ORAL ARGUMENT NOT SCHEDULED

No. 05-1192

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

_____

ASSOCIATION OF CIVILIAN TECHNICIANS,
WICHITA AIR CAPITOL CHAPTER,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

_____

ON PETITION FOR REVIEW OF A DECISION AND ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

_____

BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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ORAL ARGUMENT NOT SCHEDULED

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Appearing below in the administrative proceeding before the Federal Labor Relations Authority (Authority) were the Association of Civilian Technicians, Wichita Air Capitol Chapter (ACT) and the United States Department of Defense, National Guard Bureau, Kansas National Guard (Guard). ACT is the petitioner in this court proceeding; the Authority is the respondent.

B. Ruling Under Review

The ruling under review in this case is the Authority's Decision and Order on Remand in *Association of Civilian Technicians, Wichita Air Capitol Chapter and United States Department of Defense, National Guard Bureau, Kansas National Guard, Topeka, Kansas*, Case No. 0-NG-2581, decision issued on October 22, 2004, reported at 60 F.L.R.A. (No. 73) 342; reconsideration denied, 60 F.L.R.A. (No. 157) 835 (April 13, 2005).

C. Related Cases

This case has previously been before this Court in *Association of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA*, 360 F.3d 195 (D.C. Cir. 2004). This case was remanded to the Authority. This case has not been before any other court. Counsel for the Authority is unaware of any cases pending before this Court which are related to this case within the meaning of Local Rule 28(a)(1)(C).

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GLOSSARY

ACT v. FLRA	*Ass'n of Civilian Technicians, Wichita Air Capitol Chapter v. FLRA*, 360 F.3d 195 (D.C. Cir. 2004)
Add.	Addendum
App.	Joint Appendix
Authority	Federal Labor Relations Authority
Customs Service	*United States Customs Serv., Washington, D.C. v. FLRA*, 854 F.2d 1414 (D.C. Cir. 1988)
Fort Carson	*AFGE, Local 1345*, 48 F.L.R.A. 168 (1993)
IRS	*Dep't of the Treasury, Internal Revenue Serv. v. FLRA*, 862 F.2d 880 (D.C. Cir. 1988), *rev'd on other grounds*, 494 U.S. 922 (1990)
Kansas National Guard or Guard or agency	United States Department of Defense, National Guard Bureau, Kansas National Guard
Statute	Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (2000)
Technicians Act	National Guard Technicians Actof 1968, as amended, 32 U.S.C.A. § 709 (2000)
Tenn. Nat'l Guard	*United States Department of Defense, the Adjutant General, National Guard Bureau, Tenn. National Guard*, 56 F.L.R.A. 588 (2000)
Wichita ACT I	*Ass'n of Civilian Technicians, Wichita Air Capitol Chapter*, 58 F.L.R.A. 28 (2002), *reconsideration denied*, 58 F.L.R.A. 483 (2003)

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BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY

STATEMENT OF JURISDICTION

The decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) on October 22, 2004. The Authority=s decision is published at 60 F.L.R.A. 342. The Authority=s order denying petitioner=s motion for reconsideration was issued on April 13, 2005, and is published at 60 F.L.R.A. 835. Copies of these Authority determinations are included in the Joint Appendix (App.) at App. 7-34 and 37-49, respectively. The Authority exercised jurisdiction over the case pursuant to ' 7105(a)(2)(E) of the

Federal Service Labor-Management Relations Statute, 5 U.S.C. '' 7101-7135 (2000) (Statute).[1] This Court has jurisdiction to review the Authority=s final decisions and orders pursuant to ' 7123(a) of the Statute.

STATEMENT OF THE ISSUE

Whether the Authority reasonably concluded that a collective bargaining proposal imposing a variety of conditions on the National Guard's assignment of military training duties to dual-status National Guard technicians is nonnegotiable because the proposal affects management's right to assign work under § 7106(a)(2)(B) of the Statute.

