66 FLRA No. 150

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF CHIEF COUNSEL
WASHINGTON, D.C.
(Agency)

0-NG-3130

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

July 20, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This case 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 (the Statute) and concerns the negotiability of two provisions disapproved by the Agency head under § 7114(c) of the Statute.[2] The Agency filed a statement of position (SOP), the Union filed a response (response), and the Agency filed a reply (reply).[3]

For the reasons that follow, we order the Agency to rescind its disapproval of the first provision, and we dismiss the petition for review (petition) as to the second provision.

II. Preliminary Matters

A. We dismiss the Agency's stay request.

In its SOP and an earlier-filed motion, the Agency requests that the Authority stay these proceedings until the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issues its decision on the petition for review of the Authority's decision in *NTEU*, 65 FLRA 509 (2011) (Member Beck dissenting in part) (*NTEU*). SOP at 2. In its response and an opposition to the motion, the Union opposes granting a stay. Response at 2.

On February 7, 2012, the D.C. Circuit issued its decision dismissing the petition for review of *NTEU*. *See U.S. Dep't of the Treasury v. FLRA,* 670 F.3d 1315 (D.C. Cir. 2012) (*Treasury v. FLRA*).[4] When a party has requested a stay of proceedings that was linked to a pending case and a decision issues in the pending case, the Authority has found that the issuance of the decision mooted the stay request. *See NTEU*, 63 FLRA 26, 27 (2008). Consistent with this precedent, we dismiss the Agency's request as moot.[5] *See id.*

B. We deny the Union's request not to allow the Agency to file a reply, and we deny the Union's alternative request for permission to respond to the Agency's reply.

The Union asserts the Authority should not grant the Agency permission to file a reply. *See* Response at 1. But § 2424.26(a) of the Authority's Regulations expressly authorizes the filing by an agency of a reply to a union's response to address "any facts or arguments made for the first time in the [union's] response." 5 C.F.R. § 2424.26(a). As the Agency's reply addresses only the legal arguments raised by the Union for the first time in its response, § 2424.26(a) authorizes the reply, and filing the reply does not require the permission of the Authority. Thus, we deny the Union's request not to allow the Agency to file a reply.

In addition, the Union requests the Authority's permission to file a response to the Agency's reply. *See*

[1] Member Beck's separate opinion, dissenting in part, is set forth at the end of this decision.

[2] The petition for review originally involved three provisions. In its reply, the Agency withdrew the disapproval of Article 22, Section 2(B)(1)(b), and only two provisions remain at issue. Reply at 1.

[3] In addition, as discussed further below, prior to filing its SOP, the Agency filed a motion requesting that the Authority stay the proceedings, and the Union filed an opposition to the request.

[4] We note that, in *Treasury v. FLRA*, the court dismissed the petition for review on jurisdictional grounds and did not reach the merits of the case. *See* 670 F.3d at 1321.

[5] We note that the Agency's SOP and the Union's response provide a sufficient basis for resolving the parties' dispute regarding the stay request. As such, in resolving that dispute, it is unnecessary to rely on the Agency's separate motion or the Union's opposition. We note, in this regard, that the Agency and the Union did not request permission to file these supplemental submissions, as required under § 2429.26 of the Authority's Regulations.

Response at 1. In negotiability cases, the Authority's Regulations specifically provide for the filing of a union petition for review, an agency statement of position, a union response, and an agency reply. 5 C.F.R. §§ 2424.22, 2424.24, 2424.25, 2424.26. They do not provide for a union response to an agency reply. *IFPTE, Local 3*, 57 FLRA 699, 699 n.1 (2002) (*Local 3*). Under § 2424.27 of the Authority's Regulations,[6] the Authority will not consider any submission filed by a party, other than a submission specifically authorized by the Authority's Regulations, without a showing of extraordinary circumstances. 5 C.F.R. § 2424.27; *Local 3*, 57 FLRA at 699 n.1. Here, the Union asserts no extraordinary circumstances to permit consideration of a supplemental submission. Consistent with the Authority's Regulations and precedent, we deny the Union's request for permission to file a supplemental submission. *See Local 3*, 57 FLRA at 699 n.1.

