88* (finding a proposal requiring the agency to reoffer VSIP was not an appropriate arrangement because it excessively interfered with management's right to retain employees). By arguing that Proposal 4 is an appropriate arrangement, our dissenting colleague diminishes the very real burden that the Union's proposal imposes on management's right to retain employees. Dissent at 13-14. Here, the Agency is seeking to *retain* employees. Not only is it nonsensical that the Agency should be forced to provide substantial monetary incentives for employees to *leave* the Agency, it would run counter to the very purposes and intent of VERA/VSIP initiatives. In order to seek approval for a VERA/VSIP offering, the Agency must first demonstrate that it has an "excess of personnel" or is reducing or eliminating specific positions and/or functions. *See 5 C.F.R. § 576.102(a)(1)* (stating that a VSIP plan must include "[i]dentification of the specific positions and functions to be reduced or eliminated . . ."); *id.* § 831.114 (stating that a VERA request must include a summary of the situation "that will result in an excess of personnel because of a substantial delayering, reorganization, reduction in force, transfer of function, or other workforce restructuring or reshaping . . ."). That is not the reality of the circumstances before us – the Agency is keeping all positions, and merely moving the duty location of the positions to promote efficient and effective operations. To assert that "Proposal 4's burdens on management's right to retain are relatively slight," and cite a distinguishable decision in which an agency had eliminated the functions and positions of the employees covered by the proposals, ignores Proposal 4's direct and substantial burden on management's right to retain employees. *See* Dissent at 13-14 (citing *Loc. 1827, 58 FLRA at 347*).

<sup>62</sup> *Loc. 1450, 70 FLRA at 977* (citing *NTEU, 70 FLRA at 703; AFGE, Loc. 1164, 67 FLRA 316, 317* (2014) (Member Pizzella concurring); *Loc. 1164, 66 FLRA at 116-17*).

<sup>51</sup> 5 U.S.C. § 7106(b)(3).

<sup>52</sup> Pet. at 9 ("This proposal is intended to be an appropriate arrangement pursuant to 5 U.S.C. § 7106(b)(3)."); Resp. at 15 (claiming that the proposal constitutes an appropriate arrangement).

<sup>53</sup> *See* Reply at 18.

<sup>54</sup> *Loc. 1998, 69 FLRA at 629*.

<sup>55</sup> *NTEU, 70 FLRA at 704* (citations omitted).

<sup>56</sup> Resp. at 17.

<sup>57</sup> Reply at 19; *see also Loc. 5, 67 FLRA at 87* (proposal requiring offer of VSIP affects right to retain because offering employees "a lump-sum payment to leave the [a]gency[] discourages at least some employees from remaining employed by the [a]gency").

<sup>58</sup> Reply at 4 ("[T]he Agency sent the Union formal notice of [its] plan to permanently *reassign* [the impacted employees].") (emphasis added).

<sup>59</sup> *Id.* at 19 (arguing the proposal would "preclude the Agency from implementing [the] reorganization plan until [it] could hire additional employees").

**Chairman DuBester, concurring in part and dissenting in part:**

I agree that the Agency's statement of position and certain parts of its reply are not properly before us, and that it is appropriate to grant the Union's request to file a supplemental submission.

I also agree that Proposal 1 is outside the Agency's duty to bargain, but for reasons different from the majority. As an initial matter, the majority incorrectly states that the Union "concedes that the proposal affects management's right to determine its organization."<sup>1</sup> Rather, the Union expressly, with supporting arguments, contends that the proposal does not affect that management right.<sup>2</sup> To support its finding of a concession, the majority relies on the Union's claim that Proposal 1 is an appropriate arrangement, as well as a heading from the Union's response brief.<sup>3</sup>

With respect to the Union's appropriate-arrangement claim, equating that claim with a concession that a proposal affects management rights is inconsistent with Authority practice.<sup>4</sup> Regarding the

heading from the response brief, that heading pertinently states that the benefit provided by the proposal "outweighs the impact on management's right to determine its organization."<sup>5</sup> But the majority takes that statement out of context. After the heading, the Union expressly contends that the proposal does not affect management's right, but goes on to state, "To the extent the Authority finds that Proposal 2 *does* impact a management right, the benefit of the proposal greatly outweighs [the Agency's] interest in exercising such right."<sup>6</sup> In context, any reasonable reader – or reviewing court, for that matter – would read the Union's contentions as alternative arguments, not a concession that the proposal affects management's right. Thus, the majority errs in finding a concession.