STATEMENT OF THE CASE

This case arises as a negotiability proceeding under section 7117(c) of the Statute. The Association of Civilian Technicians, Wichita Air Capitol Chapter ("ACT" or "union"), the exclusive representative of a unit of employees of the United States Department of Defense, National Guard Bureau, Kansas National Guard (AKansas National Guard,@ AGuard,@ or Aagency@), submitted a collective bargaining proposal that would require the Guard to take specific measures prior to assigning Guard personnel military training duties. The agency declared the

[1] Pertinent statutory provisions are set forth in the attached Addendum (Add.) A to this brief.

proposal to be outside its obligation to bargain. ACT then appealed the agency's allegations of nonnegotiability to the Authority under § 7117(c) of the Statute.

The Authority (Chairman Cabaniss, concurring) held the proposal to be outside the agency=s obligation to bargain because the proposal concerned terms and conditions of military service within the scope of 10 U.S.C. ' 976(c). On review, this Court reversed the Authority and remanded the case for the Authority to consider other issues not previously addressed.

On remand, the Authority (Member Pope, dissenting) held that the union's proposal was outside the agency's obligation to bargain because it affects the agency's right to assign work under § 7106(a)(2)(B) of the Statute. The union now seeks review of the Authority's decision and order on remand.

STATEMENT OF THE FACTS

A. Background

The union is the exclusive representative of certain National Guard dual-status technicians employed by the Kansas National Guard. National Guard technicians are referred to as Adual status@ because they are civilian employees who must **B** as a prerequisite to their employment **B** become and remain military members of the National Guard unit in which they are employed and maintain the military grade specified for their technician positions. *See* National Guard

Technicians Act of 1968, as amended, 32 U.S.C.A. ' 709 (2000) (Technicians Act); *Am. Fed=n of Gov=t Employees, Local 2953 v. FLRA*, 730 F.2d 1534, 1537 (D.C. Cir. 1984).

During collective bargaining, ACT submitted a proposal concerning the assignment of Amilitary training dut[ies].@ As their name implies, these duties have a distinctly military nature. The union=s proposal defines Amilitary training@ as duties that are: (1) required by a written policy or regulation that is applicable to members of the National Guard irrespective of whether they are employees; (2) designed to impart or to measure proficiency in a military skill; and (3) required by written policy or regulation to be performed for a specified period of time, or with a specified frequency, or until a specified level of proficiency is achieved. Examples of military training duties are rifle qualification and training in the wear of garments designed to afford protection from chemical weapons. App. 8-9.

ACT sought to impose a variety of requirements on the Guard=s assignment of military training duties. For example, ACT=s proposal would require the Guard to include any military training duty assigned to a technician in the technician's position description. In addition, under the proposal, the Guard must provide the technician and the union with prior notice of such inclusion and an opportunity to discuss the inclusion with the agency. The proposal also requires the agency to

engage in impact and implementation bargaining over any military training duty if the union so requests. App. 9-10.

As specifically relevant here, paragraph 5 of the proposal would require that military training duty be assigned only by a written order to be provided no less than 30 days before the duty is to begin. Under the proposal, a shorter notice period is permissible only if the written order includes the facts and reasons for a curtailed period. Further, this written order must provide significant detail about the duties to be assigned, including the authority that requires performance of the duty, the specific military skills to be imparted or military proficiency to be tested, and the date, time, and place the duty will begin. In addition, the written order must describe any injury or illness that is known to have resulted from past performance of the duty or that is foreseeable, and measures available to prevent or treat such injuries. Finally, paragraph 5 requires the Guard to meet, upon request, with employees and union representatives to discuss the assignment of military training duties. [2] App. 10

The Kansas National Guard declared the proposal to be outside its obligation to bargain under the Statute, and ACT petitioned the Authority for review of the agency's determination pursuant to § 7117(c)(1) of the Statute. App. 7-8.

[2] The complete text of the union's proposal is set forth at App. 8-11.

