

**73 FLRA No. 54**

ANTILLES CONSOLIDATED  
EDUCATION ASSOCIATION  
(Union)

and

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

0-NG-3605  
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DECISION AND ORDER  
ON NEGOTIABILITY ISSUES

September 30, 2022  
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Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and Susan Tsui Grundmann,  
Members

**I. Statement of the Case**

This 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) concerns the negotiability of three proposals. For the reasons that follow, we find that all three proposals are within the Agency's duty to bargain.

**II. Background**

The Union represents employees in Department of Defense Education Activity (DODEA) schools in Puerto Rico. As relevant here, during negotiations over a successor collective-bargaining agreement, the parties disputed the negotiability of three proposals. The Union requested a written allegation of non-negotiability, which the Agency provided. Thereafter, the Union filed its petition, and the Agency filed a statement of position (statement). The Union filed a response to the statement (response), but the Agency did not file a reply to the Union's response. An Authority representative conducted a post-petition conference (conference) with the parties pursuant to § 2424.23 of the Authority's Regulations.<sup>2</sup>

<sup>1</sup> 5 U.S.C. § 7105(a)(2)(E). The petition initially included four proposals, but before filing its statement of position (Statement), the Agency withdrew its allegation of non-negotiability with respect to Proposal 3. Statement, Attach. 3,

**III. Proposals 1 and 2****A. Wording****1. Proposal 1**

(Article 19, Hours of Work and Scheduling, Section 2, Planning and Preparation)

a. In order to comply with requisite accreditation standards, the Agency has determined that each full-time bargaining unit member with instructional duties shall have (within the duty day) a minimum of 225 minutes per work week (5 days) for planning and preparation purposes. Part-time bargaining unit members shall receive a pro-rated portion (factor of 0.106 for each hour worked) of planning time.

b. Special education teachers will be provided additional preparation time within the duty day in accordance with Section 8. of Article 15.

c. The loss of a planning period as a result of a change in the instructional day such as assemblies, field days, special events, ceremonies, District-wide student assessment, field trips, early release for students, or emergencies (adverse weather, bomb threats, fire drills, installation-imposed threat conditions, and the like) will not be compensated.

d. In the case of management-directed loss of planning periods beyond the conditions described in section 3.c. (bargaining unit member does not receive 225 minutes of planning time per work week), the bargaining unit member will receive compensatory time in accordance with Article 26, Section 6.<sup>3</sup>

Email Withdrawal; *see also* Record of Post-Petition Conference (Record) at 1; Resp. Br. at 19.

<sup>2</sup> 5 C.F.R. § 2424.23.

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

## 2. Proposal 2

(Article 15, Section 8, Planning and Preparation/Clerical Support, Subsections a, b, and c)

a. In accordance with Section 2.a. of Article 19, the Agency has determined that Special Education bargaining unit members with instructional duties shall have a minimum of 225 minutes per week (5 days) for planning and preparation purposes.

b. The Agency has further determined that Special Education teachers currently require an additional 160 minutes of preparation time to accomplish Special Education/Case Study Committee (CSC) related duties. Speech/Language Pathologists assigned Special Education/CSC related duties for cases exclusively related to speech/language disorders will also receive additional preparation time, if justified.

c. CSC meetings will be scheduled outside the 160 minutes referred to above, if possible.<sup>4</sup>

### B. Meaning

The parties generally agree regarding the meaning of these proposals.<sup>5</sup> Proposals 1 and 2 require the Agency to provide a minimum of 225 minutes of planning and preparation time to bargaining-unit employees who perform instructional duties. Proposal 1 also establishes the circumstances under which the Agency must compensate employees with compensatory time when it does not provide the specified preparation time.<sup>6</sup> Proposal 2 further provides special-education teachers with 160 minutes of preparation time, in addition to the 225 minutes, to accomplish special-education/case-study-

committee duties. Proposal 2 also requires the Agency to provide additional preparation time to speech and language pathologists for cases exclusively related to speech or language disorders.<sup>7</sup> Proposal 2, section c. means that case-study-committee meetings will not be scheduled during the 160 minutes a week of planning and preparation time, but that there is “no repercussion” if a committee meeting must be scheduled during that time.<sup>8</sup>