Nevertheless, I would find that the proposal affects the right to determine organization because the Agency has demonstrated that there is a direct and substantive relationship between the duty stations to which it plans to relocate the affected employees and the Agency's administrative or functional structure.<sup>7</sup> Specifically, the Agency has demonstrated that: (1) Border Patrol Academy (BPA) employees are needed to perform onsite training duties at Artesia, New Mexico;<sup>8</sup> (2) Distance Learning Center employees cannot fully perform the full range of their training-video-development duties anywhere other than Harpers Ferry, West Virginia, because the Agency's test-bed servers are located there and cannot be accessed remotely;<sup>9</sup> and (3) Training Support Division (TSD) employees are needed onsite in the locations where Office of Training and Development (OTD) employees work because the TSD employees' duties require in-person interaction with OTD employees, who are their customers, as well as the completion of time-sensitive forms that require wet-ink signatures.<sup>10</sup>

As for whether Proposal 1 is an appropriate arrangement under § 7106(b)(3) of the Federal Service Labor-Management Relations Statute (the Statute),<sup>11</sup> I agree with the majority that the Agency concedes that Proposal 1 is an arrangement. I also agree that the proposal is not "appropriate" within the meaning of § 7106(b)(3).

<sup>1</sup> Majority at 6-7.

<sup>2</sup> Resp. Br. at 8 ("Proposal [1] does not impact management's right to determine its organization because, as supported more fully below, the proposal does not impact [the Agency's] proposed changes to its administrative or functional structure, rather, it supports such changes without the need to relocate employees.").

<sup>3</sup> See Majority at 6 n.35.

<sup>4</sup> See *NFFE, IAMAW, Fed. Dist. 1, Loc. 1998*, 69 FLRA 626, 633 (2016) (Member Pizzella dissenting) (finding no effect on management's right to assign work, despite union's appropriate-arrangement claim); see also, e.g., *Fraternal Ord. of Police, DC Lodge 1, NDW Lab. Comm.*, 72 FLRA 377, 378-79 (2021) (Member Abbott concurring) (analyzing agency's claims of effects on management rights, rather than finding a concession, where union argued that proposal was an appropriate arrangement); *NTEU*, 70 FLRA 701, 703-04 (2018), *pet. for review denied*, *NTEU v. FLRA*, 943 F.3d 486 (D.C. Cir. 2019) (same). I acknowledge that, in a singular decision, the Authority stated that, "[b]y arguing that [a proposal was] a negotiable procedure or appropriate arrangement, [a union] effectively concede[d] that the proposal affect[ed] management's rights." *NFFE, Loc. 2192*, 59 FLRA 868, 872 (2004) (Chairman Cabaniss dissenting in part on other grounds). There, however, the union made no other arguments that disputed the agency's "effects" claims. See *id.* at 871-72. Accordingly, the quoted statement is dicta, and I do not read that decision as holding – contrary to the Authority's general practice – that an appropriate-arrangement claim constitutes a concession that a proposal affects management rights. I note, in this regard, that unions frequently argue *both* that a proposal is an appropriate arrangement *and* that the proposal does not affect a management right. See, e.g., *NTEU*, 70 FLRA at 703-04; *NTEU*, 70 FLRA 100, 102-03 (2016); *NFFE, IAMAW,*

*Fed. Dist. 1, Fed. Loc. 1998*, 69 FLRA 586, 595 (2016) (Member Pizzella concurring in part and dissenting in part).

<sup>5</sup> Resp. Br. at 8.

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> See *NTEU*, 41 FLRA 1283, 1286, 1287 (1991); *NTEU, Chapter 83*, 35 FLRA 398, 413 (1990).

<sup>8</sup> Reply Br. at 4-5.

<sup>9</sup> *Id.* at 5-6.