B. The Authority's decision in *Wichita ACT I*

The Authority upheld the agency's determination that the proposal was outside the agency's obligation to bargain. *Ass'n of Civilian Technicians, Wichita Air Capitol Chapter*, 58 F.L.R.A. 28, 30-31 (2002), *reconsideration denied*, 58 F.L.R.A. 483 (2003) (*Wichita ACT I*). Initially, the Authority rejected the union's contention that certain of the proposal's paragraphs could operate independently and, therefore, the Authority should sever them and consider them as separate proposals. *Wichita ACT I*, 58 F.L.R.A. at 29.

Turning to the merits of the case, the Authority held that the proposal concerned terms or conditions of military service and, therefore, could not be the subject of collective bargaining. In so holding, the Authority relied upon 10 U.S.C. § 976(c), which prohibits negotiations on behalf of members of the armed forces concerning the terms and conditions of such service. *Wichita ACT I*, 58 F.L.R.A. at 30-31. Because the Authority found that the proposal was outside the duty to bargain based on 10 U.S.C. § 976(c), the Authority did not address other arguments made by the Guard. *Wichita ACT I*, 58 F.L.R.A. at 31 n. 3.

C. This Court's decision in *ACT v. FLRA*

On the union's petition for review of *Wichita ACT I*, this Court held that 10 U.S.C. § 976 does not prohibit bargaining over the union's proposal. *Ass'n of*

Civilian Technicians, Wichita Air Capitol Chapter v. FLRA, 360 F.3d 195, 196 (D.C. Cir. 2004) (*ACT v. FLRA*). The Court held that § 976 only prohibits bargaining over working conditions affecting technicians while they are in a military status. Because the proposal at issue concerns duties assigned while the technicians are in civilian status, the Court found that § 976 has no applicability. *ACT v. FLRA*, 360 F.3d at 197-199. Therefore, the Court vacated the Authority's order and remanded the case for further proceedings consistent with the Court's order. *ACT v. FLRA*, 360 F.3d at 200.[3]

D. The Authority's decision on remand

On remand, the Authority addressed arguments previously raised by the parties, but not considered in *Wichita ACT I.* App. 8. The Authority first rejected the Guard's arguments that the proposals were inconsistent with the Technicians Act, and that the proposal does not concern a condition of employment. App. 14-17. Nonetheless, the Authority held that the proposal was outside the Guard's obligation to bargain because it affected its right to assign work under § 7106(b)(2) of the Statute. App. 18.

[3] As the Authority noted (App. 8), the union did not challenge the Authority's denial of the union's severance request in *ACT v. FLRA.* The Authority did not revisit the severance issue on remand and the matter is not before the court in the instant case.

Citing *AFGE, Local 1985*, 55 F.L.R.A. 1145, 1148 (1999), the Authority noted that the right to assign work under § 7106(a)(2)(B) of the Statute 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. Further, the Authority stated that proposals prescribing when a management right may be exercised constitute substantive limitations on the exercise of that right (citing *AFGE, Local 1345*, 48 F.L.R.A. 168, 174 (1993) (*Fort Carson*)). The Authority reiterated the holding of *Fort Carson* that "proposals precluding an agency from exercising a management right unless or until other events occurred directly interfered with that right" (quoting from *Fort Carson*, 48 F.L.R.A. at 174). App. 18-19.

Applying these principles to the instant case, the Authority found that the requirements of paragraph 5 of the union's proposal, including the requirement for a detailed written order to be issued at least 30 days before any military training will begin, placed substantive limitations on the Guard's right to assign work. According to the Authority, such requirements effectively prohibited the Guard from assigning work involving any military training duty unless and until the Guard takes a number of specific actions. Noting that the Guard is a military organization dedicated to a military mission that provides trained personnel for

mobilization in times of war, national emergency or civil disruption, the Authority also found that timing is an integral and crucial aspect of the Guard's right to assign work. Because ensuring compliance with the proposal's requirements would effectively prohibit the Guard from assigning work in mobilizing and deploying technicians "immediately or very quickly," the Authority held that paragraph 5 of the proposal substantively restricts management's exercise of its right to assign work. App. 20-21.