C. We find that the Agency head disapproved the disputed provisions in their entirety.

The Union contends that the Agency head disapproved only specified wording of the disputed provisions. Response at 3, 13. The Agency contends that the Agency head disapproved the provisions in their entirety. Record of Post-Petition Conference (Record) at 2.

The Agency-head-review memorandum states that the agreement "is disapproved" and specifically lists the "provisions on which this disapproval is based" as including the disputed provisions: "Article 10, Section 4.A" and "Article 49, Section B." Petition, Attach. In support of its position, the Union has submitted printed pages of the "Chief Counsel-NTEU 2011-2014 Negotiated Agreement," which "reflects [its] understanding" of what wording the Agency head disapproved. Response at ii, 3 n.1, 13 n.6. But neither those pages nor the Agency-head-review memorandum indicates that the Agency head disapproved only certain wording of the provisions now before the Authority. Consequently, we find that the Agency head disapproved both provisions in their entirety.

[6] Section 2424.27 provides, in pertinent part: "The Authority will not consider any submission filed by any party other than those authorized under this part, provided however that the Authority may, in its discretion, grant permission to file an additional submission based on a written request showing extraordinary circumstances by any party."

III. Article 10, Section 4(A)

A. Wording

> When the Office has reasonable grounds to question whether an employee is properly using sick leave including annual leave in lieu of sick leave (for example, when sick leave is used frequently or in unusual patterns or circumstances), the Office may inquire further into the matter and ask the employee to explain. Absent a reasonably acceptable explanation, the Office will counsel the employee that continued frequent use of sick leave, or use in unusual patterns or circumstances, may result in a written requirement to furnish administratively acceptable evidence for each subsequent absence due to illness or incapacitation regardless of duration.

Petition at 3.

B. Meaning

The parties agree that the provision has the following meaning. The provision concerns sick-leave usage and applies when the Agency has reasonable grounds to question whether an employee is properly using sick leave. Record at 2. In these circumstances, the Agency may inquire into the matter and ask the employee to explain. If the Agency decides that the employee has not provided a reasonable explanation, then the Agency will counsel the employee. *Id.* According to the Union, the counseling would inform the employee that, if identified usage of sick leave continues, then such usage could result in the Agency requiring the employee to furnish administratively acceptable evidence for each subsequent absence due to illness or incapacitation regardless of duration. Petition at 3.

The Union explains that the wording of the provision does not preclude management from disciplining employees when management determines that they have abused sick leave. Response at 3-4. The Union maintains that the provision only precludes management from requiring an employee to justify all future sick-leave requests without first counseling the employee. *Id.* at 3. The Agency disagrees and argues that the provision precludes management from disciplining an employee in connection with the circumstances that caused the Agency to first question whether the employee was abusing sick leave. SOP at 5.

In interpreting a disputed provision, the Authority looks to its plain wording and any union statement of intent. *E.g., AFGE, Local 1770*, 64 FLRA 953, 958 (2010). If the union's explanation is consistent with the plain wording, then the Authority adopts the explanation for the purpose of construing what the provision means and, based on its meaning, whether it is contrary to law. *Id.* When a provision is silent on a particular matter, a union's statement clarifying the matter will be adopted if it is consistent with the wording of the provision. *Id.*

Where a provision is silent as to whether management may respond to a first offense of leave abuse with any form of discipline other than the issuance of a written leave restriction, and a union explains that the provision allows management to do so, the Authority adopts the union's explanation for purposes of assessing the negotiability of the provision. *See NTEU*, 65 FLRA at 515-16. The provision here is silent as to whether the Agency can respond to a first offense of leave abuse with any form of discipline other than the issuance of a leave-restriction notice, and the Union explains that the provision allows the Agency to do so. Based on the foregoing precedent, we adopt the Union's explanation that the provision permits management to respond to a first offense of sick-leave abuse with any form of discipline other than the issuance of a written restriction of sick leave.[7]