<sup>10</sup> *Id.* at 6-7.

<sup>11</sup> 5 U.S.C. § 7106(b)(3).

But the majority's analysis of the latter is sue is flawed. As it did in *Ass'n of Civilian Technicians, Kentucky Long Rifle Chapter & Bluegrass Chapter (ACT)*,<sup>12</sup> the majority finds that an appropriate arrangement "may not 'negate' the exercise of a management right by reversing management's substantive decision altogether."<sup>13</sup> As I stated in my separate opinion in *ACT*, this "'negates' test has no foundation in the Statute or the Authority's case law"<sup>14</sup> and itself "negates core collective-bargaining principles."<sup>15</sup>

Applying the *correct* test—the well-established balancing test set forth in *NAGE, Local R14-87 (KANG)*<sup>16</sup>—I would find that the proposal would provide significant benefits to the affected employees. As the Union asserts, directing those employees to relocate to different states would adversely affect them by, among other things, requiring them to "sell their homes and/or seek an early termination of lease obligations, uproot their spouses['] work situations and/or children's school environment[s], and relocate to . . . rural areas of the country that do not present the same opportunities for the employees and/or their families as their current cities offer."<sup>17</sup> Proposal 1 would ameliorate—in fact, it would entirely eliminate—the adverse effects of management's decision to relocate the employees.

On the other hand, the burdens on management's right to determine the Agency's organization are substantial because the proposal would preclude the Agency, without exception, from involuntarily reassigning the incumbent employees to *the only locations where they can perform the full range of their positions' duties*. I acknowledge that there are four vacant BPA positions that could immediately be transferred.<sup>18</sup> But for the six incumbent BPA employees, and the other groups of affected employees, Proposal 1 would effectively preclude the Agency from assigning those employees the full range of their duties for as long as they remain in their positions— which Proposal 1 might actually prolong if the employees are allowed to remain in their existing geographic locations.

Based on this record, I believe that, on balance, the burdens on management's right to determine the Agency's organization outweigh the benefits that the proposal would provide the employees. Accordingly,

applying the *KANG* test, I would find that Proposal 1 excessively interferes with management's right to determine the Agency's organization and, thus, is not an appropriate arrangement.<sup>19</sup>

Proposal 4 is a different matter altogether. I agree with the majority that the Union concedes that the proposal affects management's right to retain employees. But, again, I would not rely on the Union's appropriate-arrangement argument to find such a concession; instead, I would rely on the Union's failure to dispute the Agency's claim.<sup>20</sup>

And, unlike the majority, I would find that the arrangement is "appropriate" under § 7106(b)(3) of the Statute. On this point, the Union incorporates its Proposal 1 arguments regarding the adverse effects of directed relocations and discusses the various benefits that Proposal 4 also would provide.<sup>21</sup> As discussed above in connection with Proposal 1, avoiding involuntary relocation can, by itself, provide significant benefits to employees. And the Union claims, without dispute, that it has identified numerous employees who simply cannot relocate due to medical, family, or personal-hardship issues.<sup>22</sup> Proposal 4 would allow eligible employees to avoid directed relocation by giving them the opportunity to retire early or earn Voluntary Separation Incentive Pay of up to \$25,000<sup>23</sup>— a significant economic benefit in and of itself.<sup>24</sup> In short, involuntary relocation would impose

<sup>19</sup> Although the Union requests that we sever the proposal and address each of the covered groups of employees separately, I would find that the proposal excessively interferes with respect to each group. Thus, even if severance would otherwise be appropriate here, it would serve no purpose. Accordingly, I would find it unnecessary to resolve the Union's severance request. See *AFGE, Loc. 1164*, 65 FLRA 836, 842 (2011) (finding it unnecessary to resolve severance request where the sentence that the union proposed to sever had already been found to be outside the duty to bargain).

<sup>20</sup> 5 C.F.R. § 2424.32(c)(2) ("Failure to respond to an argument or assertion raised by the other party will . . . be deemed a concession to such argument or assertion.")