The Authority also held that the portion of paragraph 5 that would excuse the agency from delivering written notice to employees no less than 30 days before the duty will begin itself affects the agency's right to assign work. According to the Authority, requiring the agency to add to its written order the facts and reasons why the agency is providing shorter notice, continues to place a substantive limitation on the Agency's right to assign work. The Authority found that providing written notice justifying a shortened notice period precludes timely assignment of military training duties. App. 20 n. 7.

The Authority next stated that, under its precedent, proposals that affect the exercise of management rights under § 7106(a) of the Statute are not negotiable procedures under § 7106(b)(2) (citing *Nat'l Fed'n of Fed. Employees, Local 1214*, 40 F.L.R.A. 1181, 1188 (1991). Further, the Authority noted that the union had

not contended that paragraph 5 constitutes an appropriate arrangement under § 7106(b)(3) or involves a permissive matter under § 7106(b)(1). Accordingly, the Authority held that paragraph 5 was outside the Guard's obligation to bargain. App. 21.

Since paragraph 5 of the proposal was determined to be outside the duty to bargain and because paragraph 5 is not severable from the rest of the proposal, the Authority held that the entire proposal is outside the duty to bargain (citing *Professional Airways Systems Specialists, District No. 6, PASS/NMEBA*, 54 F.L.R.A. 1130, 1131 (1998) for the proposition that if any portion of a proposal is outside the duty to bargain, the entire proposal falls outside the duty to bargain).[4] App. 21.

The Authority denied the union's subsequent request for reconsideration (App. 35-36), finding that the union had not established extraordinary

[4] Chairman Cabaniss joined in the determination that the proposal affects the Guard's right to assign work under § 7106(a)(2)(B) of the Statute. App. 18, n.6. However, she issued a separate opinion stating that she believes the proposal is inconsistent with the Technicians Act and is outside the obligation to bargain for that reason. App 23-28.

Member Pope dissented in part, opining that the proposal does not interfere with the Guard's right to assign work. App. 29-34.

circumstances as required by § 2429.17 of the Authority's regulations, 5 C.F.R. § 2429.17 (2005).[5] App. 43.

STANDARD OF REVIEW

The standard of review of Authority decisions is "narrow." *AFGE, Local 2343* v. *FLRA*, 144 F.3d 85, 88 (D.C. Cir. 1998). Authority action shall be set aside only if it is "arbitrary, capricious, or an abuse of discretion" and "otherwise not in accordance with law." *See* 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A).

"Congress has specifically entrusted the Authority with the responsibility to define the proper subjects for collective bargaining, drawing upon its expertise and understanding of the special needs of public sector labor relations." *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1289 (D.C. Cir. 1983). With regard to a negotiability decision like the one under review in this case, such a "decision will be upheld if the FLRA's construction of the [Statute] is 'reasonably defensible.'" *Overseas Educ. Ass'n v. FLRA*, 827 F.2d 814, 816 (D.C. Cir. 1987) (citation omitted). Courts "also owe deference to the FLRA's interpretation of [a] union's proposal." *NTEU* v. *FLRA*, 30 F.3d 1510, 1514 (D.C. Cir. 1994). The instant case involves the Authority's interpretation of its own organic statute.

[5] Member Pope dissented from the denial of reconsideration.