C. Positions of the Parties

1. Agency

The Agency contends that the provision affects management's right to discipline employees under § 7106(a)(2)(A) of the Statute because the provision requires management to counsel an employee before management can restrict sick-leave usage. SOP at 2. The Agency maintains that provisions precluding an agency from imposing sick-leave restrictions affect management's right to discipline because such restrictions are a precondition to an agency's decision to discipline employees for abuse of sick leave. *Id.* And the Agency claims that, because a sick-leave restriction is a precondition to discipline, it is not necessary that such a restriction be defined as a disciplinary action under the parties' collective-bargaining agreement (CBA). Reply at 3.

The Agency asserts that the provision is not an appropriate arrangement under § 7106(b)(3) of the Statute because it excessively interferes with management's right to discipline. *Id.* at 2. The Agency acknowledges that the Authority determined in *NTEU* that it would no longer apply an excessive-interference standard in determining whether agreed-upon, contract provisions are appropriate arrangements. SOP at 3. But the Agency requests, for the reasons set forth in the Department of the Treasury's brief in *Treasury v. FLRA*, that the Authority return to the excessive-interference standard and find that this provision is not an appropriate arrangement. *Id.* at 4.

Alternatively, the Agency asserts that the provision abrogates management's right to discipline because the provision: (1) dictates that management must counsel employees before management may impose a sick-leave restriction letter; (2) requires management to substitute counseling for discipline; and (3) precludes management from disciplining an employee in connection with the circumstances that caused the Agency to first question whether the employee was abusing sick leave. *Id.* at 4-5 (citing *NTEU*, 53 FLRA 539 (1997) (*Commerce*); *NFFE, Local 858*, 42 FLRA 1169 (1991) (*Local 858*); *AFGE, Local 1156*, 42 FLRA 1157 (1991) (*Local 1156*)). The Agency also contends that the provision is not a procedure under § 7106(b)(2) of the Statute. *Id.* at 5.

2. Union

The Union contends that this provision does not affect management's right to discipline because management can discipline an employee without delay by denying the employee's sick-leave request and by declaring the employee absent without leave. Response at 9. The Union argues that sick-leave restrictions do not equate to discipline because the CBA defines "disciplinary actions" only as admonishments, written reprimands, and suspensions of fourteen days or less. *Id.* at 3 & n.2.

Alternatively, the Union asserts that the provision is an appropriate arrangement under § 7106(b)(3) of the Statute. *Id.* at 9. In this regard, the Union argues that the provision is an arrangement because it provides for counseling of employees on their sick-leave abuse before management imposes a written requirement for documentation of sick-leave requests regardless of duration. *Id.* at 7. Also in this regard, the Union argues that the arrangement is appropriate because it does not: (1) substitute counseling for discipline; (2) prevent management from disciplining employees for sick-leave abuse; or (3) prevent management from disciplining an employee for sick-leave abuse while contemporaneously counseling the employee for the same

[7] Our interpretation of the meaning of this provision, unless modified by the parties, would apply in other disputes, such as arbitration proceedings, where the construction of the provision is at issue. *E.g., ACT, Evergreen & Rainier Chapters*, 57 FLRA 475, 477 n.11 (2001) (citation omitted).

abuse. *Id.* at 7-8. The Union also claims that the provision is a procedure under § 7106(b)(2) of the Statute because it is "nearly[, a] pure procedure." *Id.* at 8-9.

D. Analysis and Conclusions

1. The provision affects management's right to discipline.

The Authority has held that "management's right to discipline includes placing an employee in a restricted leave use category." *E.g., NTEU*, 65 FLRA at 516 (quoting *NFFE, Local 405*, 42 FLRA 1112, 1131 (1991)). Thus, the Authority has held that provisions or proposals that preclude management from imposing a leave restriction in response to a first offense of leave abuse affect management's right to discipline employees under § 7106(a)(2)(A). *Id.* at 516-17 (citing *NAGE, Local R5-82*, 43 FLRA 25, 28 (1991) (*Local R5-82*); *Local 858*, 42 FLRA at 1172; *Local 1156*, 42 FLRA at 1162).