### C. Analysis and Conclusions

1. Proposals 1 and 2 affect management’s right to assign work.

The Agency argues that Proposals 1 and 2 are contrary to management’s rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute, respectively, because the proposals mandate the amount of preparation time that the Agency must provide teachers.<sup>9</sup> The Union argues that the proposals do not interfere with the right to assign work because they allow the Agency to cancel the planning and preparation periods if the Agency provides compensatory time under certain circumstances.<sup>10</sup>

Under Authority precedent, an agency’s right to assign work encompasses 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.<sup>11</sup> Because the proposals set the amount of preparation time that the Agency must assign to employees and limit the Agency’s ability to provide less or no time, we find that the proposals affect management’s right to assign work. Further, because the Union does not address the Agency’s assertion that the proposals also affect the

<sup>4</sup> *Id.* at 5. The parties disagree regarding the meaning of the phrase “if justified.” Record at 2. Specifically, the Union asserted at the conference, without further elaboration, that the term has been in the parties’ agreement for several years and has the same meaning that the phrase had in the past. *Id.* The Agency asserted that the term means if justified by management. *Id.* However, because our conclusion that the Agency has not established that the proposal is outside the duty to bargain is based on the Agency’s failure to rebut the Union’s assertion that the proposal is an appropriate arrangement and not on the meaning of the term “if justified,” we find it unnecessary to resolve the dispute regarding the meaning.

<sup>5</sup> Record at 2-3.

<sup>6</sup> *Id.* at 2.

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

<sup>8</sup> *Id.* at 3. The parties did not explain what “repercussion” meant at the conference, but the Agency did not dispute the meaning of this subsection.

<sup>9</sup> Statement at 8-11, 13-14. The Agency’s argument regarding management’s right to direct employees consists entirely of the brief assertion that because the time limitations in Proposals 1 and 2 affect management’s right to assign work, the Agency’s right “to direct employees under 5 [U.S.C. §] 7106(a)(2)(A) is therefore impeded.” *Id.* at 9.

<sup>10</sup> Resp. Br. at 5-7, 16.

<sup>11</sup> *NFFE, IAMAW, Fed. Dist. 1, Fed. Loc. 1998*, 69 FLRA 586, 591 (2016) (Member Pizzella concurring in part and dissenting in part) (citing *NTEU*, 66 FLRA 584, 585 (2012)).

right to direct employees, we find that the Union concedes that the proposals affect that right.<sup>12</sup>

2. The Agency has not demonstrated that Proposals 1 and 2 are outside the duty to bargain.

A proposal that affects a management right under § 7106(a) of the Statute is nevertheless within the duty to bargain if it is an appropriate arrangement under § 7106(b)(3).<sup>13</sup> Here, the Union argues in its response that Proposals 1 and 2 are appropriate arrangements under § 7106(b)(3) of the Statute because the proposals would benefit employees by providing an opportunity to engage in preparational and other job-related activities during working time and therefore minimize the demands on their off-duty time.<sup>14</sup> As discussed previously, the Agency did not file a reply and, therefore, does not dispute the Union's assertion that the proposals constitute appropriate arrangements.<sup>15</sup>

Section 2424.32(c)(ii)(2) of the Authority's Regulations provides that a party's "[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion."<sup>16</sup> Therefore, consistent with this regulation, we find that the Agency has conceded that the proposals are appropriate arrangements.<sup>17</sup>

Accordingly, we find Proposals 1 and 2 are within the Agency's duty to bargain.<sup>18</sup>

<sup>12</sup> *Nat'l Weather Serv. Emps. Org.*, 63 FLRA 450, 452 (2009) (finding proposal affected management right where union failed to dispute agency's claim that right was affected).

<sup>13</sup> *NTEU*, 72 FLRA 752, 755 (2022).

<sup>14</sup> Resp. Br. at 8-10, 16.