SUMMARY OF ARGUMENT

1. Both the Authority and this Court have consistently held that the right to assign work under § 7106(a)(2)(B) of the Statute encompasses, among other things, the right to determine when the work is to be done. *AFGE, Local 1985*, 55 F.L.R.A. 1145, 1148 (1999); *NTEU v. FLRA*, 691 F.2d 553, 563 (D.C. Cir. 1982). Further, applying the decisions of this Court, the Authority has held specifically that proposals prescribing when a management right may be exercised constitute substantive limitations on the exercise of that right that render such proposals nonnegotiable. *See Fort Carson*, 48 F.L.R.A. 168, 174 (citing *Dep't of the Treasury, Internal Revenue Serv. v. FLRA*, 862 F.2d 880, 883 (D.C. Cir. 1988), *rev'd on other grounds*, 494 U.S. 922 (1990)). More particularly, expressly adopting the views of this Court, the Authority held that proposals that preclude an agency from exercising a reserved right unless or until other events occur directly interfere with the exercise of that right, where timing is an integral part of the right. *Fort Carson*, 48 F.L.R.A. at 174.

2. Paragraph 5 of the union's proposal prohibits the agency from assigning military training duties unless and until the agency prepares a detailed written order concerning the tasks to be assigned and provides the order to the affected employee at least 30 days in advance of the assignment. Under well-established

precedent, such a proposal is nonnegotiable. Given the Guard's military mission to provide trained personnel for mobilization in times of war, national emergency or civil disruption, and the practicalities of the mobilization and deployment process, the timing of training is an integral if not crucial aspect of the agency's right to assign work. Because the proposal's detailed, significant requirements would effectively prohibit the Guard from assigning such training duties in a timely fashion, the proposal substantively restricts the Guard's exercise of its right to assign work, and is nonnegotiable.

Further, the Authority also reasonably held that the proposal's proviso, that the notice period may be shortened if the Guard's written order includes an explanation for the curtailed period, does not the negate the proposal's impact on the agency's right to assign work. Under the proposal's plain meaning, although the Guard may shorten the notice period, it still may not require the performance of military training duties until a detailed written order addressing that subject is prepared and issued. Such a requirement, precluding the Guard from timely assigning military training duties unless and until the Guard puts its justification into writing, also places a substantive limitation on the Guard's exercise of its right to assign work.

3. The union's contentions, particularly its reliance on the Guard's management right to take actions in emergencies under § 7106(a)(2)(D), are meritless. With regard to the union's "emergency" argument, it is well established that the right to assign work, the right involved in this case, is not limited to "emergency" situations. As the structure of the Statute reflects, each management right set forth in § 7106 of the Statute has independent significance in assessing a proposal's negotiability.

4. It is also well-established that proposals that place substantive restrictions on the exercise of a management right do not constitute negotiable procedures. In that regard, this Court has specifically held that the timing of the exercise of a management right "is a substantive, and not at all a procedural, decision." *United States Customs Serv., Washington, D.C. v. FLRA*, 854 F.2d 1414, 1419 (D.C. Cir. 1988). Accordingly, the union's proposal is not a negotiable "procedure."

The union's petition for review should be denied.

ARGUMENT

THE AUTHORITY REASONABLY CONCLUDED THAT A COLLECTIVE BARGAINING PROPOSAL IMPOSING A VARIETY OF CONDITIONS ON THE NATIONAL GUARD'S ASSIGNMENT OF MILITARY TRAINING DUTIES TO DUAL-STATUS NATIONAL GUARD TECHNICIANS IS NONNEGOTIABLE BECAUSE THE PROPOSAL AFFECTS MANAGEMENT'S RIGHT TO ASSIGN WORK UNDER § 7106(a)(2)(B) OF THE STATUTE

A. The Authority's decision is consistent with its own precedent and that of this Court

1. The right to assign work under § 7106(a)(2)(B) of the Statute

It is well established that the right to assign work under § 7106(a)(2)(B) of the Statute encompasses the right to determine what work will be assigned, to whom the work will be assigned, and when the work is to be done. *AFGE, Local 1985*, 55 F.L.R.A. 1145, 1148 (1999); *NTEU v. FLRA*, 691 F.2d 553, 563 (D.C. Cir. 1982). Further, applying the decisions of this Court, the Authority has held specifically that proposals prescribing when a management right may be exercised constitute a substantive limitation on the exercise of that right. *See Fort Carson*, 48 F.L.R.A. 168, 174 (citing *Dep't of the Treasury, Internal Revenue Serv. v. FLRA*, 862 F.2d 880, 883 (D.C. Cir. 1988), *rev'd on other grounds*, 494 U.S. 922 (1990) (*IRS*)); *see also United States Customs Serv., Washington, D.C. v. FLRA*, 854 F.2d 1414, 1419 (D.C. Cir. 1988) (*Customs Service*).