Here, the provision would preclude the Agency from requiring an employee to furnish administratively acceptable evidence for any absence due to illness or incapacitation until after the Agency has counseled the employee on suspected leave abuse. Thus, management would not be able to require an employee to justify all future sick-leave requests based on the incident that causes management for the first time to question the employee's use of sick leave. The Authority has repeatedly held that similar provisions affect management's right to discipline under § 7106(a)(2)(A). *See id.* (citing *Local R5-82*, 43 FLRA at 28; *Local 858*, 42 FLRA at 1172; *Local 1156*, 42 FLRA at 1162).

The Union asserts that the provision does not affect management's right to discipline because imposing a requirement that an employee justify all sick-leave requests does not equate to discipline under the CBA. Response at 3 & n.2. But the Authority considered and rejected substantively identical arguments in *NTEU*, 65 FLRA at 517, and *Local 1156*, 42 FLRA at 1162, and the Union provides no basis for reaching a different conclusion here.

For the foregoing reasons, we find that the provision affects management's right to discipline employees. *See NTEU*, 65 FLRA at 517.

2. The provision is an appropriate arrangement.

In *NTEU*, the Authority modified the standard it uses in negotiability cases for determining whether an agreed-upon, contract provision is an appropriate arrangement under § 7106(b)(3). *Id.* at 511-15. Under the Authority's revised framework, the Authority assesses: (1) whether the provision constitutes a sufficiently tailored arrangement for employees adversely affected by the exercise of a management right; and (2) if so, then whether the contract provision "abrogates" -- i.e., waives -- the affected management right. *Id.* at 517. In determining whether a contract provision abrogates a management right, the Authority assesses whether the provision "precludes [the] agency from exercising" the affected management right. *Id.* at 515 (quoting *U.S. DOT, FAA*, 65 FLRA 171, 174 (2010)).

Applying that framework here,[8] the Agency does not dispute the Union's assertion that the provision is an arrangement. When an agency does not dispute that a provision is an arrangement, the Authority will find that the agency concedes that the provision is an arrangement. *E.g., NATCA*, 66 FLRA 213, 216 (2011) (citing 5 C.F.R. § 2424.32(c)(2)[9]). Consistent with this precedent, we find that the provision is an arrangement under § 7106(b)(3).

As to whether the arrangement is appropriate, the provision precludes the Agency from requiring an employee to furnish administratively acceptable evidence for any absence due to illness or incapacitation until after the Agency has counseled the employee on suspected leave abuse. But the provision does not preclude management from disciplining employees, even for a first instance of suspected sick-leave abuse, by means other than leave restriction. Thus, the provision merely limits the circumstances in which management may exercise its right to discipline; it does not preclude the Agency from exercising that right. *See NTEU*, 65 FLRA at 517.

The Agency's reliance on the Authority's decisions in *Local 858* and *Local 1156* is misplaced. In both cases, the Authority applied an excessive-interference standard, rather than an abrogation standard, in concluding that the provisions were not appropriate arrangements. *Local 858*, 42 FLRA at 1172-73; *Local 1156*, 42 FLRA at 1162-64. The Agency also cites *Commerce*. But in that decision, the Authority found that the cited proposals were appropriate arrangements, and the Agency fails to explain how this precedent supports its position that this provision is not

[8] As noted, the Agency requests that the Authority return to an excessive-interference standard. In *NTEU*, 65 FLRA at 511-15, the Authority explained the reasons for adopting an abrogation standard. For the same reasons, we decline to return to an excessive-interference standard here.

[9] Section 2424.32(c)(2) provides: "Failure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion."

an appropriate arrangement. *See Commerce*, 53 FLRA at 557-59.

