OFFICE OF COMPLIANCE
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Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee Petitioner, and United States Capitol Police Employing Office.	)	Case No. 16-LM-06 (NG)

Before the Board of Directors: Barbara L Camens, Chair; Alan V. Friedman, Roberta L. Holzwarth, Susan S. Robfogel, and Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This petition for review, involving 13 proposals, was filed by the Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee (Union) after the United States Capitol Police (USCP or Department) alleged they were outside its duty to bargain. The petition for review comes before the Office of Compliance Board of Directors (the Board) pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (FSLMRS), as applied by § 220(c)(1) of the Congressional Accountability Act , 2 U.S.C. § 1351(c)(1). The Union is the certified representative of a unit of police officers employed by the USCP. The parties are governed by a collective bargaining agreement (CBA) that was to have expired on June 9, 2013, but remains in effect until superseded by a successor CBA.

I. Statement of the Case

The petition for review in this case arose after the USCP presented the Union with draft Directive 2055.xxx, Time and Attendance, which would replace Departmental Time and Attendance Certification Interim Guidance, issued in September 2011. In accordance with Article 8 of the parties' CBA, Changes in Conditions of Employment, the Union is proposing 13 modifications to the draft Directive.[1]

[1] Unlike the Board's decision in 16-LM-02, issued on this same date, this negotiability appeal involves mid-term bargaining over a draft directive unrelated to the parties' current negotiations over a successor CBA.

II. Proposals In Dispute

Proposal E

On page 1 of the draft directive, the Union proposes that the following be added to the end of the definition of "FLSA Non-Exempt Sworn Positions":

> Consistent with the Department's Collective Bargaining Agreement with the Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee, all FLSA non-exempt bargaining unit employees of the Labor Committee shall have a work period of 14 days and shall receive overtime compensation at a rate of one and one-half (l.5) times the regular hourly rate of pay for all work over 85 hours performed during each work period.

Proposal F

On page 2, the Union proposes adding the following at the end of "Purpose and Importance of Accurate Employee T&A Data": "10. Ensuring that employees are paid for all time that they work."

Proposal H

On page 3, the Union proposes that the following be added to the end of "1. Use of Time Clock": "c. Consistent with the FLSA, the Department is required to pay non-exempt employees for all time that the employees are suffered or permitted to perform work."

Proposal I

On page 3, the Department proposes the following: "Overtime compensation is paid in 15-minute increments, rounded to the nearest higher or lower quarter hour." The Union proposes that the sentence be revised as follows: "Overtime compensation is paid for every minute of work performed in excess of the applicable overtime threshold."

Proposal J

On page 4, the Union proposes that the following be added to the end of "3. Virtual Time Clock": "iii. Employees must be permitted to include on their time and attendance all work time not captured by using the "Clock In" and "Clock Out" function on the Virtual Time Clock."

Proposal K

On page 4, the Union proposes that the following be added to the end of "3. Virtual Time Clock":

d. Employees who are not able to access a computer or other mobile device while away from a duty location should notify their first-line supervisor that they will be unable to enter their daily clock-in and clock-out times until returning to their duty location. The employee and supervisor can then either (1) agree that the supervisor will enter the employee's clock-in and clock-out times while the employee is away from the workplace by the employee notifying the supervisor daily by telephone or (2) agree that the employee will be permitted to enter the clock-in and clock-out times for the time spent away from the duty station within five (5) workdays of returning to the duty station. Employees are not required to use their personal computers to enter their daily clock-in and clock-out times.

Proposal L

On page 5, the Union proposes that the following be added to the end of "Supervisor Verification/Certification":

e. Supervisors cannot refuse to verify or certify that an FLSA non-exempt employee performed work as long as the work was suffered or permitted by the employer. Supervisors cannot refuse to verify or certify that an FLSA non-exempt employee performed work on the basis that the work was not pre-approved by the Department.

Proposal M

On page 6, the Union proposes that the following be included as number three (3) under "Correcting the T&A Data": "3. Supervisors and Timekeepers cannot correct T&A data to remove work actually performed by FLSA non-exempt employees."

Proposal N

On page 6, the Union proposes that the following be added to the end of number one (1) under "Employees": "Failure to report errors does not in any way waive an FLSA non-exempt employee's right to be compensated for all hours of work or any other rights under the FLSA."

Proposal P

On page 6, the Union proposes that the following be added under "Employees":

5. The Department will provide a sufficient time, on a daily basis, for employees to complete their time and attendance responsibilities on a daily basis. While the exact amount of time to complete these duties may vary depending on the circumstances, the Department recognizes that, generally, fifteen (15) minutes is a sufficient amount of time on a daily basis for an employee to complete his or her time and attendance responsibilities.

Proposal Q

On page 7, the Union proposes that the following be added under "Additional Information": "1. Failure of an employee to comply with any provision of this Directive does not excuse the Department from the mandate under the FLSA that non-exempt employees be paid for all time worked."

Proposal R

On page 7, the Union proposes that the following be added under "Additional Information":

> 2. Employees may request extensions of any timelines under this Directive. The Department will grant such extensions unless doing so would cause an undue burden on the Department. All responses to extension requests must be provided by the Department to the employee in writing within 24 hours of the request. If the Department denies the extension request, it shall set out, with specificity, the reason(s) for the denial. Any request for an extension shall be deemed granted, if the Department fails to respond to it within 24 hours. Denials of extension requests shall be grievable pursuant to the applicable grievance procedure.

Proposal S

On page 7, the Union proposes that the following be added under "Additional Information":

> 3. If, for any reason, an employee is physically or otherwise unable to use the computer programs required under this Directive to complete his or her time and attendance, the employee is encouraged to contact his or her first line supervisor to discuss reasonable accommodations available to that employee. The Department will make every effort to ensure that employees who are physically or otherwise unable to use the computer programs are accommodated.

III. Positions of the Parties

A. Employing Office

The USCP contends that all 13 proposals are nonnegotiable because "the Union has not established that there is a change in conditions of employment," which it asserts is a prerequisite under Federal Labor Relations Authority (Authority) precedent for the Board to find an obligation to negotiate during the term of the parties' CBA.[2] In this regard, it contends that the

[2] In support of its position, the USCP cites *U.S. Dep't of the Navy, Supervisor of Ship-Building, Conversion and Repair, Groton, CN and AFGE, Local 2105, AFL-CIO,* 4 F.L.R.A. 578, 580 (1980). Further, while recognizing that

draft Directive essentially reiterates the Department's policy with respect to time and attendance by replacing the interim guidance issued in September 2011. The only *de minimis* change "is that employees can enter time and attendance in a new electronic system, called WorkBrain," which will permit them to certify their work hours on a daily, weekly or bi-weekly basis, and to "review and certify work time from any computer anywhere in the world." Employees have always been required to certify their time and attendance, either electronically or on paper, at least once per pay period to ensure they are paid for all their work hours. WorkBrain is an upgrade of the electronic recording system intended to move the Department "from a paper-based system to a more convenient electronic system." Moreover, the USCP contends, because unit employees will continue to clock in and clock out on the Department's approved time clocks since "their worksite is located on Capitol Grounds," the additional tool provided by WorkBrain "largely will not affect" them.

The USCP also asserts that all of the proposals, with the exception of Proposal E, improperly seek to negotiate on behalf of all of the Department's employees and not just those represented by the Union.[3] As such, they are "overly-broad and nonnegotiable." Additionally, as indicated below in greater detail when discussing them individually, it alleges that Proposals E, F, H, I, N, Q, and R (sentence 6) are "covered by" provisions of the parties' current CBA and, therefore, outside the scope of bargaining under precedent established by the Authority.[4] Furthermore, the USCP notes, the Authority has held that "a petition for review of a negotiability issue is only appropriate where the parties are in dispute over whether a proposal is inconsistent with law, rule, or regulation."[5] As the USCP's "covered-by" claims do not involve disputes over whether these proposals are inconsistent with law, rule, or regulation, they are not properly before the Board in this negotiability proceeding.

Turning more specifically to the USCP's contentions with respect to the 13 proposals, the USPC responds first to the Union position that the intent of Proposal E is to ensure that the Department pays overtime to FLSA non-exempt bargaining unit employees as provided for in the parties' CBA. First, the USPC contends, the Union's attempt "to memorialize into Department policy what is currently in the CBA" demonstrates that there is no change in conditions of employment triggering a bargaining obligation on the part of the USCP. Second, the USCP notes that Article 18, Basic Work Period and Overtime, Section 18.01.1 states that

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policies regarding the recording of employee time and attendance generally constitute negotiable conditions of employment, the USCP asserts that in this case "there is no change in a condition of employment," citing, for example, *AFSCME Council 26, AFL-CIO v. Office of the Architect of the Capitol,* 03-LMR-02, *3 (2003).