In *IRS*, this Court held that a proposal that precluded an agency from exercising its right under § 7106(a)(2)(B) to contract-out agency work until all grievance and arbitration procedures had been exhausted was a nonnegotiable infringement on that right. *IRS*, 862 F.2d at 882-83. The Court held that the proposal "encroaches entirely too far upon management's authority to accomplish its agency's mission with dispatch." *Id.* at 882. The *IRS* Court quoted with approval from the Court's decision in *Customs Service* where it held that the determination as to when a reserved right is to be exercised "is part and parcel" of the reserved management right. *Id.* at 883 (quoting from *Customs Service*, 854 F.2d at 1419). The *Customs Service* Court also specifically held that the timing of the exercise of a management right "is a substantive, and not at all a procedural, decision." *Customs Service*, 854 F.2d at 1419.

Adopting this Court's views as expressed in *IRS* and *Customs Service*, the Authority has held that proposals that preclude an agency from exercising a reserved right unless or until other events occur impact the timing of reserved management decisions and, therefore, directly interfere with the exercise of that right. *Fort Carson*, 48 F.L.R.A. at 174. At issue in *Fort Carson* was a proposal that would have prohibited the agency from assigning tasks that were not contained in the employee's position description. That is, if the agency determined to assign

work not contained in the employee's position description, the agency could not do so until and unless the position description was formally amended. *Id.* The Authority noted that timing of assignments was an integral part of assigning work to the medical personnel involved in that case who reasonably may be required to respond to a variety of medical situations. The Authority emphasized that the right to assign work would be affected even in situations not constituting medical emergencies. *Id.* at 174-75.

2. Application of precedent to the instant case

The Authority reasonably held that the proposal in the instant case was analogous to that found non-negotiable in *Fort Carson*. Like the proposal in *Fort Carson*, paragraph 5 of ACT's proposal here prohibits the agency from exercising its right to assign tasks to employees until and unless certain conditions are satisfied. In the instant case, no military training duties may be assigned until and unless the agency prepares a detailed written order concerning the tasks to be assigned and provides the order to the affected employee at least 30 days in advance of the assignment. In fact, this proposal has an even more direct impact on the timing of the tasks assigned because it requires a lengthy time-specific advance notice period.

The reasonableness of the Authority's decision is underscored by the fact that, similar to the situation found in *Fort Carson*, the nature of the agency's mission and the tasks to be assigned is particularly time-sensitive. It is recognized that the Guard is a military organization dedicated to a military mission that provides "trained personnel" for "mobilization in times of war, national emergency or civil disruption." *New York Council, Ass'n of Civil Tech. v. FLRA*, 757 F.2d 502, 505 (2nd Cir. 1985). The Authority reasonably found that, considering the practical realities of mobilizing and deploying employees under the circumstances mentioned above, paragraph 5 raises significant impediments that the Guard must meet before assigning such military training duties as work. Complying with the burdensome requirements of paragraph 5 would effectively prohibit the Guard from assigning work in a manner consistent with its military mission.

The Authority also reasonably held that the proposal's proviso that the notice period may be shortened if the written order includes an explanation for the curtailed period does not the negate the proposal's impact on the agency's right to assign work. Under the proposal's plain meaning, although the agency may shorten the notice period, it still may not require the performance of military

training duties until a detailed written order is prepared and issued.[6] The Authority rightly held that, under its precedent, such a requirement remains a substantial limitation on the right to assign work. In that regard, it is significant to note that the proposal in *Fort Carson* found to substantially limit the agency's right called only for the preparation of an amended position description. There were no required time frames in the *Fort Carson* proposal.