<sup>15</sup> The Agency did not address whether the proposals were appropriate arrangements in its statement. See Statement at 9, 14 (asserting that the Union had not argued that Proposals 1 and 2 were appropriate arrangements).

<sup>16</sup> 5 C.F.R. § 2424.32(c)(ii)(2).

<sup>17</sup> See, e.g., *NAIL, Loc. 5*, 67 FLRA 85, 89 (2012) (finding agency conceded proposal was appropriate arrangement); see also *AFGE, SSA Gen. Comm.*, 68 FLRA 407, 409 (2015) (*SSA*) (Member Pizzella dissenting in part) (finding two proposals were within the duty to bargain based on agency's failure to respond to union's arguments).

Member Kiko notes that, consistent with her separate opinion in *Fed. Educ. Ass'n*, 73 FLRA 262, 272 (2022) (Dissenting Opinion of Member Kiko), proposals that mandate a specified amount of preparation time impose a "'substantial' burden on the right to assign work." *Id.* at 273 (quoting *NAGE, Loc. R12-105*, 37 FLRA 462, 467 (1991)) (finding proposal that required agency to set aside a specified amount of preparation time per week would excessively interfere with management's

#### IV. Proposal 4

##### A. Wording

(Article 26, Section 1, Salary)

Effective July 25, 2021, the aggregate of the base salary schedules for bargaining unit employees and locality pay shall be not less than that of the highest salary schedule in effect for other schools in the DODEA Mid-Atlantic District. Salary schedules will be adjusted as appropriate for any changes in locality payment effective with the first pay period of the calendar year as mandated for federal employees in Puerto Rico in accordance with P.L. 111-84 (Non-Foreign Area Retirement Equity Assurance Act) plus COLA as applicable.<sup>19</sup>

##### B. Meaning

Proposal 4 creates pay equity between bargaining-unit employees and teachers at the school with the highest salary schedule in DODEA's Mid-Atlantic District.<sup>20</sup> Bargaining-unit employees' salaries consist of base pay, locality pay, and cost-of-living allowances (COLA).<sup>21</sup> Under Proposal 4, bargaining-unit employees' aggregate salary – base pay, locality pay, and COLA – will be no less than the salary set forth in the salary schedule for teachers at the school with the highest salary schedule in DODEA's Mid-Atlantic District.<sup>22</sup> The second sentence of Proposal 4 establishes the procedure for maintaining

rights to direct employees and assign work); see also *AFGE, Loc. 2879*, 49 FLRA 279, 295 (1994) (Member Armendariz concurring) (finding provision interfered with right to assign work because it obligated management "to make an effort to provide a specified amount of time to perform [certain] duties"); *Fort Knox Tchrs. Ass'n*, 22 FLRA 815, 816-17 (1986) (finding proposal limiting assignment of instructional duties during certain times impermissibly interfered with right to assign work). Here, however, by failing to file a reply, the Agency has conceded that Proposals 1 and 2 are appropriate arrangements and so Member Kiko is constrained to find those proposals within the duty to bargain.

<sup>18</sup> In light of this determination, we find it unnecessary to address the Union's request to sever the individual sections of Proposal 2. See, e.g., *SSA*, 68 FLRA at 409 (citing *AFGE, Loc. 1164*, 65 FLRA 836, 840 n.3 (2011)) (after finding that the agency had conceded entire proposal's negotiability by failing to respond to union arguments, finding it unnecessary to address request to sever proposal).

<sup>19</sup> Pet. at 7.

<sup>20</sup> Record at 3.

<sup>21</sup> Pet. at 8-9.