[3] The USCP cites *United States Dep 't of the Navy, Naval Aviation Depot, Cherry Point, NC v. F.L.R.A.,* 952 F.2d 1434, 1442 (D.C. Cir. 1992) (*Cherry Point*) (union is not permitted to bargain over the condition of employment of supervisory personnel or personnel not in the bargaining unit) to support its claim.

[4] *Dep't of the Army Enlisted Records & Evaluation Ctr., Ft. Benjamin Harrison, IN and AFGE Local 1411*, AFL-CIO, 48 F.L.R.A. 31 (1993) (*Ft. Benjamin Harrison)* (proposals expressly conflicting with provisions in a CBA are "covered by" the CBA and, thus, not negotiable) is cited by the USCP.

[5] To support its position, the USCP cites *AFGE. Local 12, AFL-CIO and Dep't of Labor,* 26 F.L.R.A. 768, 769 (1987) and *NAGE, Local R1-109 and U.S. Dep't of Veterans Affairs Med. Ctr., Newington, CN,* 38 F.L.R.A. 928, 931 (1990).

employees receive overtime compensation at 1.5 times their regular rate of pay for all hours worked in excess of 85 hours during each 14-day work period. Section 18.02.2 states "overtime will be calculated cumulatively, by the minute, during the work period. It will be totaled and calculated at the end of the work period. Overtime compensation will be paid in fifteen (15) minute increments, rounded to the nearest higher or lower quarter hour." Thus, the USCP contends, not only does "the Union itself concede[] that the matter of overtime pay is covered by the parties' CBA," Proposal E also "conflicts with the language [] contained at Article 18 of the CBA." In this regard, the parties have already agreed on what hours will be deemed as hours worked for purposes of earning overtime pay, how such hours of work will be calculated and rounded, and how employees may elect to receive overtime pay (i.e., as compensatory time or monetary compensation). As the proposal "contravenes what is contained in the CBA," the USCP's position is that it has no duty to bargain.

In addition to its position that the proposal seeks to negotiate over the conditions of employment of all employees, the USCP contends that, although the Union claims its intent is "to accurately record employees' time," nothing in the proposal refers to any recordkeeping requirement. In addition, the USCP contends, the draft Directive already captures the Union's "intent" by specifying that "the USCP will maintain a record of the number of hours worked by all employees. A record of time in pay and non-pay status must be maintained for purposes of computing pay, leave, and allowances." Further, "the Union concedes the proposal is covered by the existing overtime provisions" in Sections 18.01.1 and 18.02.2. Consequently, by requiring payment for "all time that they work," the USCP's position is that Proposal F conflicts with the existing CBA and, in accordance with the Authority's "covered-by" precedent, is outside the scope of its duty to bargain.

The USCP next responds to the Union's statement that the purpose of Proposal H "is to ensure that the Department complies with the FLSA and that the Department's managers do not attempt to make non-exempt employees work without compensation." In addition to its position that the proposal is unrelated to any change in conditions of employment created by the draft Directive, and that the Union is seeking to negotiate on behalf of all employees, the USCP contends that, on its face, the issue it addresses is covered by Sections 18.01.1 and 18.02.2 of the CBA. Moreover, because the proposal would require payment "for all the time that the employees are suffered or permitted to perform work," and Section 18.02.2 specifically provides that "overtime compensation will be paid in fifteen (15) minute increments, rounded to the nearest higher or lower quarter hour," it "conflicts with a provision covered by the CBA." Finally, the USCP argues that the Union's proposal would require compensation for activities not authorized as a matter of law. In this regard, it notes, when an employee undertakes negotiations or grievance activities in a representational capacity, overtime is payable under the FLSA only if the employee is already on overtime duty status.[6] Additionally, 5 U.S.C. § 7131 does not authorize overtime for time spent in representational activities when the employee is not

[6] To support its position, the USCP cites the Authority's decision in *Warner Robins Air Logistics Ctr. and AFGE Local 987,* 23 F.L.R.A. 270, 272 (1986) (*Warner Robins)* (payment of overtime or compensatory time not authorized by the FLSA when representational activities are performed by a union official outside his or her normal working hours).

otherwise in a duty status.[7] Thus, the USCP concludes that Proposal H is nonnegotiable.

The USCP contends that, as with Proposals E, F, and H, Proposal I is also covered by Sections 18.01.1 and 18.02.2 of the CBA. The Union has stated that the Proposal is intended "to ensure that bargaining unit employees receive pay for every minute of work and to prevent the Department from rounding down their time worked and, in effect, causing the bargaining unit employees to work without compensation." Because the parties have already agreed otherwise in Section 18.02.2, the USCP's position is that Proposal I also expressly conflicts with a provision of the parties' CBA and, under Authority case law, is "covered by" the CBA and, thus, not negotiable. Finally, as with Proposal H, the USCP contends that the Union's proposed wording would require compensation for activities not authorized as a matter of law, contrary to the Authority's decisions in *Warner Robins*, *POPA*, and *Army Reserve,* and as such, is also outside the USCP's obligation to bargain.

The USCP next addresses the Union's position that Proposal J is intended "to ensure that, if the Department's virtual time clock, for any reason, fails to capture all of the employee's time worked, that the employee will have an opportunity to report that time so that the employee is compensated for all of his or her work." In addition to the other reasons alleged by the USCP for why Proposal J is not within its duty to bargain, it states that it previously advised the Union that the wording concerns the technology, methods and means of performing the time and attendance work function, under 5 U.S.C. § 7106(b)(l). Such matters are not negotiable except at the election of the agency and "the Department has not elected to engage in bargaining."[8] In the USCP's view, there is no dispute between the parties that the use of the virtual time clocks is the Department's preferred method and means of capturing time. It asserts that Proposal J, however, "seeks to change the Department's method and means of capturing time and directly interferes with the Department's accuracy of record for which the method and means of recording time was adopted." In this regard, the USCP asserts that under the Authority's two-part test for determining whether 7106(b)(1) applies, it must be demonstrated that: (l) there is a direct and integral relationship between the particular method and means the agency has chosen and the accomplishment of the agency's mission; and (2) the proposal would directly interfere with the mission-related purpose for which the method or means was adopted.[9] The USCP's contends that this test does not require that the methods or

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[7] Cited by the USCP in this connection are *POPA and Patent & Trademark Office,* 21 F.L.R.A. 580, 584 (1986) (*POPA*) and *AFGE Local 900 and Dept. of Army, Army Reserve Personnel Ctr., St. Louis, MO,* 46 F.L.R.A. 1494, 1509-10 (l993) (*Army Reserve*) (Provision held nonnegotiable, requiring compensatory time if the employer requires the union representative's presence as a representative, or if an arbitration hearing requires the employee's presence, at a time prior to or following his or her scheduled eight-hour day; reliance placed on FLSA analysis of whether the time is spent predominantly for the benefit of the employer).

[8] The USCP cites *Int'l Fed'n of Professional and Technical Engineers, Local 49 and U.S. Dep't of the Army, Army Corps of Engineers, South Pacific Division, San Francisco, CA,* 52 F.L.R.A. 813, 818 (1996), where the Authority defined the term "method" as "the way in which an agency performs its work," and the term "means" as "any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work."

[9] Here, *Nat'l Fed'n of Fed. Emp. and Dep't of the Interior,* 59 F.L.R.A. 868, 872 (2004), is cited to support the USCP's argument.

means be essential to accomplishment of the agency's mission but "the means need only be a matter that is used to attain or make more likely the attainment of a desired end or used by the agency for the accomplishing or furthering of the performance of its work."[10] With respect to its preferred method for accurately reporting time and attendance, "it is axiomatic that accomplishment of the Department's mission is dependent upon paying employees accurately and for the hours that they have worked in support of the Department's mission." The USCP has also determined that the method it has chosen for correcting inaccurate time and attendance entries will best attain that desired end. As a result, the USCP's position is that it has no duty to bargain over the Union's proposal.

Given that the draft Directive requires employees to log into a virtual time clock to report their hours of work, the USCP understands the intent of Union Proposal K to be a "procedural arrangement" that would ensure that employees who are away from their workplace can report their work time. Because employees who are working off-site do not have access to an electronic device that will allow them to use the virtual time clock, the proposal would permit them to report their work time by having their supervisor enter their time for them or by getting the supervisor's approval to enter their time within 5 workdays after returning to the regular workplace. According to the USCP, however, the Union has not explained "the intent behind each sentence of the proposal," i.e., "what a 'procedural arrangement' is and which sentence of the proposal is covered." The USCP also contends that the Union has not demonstrated that there is a change in conditions of employment requiring negotiations over the subject matter of the proposal because, under the previous policy, employees who were unable to comply with the clock in/out process were to notify their supervisors immediately, and that policy remains unchanged by the draft Directive.