Analogously, here the requirement of a detailed written order before work can be performed constitutes a substantive limitation on the agency's reserved right even if the 30-day notice period is shortened or eliminated. Put another way, although there may be no time-specific delay in the assignment of military training duties, it cannot be denied that, under the proposal, assignment will be delayed by whatever time it takes for the agency to prepare and deliver the detailed written order.

It is clear, therefore, that the Authority properly applied existing precedent to the facts of this case in determining that ACT's proposal affected the agency's

[6] Indeed, in the circumstance of a shortened notice period, preparation of the order becomes even more of a limitation on the agency because of the additional content required in the notice.

right to assign work.[7] As discussed below, the union's arguments to the contrary are without merit.

B. The union's arguments are without merit

1. The Authority analyzed the proposal in a manner consistent with the union's proffered meaning

According to the union (Union Brief (Br.) 10-12), the Authority failed to analyze the contested proposal's meaning as the proposal was construed by the union. The union contends (Br. 11-12) that the Authority failed to consider that, as explained by the union, (1) the agency may relieve itself from the proposal's time frames "simply by writing a statement of facts and reasons explaining why it is doing so," and (2) "to the extent that complying with the paragraph would delay the required start of an exercise, this would constitute an emergency within the meaning of § 7106(a)(2)(D) of the Statute, suspending the obligation of the agency to comply prior to the exercise" (quoting from the union's Response to Agency Statement of Position (Response) at 8-9).[8]

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[7] The union's brief does not challenge the analytical framework enunciated in *Fort Carson* and applied in this case. Further, the union makes no attempt to distinguish its proposal here from that in *Fort Carson*.

[8] Although the union cites to its Response in its brief (Br. 12), the Response is not included in the Appendix. For the Court's convenience, the relevant pages of the Response are attached as Addendum B to this brief.

The union's claim lacks merit. Concerning the union's first point, as discussed above (pp. 18-19), the Authority specifically addressed (App. 20 n.7) the proposal's language that permits the agency to shorten the notice period. The Authority held that this aspect of the proposal does not negate the proposal's impact on the right to assign work because, even with this exception to the proposal's full operation, the proposal still imposes a substantial limitation on the right's exercise.

With respect to the union's arguments concerning the application of § 7106(a)(2)(D) to the proposal, these arguments have no bearing on the proposal's meaning. Rather, the union's surmise, that a delay caused by the proposal in the start of a training exercise would constitute an "emergency" under § 7106(a)(2)(D), speculates on the operation and application of the Statute in circumstances caused by the proposal.

The union's proffered legal analysis provides no basis for finding the proposal within the agency's duty to bargain. As discussed immediately below, the fact that a collective bargaining provision may be suspended in the event of an "emergency" is irrelevant to the negotiability of that proposal. This union's claim should therefore also be rejected.

As the union itself pointed out in proceedings before the Authority (Response 8), by operation of law, any collective bargaining provision may be suspended during emergencies. *See AFGE, Local 32 v. Office of Personnel Mgmt.*, 15 F.L.R.A. 825, 827 (1984) (bargaining proposal that is silent with respect to emergency situations does not prevent the agency from suspending operation of the proposal during an emergency pursuant to § 7106(a)(2)(D) of the Statute). However, the fact that a proposal does not affect the agency's independent right to take whatever actions are necessary in an emergency does not lessen the need to assess separately the proposal's impact on other management rights.