<sup>21</sup> See *Resp. Br.* at 16-19. Thus, this case is unlike *NAIL, Loc. 5*, 67 FLRA 85 (2012)—cited by the majority, *Majority* at 9 n.57, and the Agency, see *Reply Br.* at 18-19—where the union failed to identify any benefits that the proposal would provide. See *NAIL, Loc. 5*, 67 FLRA at 88.

<sup>22</sup> *Pet.* at 9.

<sup>23</sup> *Resp. Br.* at 19.

<sup>24</sup> See *AFGE, Loc. 1827*, 58 FLRA 344, 347 (2003) (*Loc. 1827*) (Chairman Cabaniss concurring; Member Armendariz dissenting) ("providing employees with a lump-sum payment to voluntarily leave the [a]gency is a substantial financial benefit to employees"). The Agency correctly claims, see *Reply Br.* at 18, that *Loc. 1827* is distinguishable from this case because there, unlike here, the agency planned to contract out the employees' functions, rather than merely transferring the employees. See 58 FLRA at 344, 346-47. Nevertheless, *Loc. 1827* remains relevant for the principles for which I cite it.

<sup>12</sup> 70 FLRA 968 (2018) (then-Member DuBester concurring in part and dissenting in part).

<sup>13</sup> *Majority* at 6.

<sup>14</sup> 70 FLRA at 971.

<sup>15</sup> *Id.* at 972.

<sup>16</sup> 21 FLRA 24, 31 (1986).

<sup>17</sup> *Resp. Br.* at 7.

<sup>18</sup> See *id.* at 5.



significant burdens on employees, and Proposal 4 would provide significant benefits to employees by allowing them to avoid such burdens.<sup>25</sup>

By contrast, Proposal 4's burdens on management's right to retain are relatively slight. On one hand, the Agency asserts that it is facing staffing shortages and that the affected employees are experienced trainers that it needs to retain, rather than encourage to depart.<sup>26</sup> On the other hand, the Union claims, without dispute, that a survey of the forty-seven affected employees showed that nearly half of them already plan to retire, resign, or transfer with the intention of subsequently resigning if a position in their current duty locations becomes available.<sup>27</sup> In other words, nearly half of the affected employees plan to leave the Agency due to the directed reassignments themselves. Proposal 4's ameliorative benefits are unlikely to add a significant, additional burden on management's ability to retain those employees. Moreover, as with the proposal found negotiable in *AFGE, Local 1827*, "the Agency retains the ability to take additional steps or institute any policies or programs to encourage particular employees to remain Agency employees."<sup>28</sup>

In short, applying the *KANG* balancing test, I would find that Proposal 4's substantial benefits to employees outweigh the relatively slight burdens on management's right to retain.<sup>29</sup> Thus, I would find that the proposal is an appropriate arrangement.<sup>30</sup>

Accordingly, I concur in part and dissent in part.

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<sup>25</sup> The majority devotes less than a sentence to assessing the benefits that Proposal 4 would afford employees. *See* Majority at 9 ("[w]hile the benefits to employees identified by the Union are significant, . . ."). In doing so, the majority "diminishes the very real burden" that directed relocations impose on employees, and the benefits that avoiding those relocations would have for employees. *Id.* at 10 n.61.

<sup>26</sup> Reply Br. at 18-19.

<sup>27</sup> Resp. Br. at 18-19.

<sup>28</sup> *Loc. 1827*, 58 FLRA at 347.

<sup>29</sup> In discussing the burden on management rights, the majority relies on government-wide regulations regarding Voluntary Early Retirement Authority and Voluntary Separation Incentive Pay. *See* Majority at 10 n.61. Because the Agency does not argue that Proposal 4 conflicts with those regulations, I do not address that issue. *See* 5 C.F.R. § 2424.32(c)(1) ("Failure to raise and support an argument will, where appropriate, be deemed a waiver of such argument.").

<sup>30</sup> In reaching this conclusion, I would find it unnecessary to resolve the parties' dispute over whether the planned relocation of the employees constitutes a transfer of function. *See* Resp. Br. at 17-19; Reply Br. at 15-18. Even if I were to reject the Union's claim that the relocation is a transfer of function, I would still find that the proposal is an appropriate arrangement.