In addition, the USCP asserts that the first and third sentences of Proposal K "excessively interfere[] with the Department's right to assign work," under 5 U.S.C. § 7106(a)(2), by: (1) requiring an employee's immediate supervisor to consult with the employee, (2) dictating the actions a supervisor may take after consulting with the employee, and (3) limiting the supervisor's decision-making ability.[11] It contends that the Union's characterization of the proposal as a procedural arrangement is "without any supporting authority," and that "it is unclear whether the Union is asserting that it is a negotiable procedure in accordance with 5 U.S.C. § 7106(b)(2) or an appropriate arrangement in accordance with 5 U.S.C. § 7106(b)(3)." In any event, the USCP maintains that Proposal K interferes with management's right to determine the means by which it will perform work.[12] Moreover, the proposal is nonnegotiable

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[10] To support this claim, the USCP refers to *Fed. Bureau of Prisons Correctional Institutional, Bastrop, TX and AFGE Local 3828, AFL-CIO,* 55 F.L.R.A. 848, 854 (1999)(*BOP Correctional Institutional*).

[11] The USCP cites *AFGE Local 1345 and Army, HQ, Fort Carson and HQ, 4th Infantry Division, Fort Carson, CO,* 48 F.L.R.A. 168, 178 (1993)(*Fort Carson)* (holding that a proposal that requires action by an employee's immediate supervisor is non-negotiable under 5 U.S.C. § 7106(a)(2)) to support its claim.

[12] The Authority's decision in *Dep't of Def., Dep't of the Air Force, Air Force Logistics Command*, 30 F.L.R.A. 1025, 1026 (1988) (*Logistics Command*)(by preventing agency from requiring civilian employees to wear military uniforms, proposal found nonnegotiable because it directly interfered with management's rights to determine

under 5 U.S.C. § 7106(b)(1) because it seeks to change the USCP's method and means of capturing time and "directly interferes with the Department's accuracy of record for which the method and means of recording time was adopted." Further, the USCP contends, sentence three of the Proposal directly interferes with management's right to determine the means by which a bargaining unit employee will clock in "by eliminating a method by which an employee can clock in or out."[13]

While the Union states that Proposal L "is intended to prevent the Department's managers from permitting [] employees to work without compensation," the USCP points out that the prior policy authorized supervisors to verify that employees' biweekly certification reports in the WorkBrain system accurately reflect their time and attendance. Thus, as with all of the Union's other proposals, the USCP contends that it is inappropriate because there has not been a change in working conditions requiring mid-term bargaining. It also is improper, according to the USCP, "as it seeks to negotiate the actions of a supervisor." Additionally, the proposal interferes with management's right to assign work and is not an appropriate arrangement or procedure for bargaining unit employees. In this regard, the USCP notes that the Union does not assert that the proposal is in fact intended to be an arrangement for employees adversely affected by management's exercise of its rights, "nor can it be because there is no adverse effect identified." Finally, the USCP contends that Proposal L "would require compensation for activities not authorized as a matter of law," contrary to the Authority's decisions in *Warner Robins*, *POPA*, and *Army Reserve.*

The USCP understands the Union's stated intent of Proposal M is "to prevent the Department's managers from editing FLSA non-exempt employees' time records," for example, "where the supervisor contends that the employee was not pre-approved to perform the work," thereby permitting the USCP not to compensate FLSA non-exempt employees for hours of work. Once again, the USCP claims that there is no change in working conditions requiring mid-term bargaining because the prior policy authorized supervisors to verify that employees' biweekly certification reports in the WorkBrain system accurately reflect their time and attendance. Moreover, the proposal "improperly intrudes on management's right to assign work and determine the personnel by which the Department's operation will be conducted in accordance with Section 7106(a)(2)(B)." In this regard, the USCP contends that it limits management's ability to assign work to supervisors and timekeepers, neither of which is in the bargaining unit. As a result, Proposal M is not negotiable.

In response to the Union's statement that Proposal N would "ensure that the Department does not use its cumbersome time and attendance system in an attempt to improperly get employees to waive their rights to compensation for all time that the employees are suffered to work," the USCP rejects the characterization of the electronic time and attendance system as "cumbersome." Rather, the USCP states that it is a "more useful system that identifies and

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internal security, under 5 U.S.C. § 7106(a)(2), and the means of performing work, under 5 U.S.C. § 7106(b)(1)) is referenced by the USCP in this connection.

[13] The USCP once again cites *BOP Correctional Institutional* to support its claim.

certifies time accurately." Moreover, as the first sentence of the proposal is identical to lines 57-60 on page 6 of the draft Directive, only sentence two is in dispute. In the USCP's view, that sentence is improper because it seeks to negotiate on behalf of all employees, not just those the Union represents, and the Union has not identified a change in any working condition that requires mid-term bargaining. With respect to the latter claim, the USCP notes that the prior policy required employees to acknowledge that they have reviewed their biweekly certification reports by signing and dating the report, thereby verifying that the time and attendance is accurate. Additionally, like Proposals E, F, H, and I, the USCP contends that Proposal N expressly conflicts with Sections 18.01.1 and 18.02.2 of the parties' CBA and, therefore, is nonnegotiable under the Authority's "covered by" doctrine. Finally, because it would require compensation for activities not authorized as a matter of law, the USCP contends that Proposal N is contrary to the Authority's decisions in *Warner Robins*, *POPA*, and *Army Reserve*.

The USCP next responds to the Union's statement that Proposal P is intended "as a procedure to allow bargaining unit employees enough time, on a daily basis, to enter their time into the time and attendance system," and that it does not set an amount of time that must be provided on a daily basis "but instead sets a general guideline for the time that the Department should provide to employees each day to enter in their time." According to the USCP, the prior policy requiring employees to certify their time has not changed, so there is no obligation on its part to engage in mid-term bargaining with the Union over this matter. In this regard, the draft Directive allows employees to certify their work time on a daily, weekly or once-a-pay-period basis, and continues the current requirement contained in the interim guidance that time be certified by the end of the pay period. Thus, the USCP maintains, the move from a paper-based to an electronic-based system set forth in the draft Directive "is negligible and represents no change in work duties or conditions, only changing the method by which employees certify their time." Since there is no impact, or reasonably foreseeable impact, of this change on unit employees' conditions of employment, the USCP asserts that the proposal is outside of its duty to bargain under Authority precedent.[14] Additionally, the proposal improperly intrudes on management's right to assign work and determine the personnel by which the USCP's operation will be conducted, pursuant to 5 U.S.C. § 7106(a)(2)(B), by limiting its ability to assign work to supervisors and timekeepers, "neither of which is in the appropriate bargaining unit." The USCP concludes that, because the Union does not assert that the proposals is a procedure or an appropriate arrangement or provide any legal precedent to support such an assertion, Proposal P infringes on management's right to assign work to employees not in the bargaining unit, and is also nonnegotiable for this reason.

In response to the Union's statement that Proposal Q is "intended to communicate to the Department, and its supervisors, that they must compensate FLSA non-exempt employees for all hours worked," the USCP first contends that the wording is overly-broad because it is not limited specifically to bargaining unit employees. Second, because the obligations of the supervisor and the employee in the draft Directive remain the same as those set forth in the prior

[14] In support of its position, the USCP cites *Dep't of Health and Human Services, SSA, Chicago Region,* 15 F.L.R.A. 922 (1984), where the Authority held that "no duty to bargain arises from the exercise of a management right that results in an impact or a reasonably foreseeable impact on bargaining unit employees which is no more than *de minimis*."

Directive, the USCP maintains that there is no change in working conditions giving rise to a mid-term duty to bargain. Third, as with a number of the Union's other proposals, the Department contends that Proposal Q expressly conflicts with Sections 18.01.1 and 18.02.2 of the parties' CBA and, therefore, is nonnegotiable under the Authority's "covered by" doctrine. Finally, because it would require compensation for activities not authorized as a matter of law, it is contrary to the Authority's decisions in *Warner Robins*, *POPA*, and *Army Reserve*.

With respect to Proposal R, the USCP challenges the Union's statement that it would ensure that, "if an employee does not have the time or opportunity to meet any of the onerous deadlines in the [draft] [D]irective, that the employee has a mechanism to request an extension and that, if the Department rejects that extension request, there is a procedure by which the Department must notify the employee of the rejection." The USCP contends that the Union has not explained each sentence of the proposal, and, in any event, sentence 6, which would permit employees to grieve denials of extension requests, is already covered by the CBA. In this regard, Article 32 of the CBA provides an extensive process in which to file a grievance. Thus, the USCP maintains, if the denial of an extension is "any matter relating to conditions of employment of the bargaining unit," then the proposal is covered by the grievance procedure already negotiated by the parties in their CBA and, under the Authority's applicable precedent, nonnegotiable. In addition, the draft Directive does not change the procedure set forth in SOP US-000-23, which included directions to employees that if a delay may have prevented a prompt check in/out at the end of the tour due to such factors as a time clock malfunction, they were to notify a supervisor. Thus, there is no change in working conditions that gives rise to a bargaining obligation on the part of the USCP. The proposal is also "overly-broad and unclear as to the specific timelines under the Directive." The only timeline specified in the Directive is for Supervisor Verification and Certification found at page 4, lines 76 to 79. In this regard, the proposal should be rejected "unless the [Board] can make a definite determination of what is at issue."[15] Accordingly, for these reasons, as well as the fact that its wording is not limited only to bargaining unit employees, the USCP maintains that Proposal Q is outside the USCP's duty to bargain.