For the foregoing reasons, we find that the provision does not abrogate management's right to discipline employees under § 7106(a)(2)(A) of the Statute, and that the provision is an appropriate arrangement under § 7106(b)(3) of the Statute.[10] Accordingly, we find that the provision is not contrary to § 7106(a)(2)(A) of the Statute, and we direct the Agency to rescind its disapproval of the provision.[11]

IV. Article 49, Section (B)

A. Wording

> Once repayments begin, the Office shall annually provide NTEU with an electronic report detailing the Office's previous fiscal year disbursements of student loan monies. This electronic report shall provide the following information, when reported to the Office by the administrator: the employee names, occupation or series, and total dollar amount of the student loan repayment.

Petition at 7.

B. Meaning

The parties agree that the provision concerns a student-loan-repayment program. The parties also agree that the Agency does not currently have such a program, but agree that, under the provision, if the Agency establishes such a program, then the Agency must annually provide the Union with a report detailing the previous year's disbursement of student loans, to include the names of employees who received student-loan repayments, their occupations or series, and the amount of the loan repayment that each employee received.[12] Record at 3; Petition at 7.

C. Positions of the Parties

1. Agency

The Agency contends that this provision is contrary to the Privacy Act, 5 U.S.C. § 552a. SOP at 9. The Agency argues that disclosure of the specified information with employees' names identified would result in a clearly unwarranted invasion of the employees' personal privacy within the meaning of exemption 6 of the Freedom of Information Act (FOIA).[13] *Id.* at 9-10. The Agency maintains that disclosure of the information would reveal that the employees are in debt and the amount of the debt. The Agency alleges that information about an employee's debts is inherently private, personal information, and that disclosure of the information is an invasion of personal privacy. *Id.* at 10. And the Agency argues that these privacy interests outweigh the limited service to the public interest by disclosure, particularly because the public interest could be served by disclosure of this information without employee names. *Id.*

In reply to the Union's response, the Agency claims that the Union failed to respond to the Agency's Privacy Act arguments and that, therefore, the arguments are unrebutted. Reply at 5. In reply to a Union assertion that the provision is negotiable as a procedure or appropriate arrangement, the Agency contends that § 7106(b)(2) or (3) does not make negotiable a provision that is contrary to law. *Id.* at 6-7.

2. Union

The Union "rejects the [Agency's] assertions." Response at 14. The Union contends that the analysis of information requests in negotiability cases is different from the analysis of information requests under § 7114(b)(4) of the Statute.[14] The Union argues that entitlement to information under § 7114(b)(4) is a statutory floor and not a ceiling. The Union maintains that, during negotiations, the local parties discussed the matter of employee privacy and whether the disclosure of the specified information to the Union would be appropriate. *Id.* at 15. The Union claims that the local parties' agreement to the provision expanded upon the Union's statutory right to information under § 7114(b)(4). *Id.* The Union also maintains that the information is necessary to assess the program and that other collective-bargaining agreements contain similar

[10] As such, the Authority need not address whether the provision is a procedure under § 7106(b)(2) of the Statute. *See NTEU*, 65 FLRA at 517 n.11.

[11] In finding that the provision is not contrary to law, we make no findings as to its merits.

[12] We note that there is no claim that the current non-existence of a student-loan-repayment program precludes the Authority from issuing a negotiability decision in this case. *Cf. AFGE, Local 3937*, 66 FLRA 393, 393-94 (2011) (Member DuBester dissenting in part on other grounds) (finding that parties "continue[d] to have a legally cognizable interest in the outcome[]" of a case where "proposals' operation could have a prospective impact on employees").

[13] Exemption 6 of the FOIA provides that information contained in "personnel and medical files and similar files" may be withheld if disclosure of the information would result in a "clearly unwarranted invasion of personal privacy[.]" 5 U.S.C. § 552(b)(6).

[14] Section 7114(b)(4) requires agencies to provide exclusive representatives with certain information. *See* 5 U.S.C. § 7114(b)(4).

provisions. *Id.* Based on the foregoing, the Union claims that the provision was properly negotiated as "a procedure and an appropriate arrangement regarding the provision of information described in [the provision] (including employee names)" to the Union. *Id.* at 16.