<sup>22</sup> *Id.* at 9; Record at 3.

that pay equity.<sup>23</sup> Specifically, Proposal 4 requires yearly adjustments to bargaining-unit employees' base salaries to account for changes in the amount of locality pay and COLA, when applicable, included in their salaries.<sup>24</sup> The parties agree on the proposal's meaning and operation.<sup>25</sup>

C. Analysis and Conclusion: The Agency has not demonstrated Proposal 4 is contrary to law.

The Agency claims that Proposal 4 is contrary to various laws.<sup>26</sup> Specifically, the Agency argues that the proposal indirectly mandates locality pay and COLA thresholds, in violation of 5 U.S.C. § 5941<sup>27</sup> and Executive Order 10,000 (EO 10,000), and that it establishes a base pay rate "where no such rate exists," in violation of 10 U.S.C. § 2164(e).<sup>28</sup>

According to the Agency, the Office of Personnel Management (OPM) has the statutory authority to set locality pay and has established a locality rate for Puerto Rico.<sup>29</sup> EO 10,000 authorizes COLA payments, as set by OPM, in nonforeign areas,<sup>30</sup> and the Agency asserts that the proposal violates this EO because it seeks to "indirectly mandate locality pay and COLA thresholds" provided in a different locality pay area, and it does not

"allow for the variations in locality pay by location and by year."<sup>31</sup>

However, under the parties' agreed-upon meaning, Proposal 4 does not determine the rate of locality pay or COLA thresholds set by OPM.<sup>32</sup> Instead, the proposal is intended to adjust bargaining-unit employees' *base salary*, so that, even if the locality or COLA rates change, the employees' aggregate salary will not be less than the highest compensated teachers in the DODEA Mid-Atlantic District.<sup>33</sup> Contrary to the Agency's argument, nothing in the proposal's plain wording requires the Agency to use a different locality rate than that established by OPM.<sup>34</sup> Therefore, we find that

<sup>23</sup> Pet. at 9.

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

<sup>25</sup> Record at 3; Statement at 15.

<sup>26</sup> Statement at 15-17 (citing 10 U.S.C. § 2164(e); 5 U.S.C. §§ 5304, 5596, 5941; Regulations Governing Additional Compensation and Credit Granted Certain Employees of the Federal Government Serving Outside the United States, Executive Order No. 10,000, 13 Fed. Reg. 5453 (Sept. 16, 1948) (EO 10,000); and the doctrine of sovereign immunity). We note that, pursuant to 5 C.F.R. § 2429.26, the Union requested leave to file, and did file, a motion requesting to "augment" the conference record. In its motion, the Union asserted that during the conference, the Agency had withdrawn its allegation that the first sentence of Proposal 4 was outside the duty to bargain. Motion to Augment the Record of Post-Petition Conference at 1-2. However, the Union did not request to sever Proposal 4 into separate sentences, and therefore we do not consider the sentences independently. See *NTEU*, 72 FLRA 749, 750 n.3 (2022); *AFGE, Loc. 1985*, 55 FLRA 1145, 1149 (1999). Moreover, because we find that the Agency's arguments do not demonstrate that the proposal is contrary to law, we find it unnecessary to address the Union's motion further.

<sup>27</sup> National Defense Authorization Act for Fiscal Year 2010 - Non-Foreign Area Retirement Equity Assurance Act of 2009, Pub. L. No. 111-84, §§ 1911-1919, 123 Stat. 2190, 2619 (2009) (codified as amended in 5 U.S.C. §§ 5304, 5941, and 39 U.S.C.A. § 1005). The Non-Foreign Area Retirement Equity Assurance Act of 2009 provides that "in the United States . . . and its territories and possessions, including the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands, shall be included within a pay locality." *Id.*

<sup>28</sup> Statement at 15.

<sup>29</sup> *Id.* at 15-16.

<sup>30</sup> *Id.* at 16.

<sup>31</sup> *Id.* at 15-16.

<sup>32</sup> *Id.* at 15; Pet. at 8-9; Record at 3.

<sup>33</sup> Statement at 15-16; Pet. at 8-9; Record at 3.