Finally, the USCP responds to the Union's position that Proposal S would notify employees that are physically or otherwise unable to use the computer programs required by the draft Directive that they can request an accommodation from their first-line supervisor, and that the intent of the proposal "is to create a procedure under which employees who are unable to use the computer systems required by the draft [D]irective have an avenue to request a manner in which they can report their time." According to the USCP, as it has already stated numerous times with respect to the other proposals at issue, the proposed wording it is nonnegotiable because it: (1) seeks to bargain over the conditions of employment of all of the Department's employees; and (2) does not relate to any change in working conditions. With regard to the latter claim, officers have been required to clock in and out since as early as June 22, 2009. Thus, "the Union has not established a change in working conditions for an officer in recording clock in and out times for time and attendance." The proposal also interferes with

[15] *IFPTE Local 3 and Dep't of Navy, Philadelphia Naval Shipyard, Philadelphia, Pennsylvania,* 51 F.L.R.A. 451, 459- 60 (1995) and *Nat'l Ass'n of Agric. Emp. and Dep't of Agric., APHIS, Plant Protection and Quarantine, Houston, TX*, 32 F.L.R.A. 1265 (1988), are cited by the USCP in this regard.

management's right to assign work under 5 U.S.C. § 7106 (a)(2)(B).[16] Finally, to the extent the proposal is intended to require the Department to provide an employee a reasonable accommodation under the Americans with Disabilities Act (ADA), as incorporated in the Congressional Accountability Act, the USCP maintains that it is outside the scope of negotiation under 5 U.S.C § 7103(a)(14)(C).[17]

B. Union

In its response to the USCP's statement of position, the Union contends that all 13 proposals are fully negotiable. Turning first to its generic arguments that apply to more than one proposal, the USCP's claim should be rejected that all of them are nonnegotiable because they address areas where there has been no change in conditions of employment. The draft Directive sets forth "an entirely new time and attendance policy." Although there may be some similarities between the new policy and the interim guidance issued in 2011, the Union states that "the new policy [] includes significant amounts of new information." The interim guidance is 5 pages long and contains 5 subtopics under "General Policy" while the new policy is 8 pages long and has 15 subtopics under "General Policy." The new policy also contains "significantly more detail, including adding substantial information regarding how employees are to account for time worked and enter it into an online system" using a time clock and virtual time clock "that are simply not included in the old interim policy." Moreover, the Union contends, it contains definitions of nine terms whereas the interim policy only had three. In summary, "the change nearly doubled the length of the policy, changing the requirements of employees and adding a dozen or more new sections to the policy." Under Authority case law, "it is well-established that an agency is obligated to bargain over proposals that are 'reasonably related' to the proposed change in conditions of employment."[18] Because all of the Union's proposals are "reasonably related" to the new time and attendance directive, it argues that they are within the scope of the proposed change and, therefore, negotiable.

The Union also contends that the USCP's claim is "a plain red herring" that all of the proposals, except for Proposal E, are "improper" because they seek to negotiate on behalf of "all employees." None of the proposals "facially appl[y] to employees outside of the Union's bargaining unit," the Union asserts, and if this were a real concern, the Department would have raised the issue initially when it rejected them as nonnegotiable but did not. Additionally, the USCP's position "is belied by the fact that the Department accepted three of the Union's initial

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[16]Here, the USCP cites *AFGE, AFL-CIO, Local 1923, Union and Dep't of Health and Human Services, Soc. Sec. Admin.,* 12 F.L.R.A. 6 (1983) (*DHHS*) (a proposal granting certain trainees with "time allowance" in order to learn and implement" the agency's procedures found non-negotiable because it would require negotiation of the content of performance standards and would interfere with management's rights to direct employees and to assign work under 5 U.S.C. § 7106(a)(2)(A) and (B)).

[17] *IBEW Local 2080, AFL-CIO and Dep't of the Army U S. Corps of Engineers, Nashville, Tennessee,* 10 F.L.R.A. 222 (1982)(*Corps of Engineers*) is referenced by the USCP to support this contention.

[18] The Union cites *Patent Office Professional Association and U.S. Dept. of Commerce, U.S. Patent and Trademark Office*, 66 FLRA 247, 253 (2011)(*POPA*) and *U.S. Dept. of Homeland Sec., U.S. Customs and Border Protection*, 65 FLRA 870, 872-873 (2011)(*Customs and Border Protection*) in this regard.

proposals that were not tailored specifically on their face to just bargaining unit employees – Proposals D, G, and 0." Had the USCP "fulfilled its duty to negotiate in good faith," the parties would have executed an agreement, such as a memorandum of understanding (MOU), which "would have been inapplicable to non-bargaining unit employees." Further, the Union notes, the Authority has previously found that union proposals regarding "all employees" are negotiable.[19]

In the Union's view, the USCP's contention is also without merit that Proposals E, F, H, I, N, Q, and R are outside its duty to bargain because they are "covered by" the parties' CBA. The "covered by" doctrine provides that a proposal that expressly conflicts with a provision of a negotiated agreement is "covered by" the provision and, therefore, not negotiable.[20] Proposal E, however, "merely restates what is included in the CBA" so it "does *the opposite* of what the 'covered by' doctrine precludes."[21] The Union asserts that Proposals F, H, and I, which "mirror" the FLSA's requirement that non-exempt employees be compensated for all hours that are suffered or permitted to be worked, and Proposals N and Q, which would ensure that failure, for whatever reason, to comply with the draft Directive does not constitute a waiver of non-exempt employees' rights under the FLSA,[22] are consistent with both the requirements of the law and the parties' CBA. Proposal R, the Union maintains, is also consistent with the CBA and would ensure that supervisory denials of requests from employees to extend the draft Directive's timelines are grievable. Since it is well-established that proposals consistent with contractual obligations, or that incorporate statutory requirements, are negotiable, all of the USCP's covered by claims should be rejected by the Board, the Union maintains.[23] The related allegation also lacks merit that, because the USCP has raised a "covered by" argument, there is no basis for a negotiability review. The "covered by" argument is one of numerous others that were not included in USCP's original letter where it expressly stated the proposals are non-negotiable because they are contrary to law. The Union thus contends that the USCP "has seemingly only raised this baseless argument here in an attempt to avoid review of its meritless non-negotiability arguments."[24]

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[19] The Union cites the following Authority decisions in this connection: *AFGE Local 12 and DOL*, 27 FLRA 363 (1987)(finding negotiable a proposal that all meeting areas would be equally accessible to "all employees"); *NTEU and Family Support Admin.*, 30 FLRA 677 (l987) (finding negotiable a proposal that required reimbursement for parking expenses of "all employees"); and *AFGE Local 1184 and Social Security Administration*, 65 FLRA 836 (20ll) (finding negotiable as an appropriate arrangement a proposal providing for additional adjudication time for "all employees").

[20] *Ft. Benjamin Harrison, 48 F.L.R.A.31* (1993) is cited by the Union to support its contention.

[21] *Prof. Airways Sys. Specialists and U.S. Dept. of Trans., FAA,* 64 FLRA 474, 478 (2010)(*FAA*) is one example cited by the Union of where the Authority has found that parties frequently include statements in negotiated agreements that mirror existing obligations and that such proposals are negotiable.

[22] Here, the Union refers to 5 C.F.R. § 551 .401(a); 29 U.S.C. § 203(g); 29 C.F.R. § 785.11.

[23] Among other Authority decisions, the Union once again cites *FAA* ("parties frequently include in their collective bargaining agreements provisions that mirror, or are intended to be interpreted in the same manner as, provisions of law and regulation") in support of its argument.

[24] The Union also suggests that the real reason behind the USCP's decision to allege the proposals are nonnegotiable is because it "objects to their contents and does not want to have to follow them." In such an instance, "the proper

The Union also disagrees with the USCP that Proposals H, I, L, N, and Q are not negotiable because they would lead to employees being paid for "activities not authorized as a matter of law." In response to the USCP's claims that the aforementioned proposals would result in employees being paid for engaging in Union activities, the Union replies that none of the proposals here have anything to do with Union activities but are all related to ensuring that employees are compensated for all *work* they perform, in accordance with the FLSA.[25] Accordingly, the Union contends that the USCP's argument should be rejected.

With respect to Proposal E, the Union states that it submitted Proposal E to ensure that the Department complied with its negotiated provision regarding overtime and work periods. Thus, as stated previously, rather than conflicting with it, the proposal is consistent with Section 18.01.1. For this same reason, the Union asserts that the USCP's contention that there has been no change in conditions of employment because the proposal seeks to include what is already in the CBA "misses the point."