D. Analysis and Conclusions

As an initial matter, the Agency claims that the Union failed to respond to the Agency's Privacy Act arguments. *See* Reply at 5. But the Union specifically stated that it "rejects the [Agency's] assertions," Response at 14, which includes the Agency's assertion that the provision is contrary to the Privacy Act, *see id.* at 13. Accordingly, we address whether the Agency has demonstrated that the provision is contrary to the Privacy Act.

The Privacy Act prohibits disclosure of information in a system of records that would result in a clearly unwarranted invasion of personal privacy within the meaning of exemption 6 of the FOIA. *E.g., U.S. DOT, FAA, N.Y. TRACON, Westbury, N.Y.,* 50 FLRA 338, 345 (1995) (*FAA*). *FAA* sets forth the analytical approach the Authority follows in negotiability cases involving the Privacy Act. *E.g., AFGE, Local 1858*, 56 FLRA 1115, 1117 (2001) (*Local 1858*).

Under this approach, the agency is required to demonstrate: (1) that the disputed information is contained in a system of records; (2) that disclosure would implicate privacy interests; and (3) the nature and significance of those privacy interests. *FAA*, 50 FLRA at 345. If the agency makes these showings, then the burden shifts to the union to: (1) identify a public interest cognizable under the FOIA; and (2) demonstrate how disclosure would serve that public interest. *Local 1858*, 56 FLRA at 1117. And the only public interests that the Authority considers are the extent to which disclosure would shed light on the agency's performance of its statutory duties or would inform citizens about the activities of the Federal Government. *FAA*, 50 FLRA at 343.

Once the relevant interests are established, the Authority balances the privacy interests of employees against the public interest in disclosure. *Id.* at 346. When the privacy interests outweigh the public interest, the Authority finds that disclosure of the requested information would result in a clearly unwarranted invasion of personal privacy under FOIA exemption 6. *Id.* And unless disclosure is permitted under another exception to the Privacy Act, the Authority concludes that the Privacy Act prohibits disclosure of the information. *Id.*

Applying this approach here, with regard to a system of records, there is no dispute that, in the event that the Agency establishes a student-loan-repayment program, the information specified in the provision will be contained in a system of records. In this regard, the Agency notes, without dispute, that agencies with such programs must compile information for an annual report to the Office of Personnel Management. SOP at 9 n.5.

As to privacy interests, the Agency argues that disclosure of the specified information with employees' names identified would result in a clearly unwarranted invasion of the employees' personal privacy because disclosure would reveal that the employees are in debt and the amount of the debt. Courts have repeatedly acknowledged that disclosure of financial information linked to a specific individual implicates significant privacy interests. *E.g., U.S. Dep't of Housing & Urban Dev.*, 822 F.2d 182, 186 (1st Cir. 1987). Thus, we find that the provision implicates significant employee privacy interests. *See Local 1858*, 56 FLRA at 1118.

The Union maintains that the local parties, in agreeing to the provision, discussed the matter of employee privacy and whether the disclosure of the specified information to the Union would be appropriate. But the Union does not: (1) identify a public interest cognizable under the FOIA; or (2) demonstrate how disclosure would serve that public interest. *See FAA*, 50 FLRA at 345. Consequently, the Union has not rebutted the Agency's prima facie case under *FAA*. When a union in a negotiability case has not rebutted the agency's prima facie case under *FAA*, the Authority has concluded that the disputed provision was contrary to the Privacy Act. *Local 1858*, 56 FLRA at 1118.

We note that the Union maintains that the information specified in the provision is necessary to assess the program. But even if the Authority were to view this as an assertion that the public interest in government accountability would be served by disclosure of the disputed information, there is no basis for finding that the public interest would not be equally served by disclosure of the information without the employees' names. Consequently, the Union does not show how the disclosure of the name-identified information serves the public interest.