<sup>34</sup> Resp. Br. at 22. It is undisputed that, in the Mid-Atlantic district, only employees in Puerto Rico receive locality pay. Therefore, to the extent that the Agency argues Proposal 4 requires it to apply a locality rate for a different location in the Mid-Atlantic district, that argument is misplaced. The Union asserts that "[p]resently, the . . . teachers at West Point receive the highest salaries, and [Proposal 4] would entitle the teachers in Puerto Rico to the same salary rates." *Id.* at 22-23. Member Kiko notes that even though Agency teachers "in the continental United States do not receive locality pay," *id.* at 22, the same cost-of-living considerations that underly locality-pay determinations also underly the negotiated salaries at West Point. By requiring pay equity between two regions, Proposal 4 gives unit employees the benefit of any locality-based premiums that are incorporated into the higher salaries negotiated at West Point. Thus, Member Kiko is troubled that clever draftsmanship permits the parties here to do indirectly something that the law forbids them from doing directly – i.e., requiring that locality-based premiums from the highest salaries be paid to employees in a different location. However, as even the Agency concedes that Proposal 4 seeks to "indirectly mandate locality pay," Statement at 16 (emphasis added), Member Kiko is constrained to agree that there is no direct conflict between Proposal 4 and the laws that the Agency cites.

the Agency's argument does not demonstrate that the proposal is contrary to EO 10,000 or 5 U.S.C. § 5941.

The Agency also asserts that, pursuant to 10 U.S.C. § 2164(e)(2)(c), “[t]he Director of DODEA has been redelegate[d] the authority from the Secretary of [the Department of Defense] to fix the compensation of its educators without regard to the provisions of any other law . . . relating to compensation.”<sup>35</sup> However, as the Authority has previously explained, the Secretary of Defense does not have sole and exclusive authority under 10 U.S.C. § 2164 to set pay, but must bargain over the pay for bargaining-unit employees like the ones at issue here.<sup>36</sup> Further, despite citing 10 U.S.C. § 2164(e)(1)-(2), and arguing that the proposal establishes a base pay “where no such rate exists,” the Agency does not explain how a proposal to establish a base pay is contrary to that statute.<sup>37</sup> For these reasons, the Agency does not demonstrate that the proposal is contrary to § 2164.

Additionally, the Agency argues that, because Proposal 4 seeks to impose a date that would make the employees' pay increases retroactive, the increases are “barred under the doctrine of sovereign immunity and the Back Pay Act if the retroactive application of any monetary award is not supported by a specific statutory authority.”<sup>38</sup> However, the Agency neither cites any authority nor further explains the basis for this argument, including any explanation as to how the Back Pay Act<sup>39</sup> or the doctrine of sovereign immunity render the proposal outside the duty to bargain. Thus, the Agency's argument is a bare assertion and provides no basis for finding the proposal outside the duty to bargain.

Accordingly, we find Proposal 4 within the duty to bargain.<sup>40</sup>

## V. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, bargain with the Union over Proposals 1, 2, and 4.<sup>41</sup>

<sup>35</sup> Statement at 15.

<sup>36</sup> *Antilles Consol. Educ. Ass'n*, 56 FLRA 664, 665-66 (2000) (explaining that Congress specifically preserved the right of employees to bargain collectively over matters including wages when it enacted § 2164 (citing *Nat'l Educ. Ass'n, Overseas Educ. Ass'n, Fort Bragg Ass'n of Educators*, 53 FLRA 898, 902-05, 919 (1997))).

<sup>37</sup> *Id.*

<sup>38</sup> Statement at 17.

<sup>39</sup> 5 U.S.C. § 5596.

<sup>40</sup> The Union also requested leave under 5 C.F.R. § 2429.26 to file, and did file, a motion requesting that the Authority

“expedite” its decision in this case. Motion to Expedite at 2-4. Based on our decision here, we find it unnecessary to address the Union's motion. *See, e.g., U.S. Dep't of Com., Pat. & Trademark Off., Arlington, Va.*, 60 FLRA 869, 869 n.2 (2005) (finding decision mooted request to expedite); *SSA*, 45 FLRA 303, 307 (1992) (finding it unnecessary to address motion to expedite when motion is moot because of decision).

<sup>41</sup> In finding the proposals are within the duty to bargain, we make no judgment as to their merits. *See, e.g., NTEU*, 64 FLRA 395, 397 n.10 (2010) (Member Beck dissenting). Further, we note that requiring negotiations over a proposal does not require agreement to the proposal.