The Union states that Proposal F is intended to address its concern that the "potentially cumbersome timekeeping requirements of the new directive" could be used to refuse or fail to pay bargaining unit employees who did not accurately record their time, even if the Department was aware of their time worked. Ensuring that employees are paid for all of their work time is "a basic requirement of the FLSA." While the USCP asserts that the Union's stated "intent" is inconsistent with the proposal, and provided for elsewhere in the draft Directive, the Union responds that "it is unclear [] how the Department's argument implicates, in any way, whether the proposal is contrary to law," or otherwise relates to the negotiability of the proposal. Its concerns about "intent" should be raised with the Union at the bargaining table rather than a negotiability proceeding. Finally, the USCP's argument that the proposal is "covered by" the CBA because it conflicts with Section 18.02.2, which addresses the rounding of overtime, "ignores that the CBA expressly states that work is calculated by the minute." The Union's proposal that all hours worked be compensable "is clearly consistent with the CBA provision that requires work to be calculated to the minute." Nor, the Union continues, does USCP explain what law permits it to refuse to pay employees for all hours worked, "nor could it, as the FLSA explicitly provides that employees covered by the law, such as the Union's bargaining unit employees, must be paid for all work that an employer suffers or permits to be performed." Consequently, the Union concludes, because Proposal F is consistent with both the requirements of the law and the parties' CBA, it is negotiable.

The Union states that Proposal J would ensure that bargaining unit employees are able to report work time not captured by the Department's clock in and out function. According to

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avenue of recourse is not to speciously reject a proposal as contrary to law, but instead to negotiate in good faith over the proposal until either an agreement is reached or the parties reach impasse."

[25] In addition to the statutory and regulatory provisions referenced in footnote 23, the Union also cites *Brennan v. General Motors Acceptance Corp.,* 482 F.2d 825, 827 (5th Cir. 1973); *Reich v. Dept. of Conservation & Natural Resources,* 28 F.3d 1076, 1082 (11th Cir. 1994); and *Cunningham v. Gibson Electric Co., Inc.,* 43 F. Supp.2d 965, 975 (N.D. Ill. 1999) to support its position.

the Union, the wording is consistent with the well-established principle that employees covered by the FLSA must be paid for their entire continuous work day.[26] As to the USCP's contention that the proposal is non-negotiable because it impacts technology, the Union responds that, while the technology of performing work is a permissive subject of bargaining under 5 U.S.C. § 7106(b)(l), it is unclear how the Union's proposal, which simply states that an employee must be able to report all of his or her work time, "could possibly infringe on the Agency's right to determine technology." As Proposal J deals with ensuring that employees can request to be paid for their entire continuous workdays, and has no impact on the ability of the Department to determine its technology, the Union contends that this USCP argument also should be rejected.

The Union states that it offered Proposal K as an "appropriate arrangement" designed to "alleviate the impact of the Agency requiring them to report their time while away from their duty station." It notes that, under Authority precedent, even where an issue is not substantively negotiable because it constitutes a management right, 5 U.S.C. § 7106(b)(2) and (3) still require an agency to negotiate over the impact and implementation and appropriate arrangements of the proposed change.[27] A union proposal constitutes an appropriate arrangement under 5 U.S.C. § 7106(b)(3) if it is: (l) intended as an arrangement for employees adversely affected by the exercise of a management right; and (2) appropriate because it does not excessively interfere with the exercise of management rights. The FLRA determines whether an appropriate arrangement will excessively interfere with a management right by "weighing the benefits afforded employees under the proposed arrangement against the burden on the exercise of the right."[28] In the Union's opinion, Proposal K "easily passes muster as an appropriate arrangement." In this regard, it is intended as an appropriate arrangement for employees adversely affected by management's decision to assign them the work of entering their time electronically, "especially those employees away from their duty station that cannot enter time into the system electronically." The arrangement is appropriate because it "in no way excessively interferes with management's rights, nor does it require anyone specific to do anything." Instead, the Union contends, the proposal gives the employee the ability, if necessary, to contact his or her supervisor and gives the two parties *two options* for what to do next. It addresses a concern the Union has over the exercise of management's right to assign work without impacting that right "in any significant way" because employees would still have to have their time entered into the system, "just at a later time." Accordingly, the Union maintains that the proposal is a negotiable appropriate arrangement.

The Union also contends that the Board should reject the USCP's position that Proposal K interferes with management's rights by "dictating the actions a supervisor *may* take after consulting with the employee." (Emphasis added). The proposal "dictates nothing," as the Department acknowledges by using the word "may." It allows employees to notify their

[26] The Union refers to *IBP, Inc. v. Alvarez,* 546 U.S. 21, 32-33 (2005) in this context.

[27] *Dep't of Veterans Affairs and AFGE, Local 2400*, 50 FLRA 220, 221 (1995) is cited by the Union to support its position.

[28] Here, the Union cites *AFGE Local 1345 and U.S. Dep't of the Army*, 64 FLRA 949, 951 (2010).

supervisors if they cannot report their time electronically when away from the duty station and gives supervisors, at their election, the option of entering the time themselves or allowing employees to enter it later. Unlike the case relied upon by the USCP, the Union maintains that the proposal does not require any action by the employee's supervisor. Finally, in response to the USCP's argument that the proposal "seeks to change the Department's method and means of capturing time and directly interferes with the Department's accuracy of records for which the method and means of recording time was adopted," the Union states that the proposal does not "in any way change" how time is entered because employees and supervisors would still be using the same computerized method of doing so. Thus, it contends that the proposal is an appropriate arrangement for employees away from their duty station without access to a computer and does not exempt them from entering their time into the system the Department has determined to use.

The Union contends that the USCP's arguments concerning its duty to bargain over the Proposal L are also misplaced. In this regard, it fails to explain what supervisory conditions of employment are implicated by the proposed wording, and the *Cherry Point* case cited to support the claim is inapposite because the union in that instance sought to bargain over employees', including supervisors', ability to compete for positions at a particular installation. To the contrary, the Union contends that Proposal L "does not require supervisors to do anything" but merely reiterates the FLSA's requirement that the Department cannot refuse to pay employees for time that they have been suffered or permitted to perform work. Since Proposal L would ensure that the draft Directive is consistent with the law, the Union maintains that it is negotiable.

The Union states that "Proposal M has essentially the same purpose as Proposal L," *i.e.*, it is intended to mirror the requirements of the FLSA by not permitting the Department to refuse to pay an employee for work. As to the USCP's argument that the proposal infringes on its right to assign work because it "limits management's ability to assign work to supervisors and timekeepers," the Union contends that it only limits the Department's ability to delete hours of work that have actually been performed from an FLSA non-exempt employees' time and attendance, in accordance with the requirements of the FLSA. Thus, the only assignment of work at issue in Proposal M "is an illegal assignment of work." Because Proposal M does nothing more than reiterate unit employees' rights under the FLSA it "is plainly negotiable."

As the Union previously stated, Proposal N is intended to ensure that, if FLSA non-exempt employees fail, for whatever reason, to claim all the hours they have worked, such a failure does not constitute a waiver of the employees' rights under the FLSA. It is well-established that an employer must pay its FLSA non-exempt employees for all of their hours of work, and the Supreme Court has consistently emphasized that "FLSA rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate."[29] Therefore, any agreements which waive an individual's rights under the FLSA are invalid.[30] With respect to the USCP's

[29] Here, the Union cites *Barrentine v. Arkansas-Best Freight Sys., Inc.,* 450 U.S. 728, 740 (1981).

[30] To support this claim, the Union cites *Brooklyn Savings Bank v. O 'Neill,* 324 U.S. 697 (1945).

arguments concerning the proposal, its assertion that the new timekeeping system is not cumbersome "is not a negotiability issue" but a disagreement over its merits. The contention that the proposal is not negotiable because it is "covered by" the parties' CBA requires a finding, under Authority case law, that it "expressly conflict[s]" with a provision in the parties' CBA. Contrary to the USCP's claim that Proposal N somehow conflicts with Section 18.01.1, however, the Union contends that it "merely states that the failure to report hours in the Department's timekeeping system does not waive an employee's rights under the FLSA" and "does not deal at all with the FLSA work period or the overtime threshold set forth in the CBA." As to its argument that the proposal would require compensation for activities not authorized as a matter of law, the Union stresses that the USCP does not actually explain what these activities are. According to the Union, Proposal N does nothing more than mirror the law, which requires that work that is not requested in advance but instead "suffered or permitted" is compensable and must be paid under the FLSA, and that employees cannot waive their rights to be paid for these hours of work. Moreover, the Union continues, the USCP cannot point to any sort of time that is not compensable under law that would somehow become compensable due to the proposal. Accordingly, its position should be rejected.

The Union explains that Proposal P "is simply a straightforward procedure intended to ensure that its bargaining unit employees are provided enough time, on a daily basis, to input their time into the time and attendance system." It does not require a set amount of time, but instead states that 15 minutes would normally be sufficient. Given that the USCP is exercising its right to assign employees the work of entering their time and attendance information, the Unions' position is that the procedure the proposal sets forth is negotiable pursuant to 5 U.S.C. § 7106(b)(2). As with Proposal N, the USCP's contention that Proposal P is not negotiable is really an argument concerning the merits of Proposal P.