The Union also argues that the provision is a procedure or appropriate arrangement under § 7106(b)(2) or (3) and is contained in other collective-bargaining agreements. But a provision that is contrary to the Privacy Act remains so even if it is a procedure or appropriate arrangement or is contained in other agreements. *See AFGE, Local 12*, 60 FLRA 533, 536 (2004) (Member Armendariz concurring as to another matter); *NTEU*, 55 FLRA 1174, 1181 (1999)

(Member Wasserman dissenting as to another matter). Thus, we do not address the Union's argument that the provision is a procedure or appropriate arrangement. *See NTEU*, 55 FLRA at 1181.

Based on the foregoing, we conclude that Article 49, Section (B) is contrary to the Privacy Act.

V. Order

The Agency shall rescind its disapproval of Article 10, Section 4(A), and the petition is dismissed as to Article 49, Section (B).

Member Beck, Dissenting in Part:

I agree with my colleagues that the provision concerning the student loan repayment disbursements is contrary to the Privacy Act.

I continue to disagree, however, with the analytic framework that was adopted by the Majority in *NTEU*, 65 FLRA 509 (2011) (Member Beck dissenting). It is legally improper to apply an abrogation standard to those situations where an agency head rejects a provision that was provisionally accepted at the bargaining table.

For the reasons that I articulated in my dissent in *NTEU*, the Majority's approach is inconsistent with the management prerogatives that Congress sought to protect through § 7106(a) and flies in the face of several decades of judicial precedent. *See id.* at 519 (Dissenting Opinion of Member Beck) (citing *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983) (*Local 2782*) (proposal affecting management rights should be deemed within the duty to bargain unless it interferes with statutory management rights "to an excessive degree")), 520 (citing *AFGE v. FLRA*, 778 F.2d 850, 863 (D.C. Cir. 1985) (Congress intended that the head of an agency may reject a contract term – even a settlement imposed by the Federal Service Impasses Panel – if "it is violative of management prerogatives under the Act")). As I noted in *NTEU*,

> when a proposal impermissibly interferes with a management right, it is prohibited by § 7106(a). And a proposal that is prohibited by § 7106(a) can properly be characterized as being *both* outside the duty to bargain and not "in accordance with the provisions of [the Statute]." Such a proposal is subject to agency head rejection under § 7114(c)(2).

65 FLRA at 521 (Dissenting Opinion of Member Beck).

The Court in *U.S. Dep't of the Treasury, Bureau of the Public Debt, Wash., D.C. v. FLRA*, 670 F.3d 1315, 1321 (D.C. Cir. 2012), did not address these concerns because the agency failed to seek reconsideration from the Authority before filing its appeal.

Unlike the Majority, I would determine whether the sick leave provision at issue in this case interferes with a management right "to an excessive degree."[*] *Local 2782*, 702 F.2d at 1188.

[*] The Agency does not dispute the Union's assertion that the provision is an arrangement.

The analysis is not a difficult one.

Article 10, Section 4(A) requires the Agency to counsel an employee before it takes any other steps to restrict the use of sick leave even when the Agency has "reasonable grounds" to question whether an employee is properly using sick leave. Record of Post-Petition Conference at 2.

We have found consistently that any provision that imposes a "precondition" on the Agency's prerogative to impose discipline or to place restrictions on how sick leave is requested by employees for suspected sick leave abuse excessively interferes with management's right to discipline. *AFGE, Local 1156*, 42 FLRA 1157, 1161 (1991) (requirement that the Agency issue written notice prior to placing employees on sick leave restriction directly interferes with management's right to discipline); *NFFE, Local 858*, 42 FLRA 1169, 1173 (1991) (precluding disciplinary action for initial incidents of suspected sick leave abuse excessively interferes with management's right to discipline employees); *see also NAGE, Local R5-82*, 43 FLRA 25, 32 (1991) (citing *Dep't of Justice, Bureau of Prisons, Fed. Corr. Inst., Petersburg, Va.*, 30 FLRA 837, 844 (1987) (proposal limiting agency from telephoning employees who are on sick leave excessively interferes with management's right to discipline)).

I conclude that the sick leave provision excessively interferes with management's right to discipline under § 7106(a)(2)(A).