In that regard, the Authority has made it clear that management's right to assign work is not coextensive with the right to assign work "in emergencies." *Colorado Nurses Ass'n*, 25 F.L.R.A. 803, 819 (1987) (*rev'd on other grounds*, 851 F.2d 1486 (D.C. Cir. 1988). As the Authority reasonably held in that case, if management's right to assign work was limited to emergencies, § 7106(a)(2)(D) would be redundant. *Id.* Therefore, the fact that the proposal would not affect the Guard's right to act in emergencies does not mean that the proposal does not affect the right to assign work.[9]

[9] The union's theory appears to be that because the proposal could be suspended in an emergency, there is no real impact on the exercise of the right to assign work. This proves too much. Under this theory, all proposals would be negotiable as

As to the proposal's impact on management's right to assign work, this has been discussed previously (pp. 17-19). As the Authority held, the proposal's substantive requirements would still affect the agency's ability to assign military training duties with the dispatch the agency determines to be appropriate in the various circumstances calling for such training, whether or not those circumstances would rise to the level of "emergencies" under § 7106(a)(2)(D).[10] *Compare* in this regard the Authority's decision in *Fort Carson*, where the Authority held that "even in circumstances which do not constitute medical emergencies, requiring the agency to amend position descriptions before assigning work could effectively prohibit such assignment." *Fort Carson*, 48 F.L.R.A. at 175. As discussed above, the Authority found ACT's proposal in the instant case to be wholly analogous to that at issue in *Fort Carson*. App. 19.

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long as they did not expressly negate the agency's § 7106(a)(2)(D) right to act in emergencies. However, the structure of § 7106(a) indicates that each of the enumerated management rights is to have independent significance in assessing a proposal's negotiability.

[10] The Guard cannot escape the impact of the proposal simply by declaring an emergency situation. An agency is never free merely to label any particular set of circumstances an "emergency" and on that basis act unilaterally. *United States Dep't of Veterans Affairs, VA Reg'l Office, St. Petersburg, Fla.*, 58 F.L.R.A. 549, 551 (2003). An agency has a burden to support a determination made pursuant to a management right, including the right to take whatever action is necessary in an emergency. *Id*.

The union's claims that the Authority failed to properly consider the proposal's meaning are therefore unfounded and should be rejected.

2. The proposal is not a negotiable procedure

Finally, and contrary to the union's contention, paragraph 5 does not constitute a negotiable procedure under § 7106(b)(2) of the Statute. As the Authority properly stated the law, a proposal that affects the exercise of a management right is not a negotiable procedure. *See, e.g., Marine Engineers' Beneficial Ass'n, Dist. No. 1-PCD*, 60 F.L.R.A 828, 831 (2005); *Nat'l Fed'n of Fed. Employees, Local 1214*, 40 F.L.R.A. 1181, 1188 (1991). In addition, this Court has specifically held that proposals, like that at issue here, that impact the timing of the exercise of a management right are substantive infringements and "not at all" procedural. *Customs Service*, 854 F.2d at 1419.

Further, the Authority's decision here is distinguishable from that in *United States Department of Defense, the Adjutant General, National Guard Bureau, Tenn. National Guard*, 56 F.L.R.A 588, 581 (2000) (*Tenn. Nat'l Guard*), cited in the union's brief (Br. 11). In *Tenn. Nat'l Guard*, the provision at issue did not affect the timing of the exercise of a management right or otherwise affect such a right. Rather, the proposal there only required notification of an action that had already occurred, namely, that certain job applicants had been deemed unqualified.

Cf. AFGE, Local 3354, 34 F.L.R.A. 919, 925-26 (1990) (proposal permitting union presence at meeting conveying decision already made did not interfere with the agency's right to make that decision).

In sum on this point, after adopting the views of this Court in *IRS* and *Customs*, the Authority has consistently held that proposals that affect the timing of a management right are substantive infringements on that right and not procedural. Because paragraph 5 affects the Guard's ability to assign military training duties within timeframes the Guard deems appropriate, it does not constitute a negotiable procedure. Accordingly, the Authority properly held the proposal outside the agency's obligation to bargain.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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November 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ASSOCIATION OF CIVILIAN TECHNICIANS, WICHITA AIR CAPITOL CHAPTER,	)	
Petitioner	)	
v.	)	No. 05-1192
FEDERAL LABOR RELATIONS AUTHORITY,	)	
Respondent	)	

CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority, have been served this day, by mail, upon the following:

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November 30, 2005