The Union next addresses the USCP's contention that the proposal is not negotiable because the change is *de minimis.* When evaluating such claims, the Authority makes fact-specific determinations of whether the effect of a change on bargaining unit employees is significant, looking at, among other things, the number of employees affected by the change."[31] Here, the USCP argues that the change is *de minimis* because it merely involves going from a paper to an electronic system for entering work hours, whereas the Union contends that it really concerns an entirely new time and attendance directive. By providing notice of the change to the Union and adopting five of its proposals, however, the Union argues that "the Department has acknowledged that the change was more than *de minimis*." Even if that were not the case, the Union continues, adopting the new time and attendance directive impacts the entire bargaining unit, implementing new policies and procedures for timekeeping, so it "is plainly more than *de minimis*."[32]

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[31] The Union cites *HHS, SSA and AFGE Local 1760,* 24 F.L.R.A. 403 (1986).

[32] The Authority decisions cited to support the Union's position are *SSA, Gilroy Branch Office, Gilroy, CA and AFGE Local 3172,* 53 F.L.R.A. 1358 (1998) (holding that a change in appointment schedules that affected employees' ability to complete other work was more than *de minimis); Customs Serv., SW Region, El Paso, TX and NTEU,* 44 F.L.R.A. 1128 (1992) (holding that a change in work hours that lead to a decrease in overtime opportunities was more than *de minimis); US. Dept. of Treas., Internal Revenue Service and NTEU,* 56 F.L.R.A. 906 (2000) (holding that an office move resulting in some computers and telephones not working and loss

The Union also asserts that there also is no basis for the USCP's argument that Proposal P infringes on management's right to assign work by limiting its ability to assign work to supervisors and timekeepers, neither of which is in the appropriate bargaining unit. Its proposal "simply asks the Department [to] agree that its bargaining unit employees will be given sufficient time to use the online timekeeping system," and does not require the assignment of any work to any employees nor prevent the assigning any work to any employees. It states that Proposal P merely sets out a guideline that the parties agree is reasonable for allowing unit employees to enter their time "into the Department's cumbersome, confusing online timekeeping system."

According to the Union, Proposal Q "is similar in spirit to Proposal N" because it would ensure that, if FLSA non-exempt employees fail, for whatever reason, to claim all the hours they have worked, such a failure does not constitute a waiver of the employees' rights under the FLSA. For the reasons stated earlier, the proposal: (1) does not apply to all of the USCP's employees; (2) is reasonably related to the changes set forth in the draft directive; (3) is not covered by the CBA because it does not conflict with Section 18.01.1; (4) is ripe for review in this negotiability proceeding; and (5) does not require employees to receive compensation not authorized by law.

The Union adds that, contrary to the USCP's claim, the new time and attendance directive contains several timelines that bargaining unit employees are required to follow, but makes no reference to extensions. According to the Union, Proposal R addresses this defect and "is simply a straightforward procedure intended to allow its bargaining unit employees to request an extension and receive a response from the Department in writing." Consistent with 5 U.S.C. § 7106(b)(2), it corresponds to the exercise of management's right to assign employees the work of entering time and attendance, under 5 U.S.C. § 7106(a). Additionally, the USCP has rejected the entire proposal as nonnegotiable yet also claims that sentence six about grievability is "covered by" the parties' CBA. If its arguments are accepted, "employees would be entitled to grieve denials of extension requests but there would be no actual mechanism for making," nor any standard for deciding, upon them. In addition, the USCP apparently is contending that sentence six is "covered by" the CBA because it is consistent with it. As the Union asserted previously, the "covered by" doctrine only bars proposals that are inconsistent with a negotiated agreement, so the "doctrine is inapplicable here." Furthermore, the USCP's claim that Proposal R is "overly broad and unclear as to the specific timelines under the Directive" is "disingenuous at best" since it would apply to "all timelines" that unit employees are to adhere to, including the draft directive's requirement that they review their timesheets no later than close of business the Monday after the end of a pay period.

Finally, the Union states that the intent behind Proposal S "is to encourage employees" who are physically unable to meet a requirement in the directive to engage in

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of storage cabinets was more than *de minimis);* and *Air Force Materiel Command and AFGE Council 214,* 54 F.L.R.A. 914 (1998) (holding that implementing a program that would affect future career and retirement plans and involve losing benefits was more than *de minimis).*

the reasonable accommodation process established under the ADA.[33] Thus, it is negotiable because it would incorporate this statutory requirement into the agreement over which the parties are bargaining. It responds that the USCP's unexplained argument that the wording infringes on management's right to assign work is misguided. The only case it cites to support this allegation involves a union proposal to provide trainees with a time allowance to learn an agency's procedures, something that is not required under Proposal S. In addition, the USCP's final argument that the proposal is contrary to the ADA to the extent that it would require management to provide an employee with a reasonable accommodation, should also be rejected. As discussed above, the proposal merely encourages employees to exercise their rights under the ADA to request a reasonable accommodation and then requires the USCP "to take steps to try to provide such an accommodation," as required by the law. In this regard, if the Union were seeking to require the USCP to grant "unreasonable accommodation" requests the proposal would not contain the term "reasonable accommodation."

IV. Analysis and Conclusions[34]

As the Board stated in its decisions in 16-LM-03 and 16-LM-05, also issued on this date, the Authority's negotiability regulations define two general types of disagreements that parties may have concerning the duty to bargain over a union proposal. Under 5 C.F.R. § 2424.2(a), a *bargaining obligation dispute* means a disagreement between an exclusive representative and an agency concerning whether, "in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable."[35] Under 5 C.F.R. § 2424.2(c), a *negotiability dispute* means a disagreement between an exclusive representative and an agency concerning "the legality of a proposal or provision."[36] Moreover,

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[33] 2 U.S.C. § 1302(a); 42 U.S.C. § 121 12(b)(5) is referred to by the Union in this connection.

[34] When deciding negotiability issues, we have been guided by cases decided by the Federal Labor Relations Authority (Authority), which is the executive branch agency responsible for resolving issues arising under the FSLMRS. See, *e.g., Plumbers Local 5, United Ass'n of Journeymen & Apprentices and Office of the Architect of the Capitol,* 2002 WL 34661693, 02-LMR-03,-04,-05 & -06 (CAOC 10/7/2002); *Int'l Brotherh'd of Electrical Workers, Local 26 and Office of the Architect of the Capitol*, 2001 WL 36175211, 01-LMR-02 (CAOC 11/23/01).

[35] The Authority provides the following non-exclusive examples of bargaining obligation disputes, e.*g.*, where an agency claims that: (1) A proposal concerns a matter that is covered by a collective bargaining agreement; and (2) Bargaining is not required over a change in bargaining unit employees' conditions of employment because the effect of the change is *de minimis.*

[36] Here the Authority's Regulations state:

> Examples of negotiability disputes include disagreements between an exclusive representative and an agency concerning whether a proposal or provision:
>
> (1) Affects a management right under 5 U.S.C. 7106(a);
> (2) Constitutes a procedure or appropriate arrangement, within the meaning of 5 U.S.C. 7106(b)(2) and (3), respectively; and
> (3) Is consistent with a Government-wide regulation.

5 C.F.R. § 2424.2.

under § 2424.2 of the Authority's Regulations, the Authority will consider a petition for review of a negotiability dispute only when the parties disagree "concerning the legality of a proposal." Where a proposal raises both a bargaining obligation dispute and a negotiability dispute, the Authority may resolve both disputes, but where a proposal involves only a bargaining obligation dispute, that dispute may not be resolved in a negotiability proceeding.[37]

While the Board generally has been guided by Authority case law when deciding negotiability issues, we note that our negotiability regulations differ from those of the Authority. In this regard, contrary to the requirements of 5 C.F.R. § 2424.2, we have determined that it is in the best interests of the parties and the collective bargaining process to resolve all of their disagreements in this negotiability petition regardless of whether they involve only bargaining obligation disputes.

Our review of the USCP's position reveals several generic arguments that apply to more than one proposal. The first of its generic arguments, essentially, is that it has no bargaining obligation whatsoever because the draft Directive merely implements a *de minimis* change in conditions of employment that permits employees to enter time and attendance remotely in a new electronic system. As the Union accurately points out, the Authority's test for determining whether an agency has an obligation to bargain over a proposal that purports to address a change in conditions of employment is whether the proposal is "reasonably related" to the change.[38] Contrary to the USCP's apparent view, its bargaining obligation is not limited only to subjects where management has initiated specific changes, as long the proposals are reasonably related to the subjects addressed in the time and attendance directive. After comparing the interim time and attendance guidance issued in 2001 with the draft Directive, we conclude that the overall effects of the changes to conditions of employment set forth in the draft Directive are more than *de minimis*, and that the Union's proposals are reasonably related to those changes.

The USCP's second generic argument is that all of the proposals, with the exception of Proposal E, improperly seek to negotiate on behalf of all employees. As we stated in 16-LM-03, issued on this same date**,** we believe that the argument is premature. The Union has represented in this proceeding that it only seeks to negotiate on behalf of its bargaining unit. On the assumption that bargaining over the draft Directive will resume once the Board issues this decision, the parties will then negotiate an MOU limiting its scope to unit employees. If the Union does not agree to limit the scope of any subsequent agreement to unit employees, the USCP may choose to litigate the matter in an appropriate forum. Consequently, at this point the argument provides no basis for finding any of the Union's proposals outside the Department's duty to bargain.

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[37] *Nat'l Fed. of Fed. Employees, Int'l Assoc. of Machinists and Aerospace Workers, Federal District 1, Local 1998 and U.S. Dep't of State, Passport Services*, 69 F.L.R.A. No. 90 (September 28, 2016) (*Passport Services*), citing 5 C.F.R. § 2424.2(c), § 2424.30(b)(2), and § 2424.2(d), respectively.

[38] *See, e.g.*, *POPA*, 66 F.L.R.A. 247, 253 (2011); and *Dept. of Treasury, Customs Service, Washington, DC and North East Region, Boston, MA*, 38 F.L.R.A. 770 (1990).

The USCP's third generic argument applies only to Proposals H, I, L, N, and Q, the adoption of which it contends would require overtime compensation for employees engaged in Union representational activities. The Union disagrees, stating that these proposals have nothing to do with Union activities but instead are all related to ensuring that employees are compensated for all the work they perform, consistent with the requirement of the FLSA. Where parties dispute the meaning of a proposal, the Authority looks to the proposal's plain wording and any union statement of intent.[39] If the union's explanation is consistent with the proposal's plain wording, the Authority adopts that explanation for the purpose of assessing the proposal's legality.[40] In this case, we find that the Union's explanation of the meaning of Proposals H, I, L, N, and Q is consistent with their plain wording. Therefore, wherever it is necessary in what follows for the Board to assess the legality of these proposals to determine whether they are within the duty to bargain, the USCP's claim that they would require overtime compensation for employees engaged in Union representational activities is hereby rejected.

The USCP's fourth generic argument is that Proposals E, F, H, I, N, Q, and R (sentence six) are "covered by" Sections 18.01.1 and/or 18.02.2 of the parties' current CBA. We adopt the 2-prong test established by the Authority in *HHS, SSA, Baltimore, MD and AFGE, National Council of SSA Field Office Locals, Council 220*, 47 FLRA 1004 (1993) (*SSA*) for assessing whether a contract provision precludes further bargaining because it covers a matter in dispute, we first determine whether the matter is expressly contained in the CBA. In this examination, we do not require an exact congruence of language, but will find the requisite similarity if a reasonable reader would conclude that the provision settles the matter in dispute. Significantly, while the Authority has found that proposals that conflict with negotiated agreements are *clearly* expressly contained in those agreements, contrary to the Union's repeated assumption, inconsistency with a negotiated agreement is not the *only* ground for finding a proposal "covered by" a negotiated agreement under the first prong of the test. In *SSA*, the Authority explained its underlying goal in adopting the covered by test is to ensure that, "upon execution of an agreement, an agency should be free from a requirement to continue negotiations over terms and conditions of employment already resolved by the previous bargaining."

In our view, the Union's claim that these proposals are all consistent with the CBA is a tacit admission that they are expressly contained in 18.01.1 and/or 18.02.2 of their previously negotiated agreement.[41] Because we conclude that Proposals E, F, H, I, N, Q, and sentence six of Proposal R are expressly contained in the parties' CBA, the Union's petition for review with respect to them shall be dismissed.

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[39] *NAIL, Local 7*, 67 FLRA 654, 655 (2014)(citing *NAGE, Local R-109*, 66 FLRA 278, 278 (2011)).

[40] *See, e.g.*, *id.*

[41] The Union also attempts to rebut the USCP's argument that some of its proposals conflict with Section 18.02.2, which rounds overtime to the nearest higher or lower quarter hour, by pointing out that the same section "expressly states that work is calculated by the minute." It also alleges that "any agreements which waive an individual's rights under the FLSA are invalid." To the extent the Union is arguing that the USCP's current practices, the CBA, or the draft Directive violate the FLSA, such claims are inappropriate for resolution in a negotiability proceeding.

We now turn to the resolution of the parties' remaining negotiability disputes over Proposals J, K, L, M, P, R (sentences one through five), and S.

Proposal J

Proposal J would require the USCP to permit employees to include on their time and attendance all work time not captured by using the "Clock In" and "Clock Out" function on the Virtual Time Clock referenced in the draft Directive. According to the Union, the proposal is consistent with the FLSA's requirement that employees must be paid for their entire continuous workday. The USCP contends that the proposal interferes with the *methods and means of performing work*, under 5 U.S.C. § 7106(b)(l). Significantly, the Union's only response to that argument is that the wording does not infringe on the Agency's right to determine *technology*. Moreover, the Union does not explain, nor is it clear on its face, *how* employees would be permitted to include on their time and attendance the work time not captured on the Virtual Time Clock. In supporting its contention by stating that the proposal "seeks to change the Department's method and means of capturing time and directly interferes with the Department's accuracy of record for which the method and means of recording time was adopted," the USCP's focus is clearly on this aspect of the proposal. When a party fails to respond to an argument this results in a waiver or acts as a concession.[42] Therefore, given its failure to respond to the USCP's argument that the proposal interferes with the methods and means it has chosen to perform the work of entering time and attendance, we conclude that the Union has conceded to that argument. Accordingly, we shall dismiss the Union's petition for review concerning Proposal J.[43]

Proposal K

While the Union's initial characterization of Proposal K as a "procedural arrangement" is somewhat confusing,[44] it goes on to explain that the wording is intended as an appropriate arrangement, under 5 U.S.C. § 7106(b)(3), for employees adversely affected by management's decision to assign them the work of entering their time electronically when they are away from the duty station. Thus, there is no disagreement between the parties that the proposal directly interferes with management's right to assign work under 5 U.S.C. § 7106(a)(2)(B). As a result, the Board will apply the analytical framework set forth by the Authority in *National Association of Government Employees, Local R14-87 and Kansas Army National Guard*, 21 F.L.R.A. 24, 31-

[42] *See*, *e.g.*, *Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) (holding that a "[f]ailure to respond to an argument...results in waiver"); *CREW v. Cheney,* 593 F. Supp. 2d 194, 229 (D.D.C. 2009) ("failure to respond to an argument . . . acts as a concession").

[43] We note in this regard that page 5 of the draft Directive, under the section titled "Entering and Modifying T&A Data," sets forth a procedure permitting employees to challenge the accuracy of daily work times recorded in the system.

[44] The Union is not the only party in this case guilty of causing confusion. In this regard, the USCP cites *Logistics Command,* an Authority decision involving a requirement that civilian employees wear the military uniform, in support of its claim that the proposal would prohibit "the implementation of the uniform requirement in this case." As Proposal K has nothing to do with that issue, that contention shall not discussed further herein.

35 (1986), to determine whether the proposal is negotiable. In this regard, we must first decide whether the proposal is an "arrangement" for employees adversely affected by the exercise of that right. If the proposal is an arrangement, we then examine whether the proposed arrangement is appropriate because it does not excessively interfere with the exercise of that right by weighing the benefits afforded employees under the proposed arrangement against the burden on the exercise of the right. Because Proposal K addresses the draft Directive's failure to explain how employees who are away from their duty station, and do not have access to a computer, should report their time, we conclude that it constitutes an arrangement.

The USCP contends that sentences one and three excessively interfere with its right to assign work by requiring an employee's immediate supervisor to consult with the employee, dictating the actions a supervisor may take after consulting with the employee, and limiting the supervisor's decision-making ability. In our view, consultations between employees and supervisors are, or should be, routine activities in the workplace. In agreement with the Union, under the two options provided in the proposal, supervisors may avoid taking any actions after consulting with employees by permitting them to enter their times at a later date. For the same reason, any limitation on supervisors' decision-making ability appears minimal. The benefit afforded to employees under the proposal, on the other hand, is significant. It would prevent employees working off-site who do not have access to computers, or do not want to use their personal computers, from contravening the requirements of the draft Directive. On balance, therefore, we conclude that Proposal K does not excessively interfere with management's right to assign work. Accordingly, the proposal is within the USCP's duty to bargain.[45]

Proposal L

Proposal L would prohibit supervisors from refusing to compensate employees for work that is not pre-approved. In addition to the other USCP arguments that have already been disposed of, it contends that the proposal: (1) improperly seeks to negotiate the actions of supervisors; and (2) interferes with management's right to assign work. The only case it cites to support the former contention is *Cherry Point.* In that case, among other things, the U.S. Court of Appeals for the D.C. Circuit held that proposals seeking *to regulate the conditions of employment* of supervisors would "violate the fundamental principle that a union is the exclusive representative of employees in the certified or recognized unit, and those employees *only*."[46] Under Authority precedent, however, the negotiability of proposals that require supervisors to take actions depends primarily on whether the union intends to assign responsibility for specific functions to particular individuals.[47] There is no evidence in the record that under its proposal

[45] The USCP's also argues that sentence three of Proposal K directly interferes with management's right to determine the methods and means of performing work, under 5 U.S.C. § 7106(b)(1), "by eliminating a method by which an employee can clock in or out, *i.e.*, the use of personal computers. We find the argument unpersuasive for two reasons. First, it is unclear whether the USCP has the right to require employees to use their personal computers to enter time and attendance data. Second, contrary to the USCP's contention, the Union's proposal does not eliminate the use of personal computers for that purpose but leaves it to the employees' discretion.

[46] *Cherry Point*, 952 F.2d at 1442.

[47] *See, e.g.*, *Fort Carson, CO,* 48 F.L.R.A.168, 178 (1993).

the Union intends to assign responsibility for specific functions to particular individuals, nor does the proposal require that supervisors perform any particular tasks. Instead, the Union states that it "merely reiterates the FLSA's requirement that the Department cannot refuse to pay employees for time that they have been suffered or permitted to perform work." As the USCP does not provide any support for its allegation that the proposal interferes with management's right to assign work, its argument is conclusory or cursory and need not be considered by the Board.[48] Moreover, to the extent the USCP is claiming that the proposal interferes with the right to assign work simply because it prohibits supervisors from taking some action, the Authority has found that this "would completely nullify the obligation to bargain because no obligation of any kind could be placed on management through negotiations."[49] Consequently, we conclude that Proposal L is negotiable.

Proposal M

Proposal M would prohibit supervisors and timekeepers from correcting time and attendance data by removing work actually performed by FLSA non-exempt employees. According to the Union, it has essentially the same purpose as Proposal L because it is intended to mirror the requirements of the FLSA by preventing the Department from refusing to pay an employee for work. The USCP's non-meritorious claims that: (1) there has been no change in conditions of employment concerning the proposal's subject matter giving rise to a bargaining obligation; and (2) the Union is seeking to negotiate the conditions of employment of employees it does not represent, have already been addressed. It further contends that, by limiting management's ability to assign work to supervisors and timekeepers, the proposal intrudes on management's right to assign work and determine the personnel by which its operations will be conducted. In our view, while the intent of Proposals L and M may be the same, their effect on management's rights is not. In this regard, in agreement with the USCP, we conclude that Proposal M interferes with management's right to assign work, under 5 U.S.C. § 7106(a)(2)(B), by limiting its ability to assign supervisors and timekeepers the work of correcting time and attendance data. Since the Union does not argue that the proposal is an exception to management rights under 5 U.S.C. § 7106(b), we conclude that the proposal is outside the duty to bargain. Finally, the Union's assertion that the proposal merely prevents the USCP from making illegal assignments of work appears to be related to its earlier argument concerning identical sections of the draft Directive and the parties' CBA requiring minutes of overtime to be rounded to the nearest higher or lower quarter hour. As we stated in footnote 39, however, a negotiability petition is not the appropriate forum for resolving disputes over whether those provisions are inconsistent with the FLSA.[50]

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[48] *Architect of the Capitol v. Ihoha*, 2014 WL 3887569, 12-AC-30, 13-AC-03 (CAOC 7/30/14), n. 14 (citing *Herbert v. Office of the Architect of the Capitol,* 839 F.Supp. 2d 284, 297-98 (D.D.C. 2012); *Hutchins v. District of Columbia,* 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (*en banc*).

[49] *NFFE Local 2099 and Navy, Naval Plant Representative Office, St. Louis, MO,* 35 F.L.R.A. 362, 366 (1990), citing *National Labor Relations Board Professional Association and General Counsel, National Labor Relations Board*, 32 F.L.R.A. 557, 564 (1988).

[50] This is not to say, with regard to timekeeping, that the USCP does not have an obligation to meet the requirements of the FLSA. If the Union believes the USCP's timekeeping practices violate the law it can file a grievance under

Proposal P

According to the Union, Proposal P would provide employees enough time on a daily basis, normally 15 minutes, to ensure that they can perform the work of entering their time and attendance data. We have already rejected the USCP's arguments that any changes caused by the Directive in this area are no more than *de minimis*, and that the proposal is outside the duty to bargain because its terms would apply to all employees and not just those in the bargaining unit. The USCP also claims that the proposal improperly intrudes on management's right to assign work and determine the personnel by which the USCP's operation will be conducted, under 5 U.S.C. § 7106(a)(2)(B), by limiting its ability to assign work to supervisors and timekeepers, "neither of which is in the appropriate bargaining unit." After due consideration of that contention, we agree with the Union that, by its plain terms, Proposal P neither requires nor prevents the assignment of work to any employees. Instead, it is a procedure management officials would observe, under 5 U.S.C. § 7106(b)(2), in exercising their authority to require employees to enter their time and attendance data, pursuant to 5 U.S.C. § 7106(a)(2)(B). Moreover, contrary to the claim set forth in the USCP's statement of position, the Union does assert in its response that the proposal is a procedure that would provide employees sufficient time to use the Department's "cumbersome, confusing online timekeeping system." Because we conclude that Proposal P is negotiable, the USCP's opposing view that the online timekeeping system is not cumbersome, and its concern that the amount of time the proposal would grant employees to perform the work of entering the data is unreasonable, are more appropriately raised at the bargaining table.

Proposal R (sentences one through five)

In essence, the USCP contends that sentences one through five of Proposal R are nonnegotiable because: (1) there has been no change in conditions of employment requiring it to engage in mid-term bargaining over extensions to any of the draft Directive's timelines; (2) they improperly seek to negotiate on behalf of all employees; and (3) they are overly-broad and unclear. We reject the first two claims for the same reasons provided elsewhere in this decision. As to the third claim, in our view the sentences are neither overly-broad nor unclear. In this regard, in agreement with the Union, by permitting bargaining unit employees to request extensions to the draft Directive's timelines and receive responses from the Department in writing, the five sentences constitute a procedure, under 5 U.S.C. § 7106(b)(2), that management officials would observe in exercising their right to assign employees the work of entering time and attendance, under 5 U.S.C. § 7106(a). Accordingly, the first five sentences of Proposal R are within the USCP's duty to bargain.

Proposal S

The Union's stated intent in Proposal S is to encourage employees who are physically unable to meet a requirement in the Directive to engage in the reasonable accommodation process established under the ADA. As its stated intent is consistent with

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the parties' negotiated procedure.

the proposal's plain terms, we adopt it for the purpose of this analysis. The only USCP arguments the Board has not already addressed and rejected concerning Proposal S are its contentions that: (1) it interferes with management's right to assign work under 5 U.S.C. § 7106 (a)(2)(B); and (2) to the extent it is intended to require the Department to provide employees with reasonable accommodations under the ADA it is outside the scope of negotiations under 5 U.S.C § 7103(a)(14)(C). The USCP cites two Authority decisions to support its claims. In *DHHS,* the decision it relies upon in connection with the first claim, the union's proposal was found nonnegotiable because it would have required negotiations over the content of an agency's performance standards. Since it is unclear how Proposal S is related to that issue, *DHHS* is inapposite. *Corps of Engineers,* which it cites to support the second claim, involved two proposals that would have required prevailing rate employees to receive premium pay under certain conditions. Premium pay for such employees is specifically provided for by federal statute, so the Authority found them nonnegotiable because they did not concern conditions of employment under 5 U.S.C § 7103(a)(14)(C). Consistent with the Union's explanation, unlike the situation in *Corps of Engineers,* the only thing Proposal S requires is that the USCP meet its obligations under the ADA. As such, it involves a negotiable condition of employment under Authority precedent because it would merely incorporate statutory requirements into the parties' negotiated agreement over the draft Directive. Accordingly, we conclude that the USCP is obligated to negotiate over Proposal S.[51]

V. ORDER

The Union's petition/appeal concerning Proposals E, F, H, I, J, M, N, Q, and R (sentence six) are hereby dismissed. The USCP shall, upon request, or as otherwise agreed to by the parties, bargain over the Proposals K, L, P, R (sentences one through five), and S.[52]

Issued, Washington, D.C., March 20, 2017.

[51] *See, e.g.*, *FAA,* 64 F.L.R.A. 474, 478 (2010); *NLRB Professional Ass 'n and NLRB,* 62 F.L.R.A. 397 (2008); and *NTEU Chap. 213 and Dept. of Energy,* 32 F.L.R.A. 578 (1988).

[52] In finding Proposals K, L, P, R (sentences one through five), and S to be negotiable, we make no judgment as to their merits.