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In the Matter of the Arbitration Between

**AFSCME LOCAL 1653,**

Union,

**OPINION & AWARD**

**Grievance No. GREV202500263  
Deferred Resignation Program**

-- and --

**U.S. DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION,**

Agency.  
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**ARBITRATOR:** James M. Darby, Esq.

**APPEARANCES:** For the Union:  
Daniel T. Ronneberg, JD  
President

For the Agency:  
Victor D. Smith, J.D.  
Labor Relations Specialist

This dispute arose on or about January 28, 2025, when the Office of Personnel Management (“OPM”) emailed employees working for the U.S. Department of Transportation, Federal Aviation Administration (“the Agency”), and represented by AFSCME, Local 1653 (“the Union”), informing them of the Deferred Resignation Program (“DRP”). The Union filed a grievance alleging the Agency violated the parties’ Collective Bargaining Agreement (“the Agreement”) and the Federal Service Labor-Management Relations Statute (FSLMRS) by bypassing the Union and failing to provide notice and an

opportunity to bargain. The grievance was denied by the Agency and the Union filed a demand for arbitration.

On March 18, 2025, the parties notified the undersigned of his selection as Arbitrator of the instant dispute. A virtual hearing was held on June 11, 2025, where the parties agreed to submit stipulated facts and exhibits and to submit briefs in support of their respective positions. The record was closed after receipt of the parties' briefs. After fully considering all the evidence and arguments presented, the matter is now ready for final disposition.

**QUESTION TO BE RESOLVED**

The parties stipulated to the following issue to be decided by the Arbitrator:

Did the Agency violate Article 7 and Article 3.1.a of the parties' Collective Bargaining Agreement, as well as the Federal Service Labor-Management Relations Statute, when on January 28, 2025, the Deferred Resignation Program was initiated without advance notice and bargaining? If so, what shall the remedy be?

**APPLICABLE CONTRACT PROVISIONS**

**ARTICLE 3  
UNION RIGHTS AND REPRESENTATION**

Section 1. As the exclusive representative of the employees in the bargaining unit identified in Article 2, Section 1, the Union is entitled to act for and negotiate collective bargaining agreements on behalf of the employees in the bargaining unit. Additionally, the Union will be given the opportunity to be represented at the following:

- a. attending formal discussion within the meaning of 5 USC 7114 between representative(s) of the Agency and bargaining unit employee(s) concerning any grievance, personnel policy or practices, or other general condition of employment;

\* \* \*

(Joint Exhibit 1, p. 5.)

**ARTICLE 7**  
**MID-TERM BARGAINING**

Section 1. The Parties agree that personnel policies, practices, and matters affecting working conditions of bargaining unit employees not covered by this Agreement shall not be changed by the Agency without prior notice to and negotiations with the Union in accordance with applicable law. The provisions of this Article apply to substance bargaining when allowable by law and to procedures which the Agency will observe in exercising a Management right, and/or appropriate arrangements for employees adversely affected by the exercise of a Management right in accordance with 5 USC Section 7106.

Section 2. Should the Agency propose a change described in Section 1, thirty (30) days written notice of the proposed change shall be provided to the Union. It is agreed longer notice periods are in the best interest of the Parties and should be provided whenever feasible. The Union shall have up to fifteen (15) days from receipt of the notice to request a meeting regarding the change. If the Union requests a meeting, the meeting will be held within ten (10) days of the Union's request, and the Parties will review the proposed changes. The Union may submit written proposals within fifteen (15) days of the meeting or within thirty (30) days of receipt of the original notice of the change(s), whichever is later. If the Union submits written proposals that meet the duty and scope of bargaining, the Parties shall meet at a mutually agreeable time and place to conduct negotiations. The Union will be advised regarding their failure to submit negotiable proposals and may, within ten (10) days of being advised, amend their initial offering to make it negotiable. The Parties agree that every effort shall be made to reach agreement as expeditiously as possible. If the Union does not request a meeting or submit negotiable written proposals within the prescribed time period, the Agency may implement the change as proposed. If an Agency delay in responding to a request for information under 5 USC Section 7114(b)(4)(B) would cause the Union to miss a deadline, then that deadline may be extended.

Section 3. If the Parties are unable to reach agreement, the Parties are free to pursue whatever course of action is available to them under the Federal Service Labor-Management Relations Statute or other relevant statutes/law.

Section 4. The Parties at the bargaining unit level identified in Article 2, Section 3 may enter into written agreements or understandings on matters that primarily affect their bargaining unit. No such agreements

may increase or diminish rights, obligations, and/or protections expressly contained in this Agreement unless specifically authorized by this Agreement.

Section 5. The Union at the bargaining unit level identified in Article 2, Section 3 may initiate bargaining on personnel policies, practices, and matters affecting working conditions during the term of this Agreement on matters not covered by this Agreement in accordance with the Federal Service Labor Management Relations Statute. When the Agency has received a written proposal from the Union, if required, a meeting will be scheduled within fifteen (15) days to review the Union's proposal. The Agency may submit written counter proposals within fifteen (15) days of the meeting or thirty (30) days of the Union's proposal, whichever is later. The Parties shall meet at mutually agreeable times and places to conduct negotiations. If no agreement is reached, the provisions of Section 3 of this Article shall apply.

Section 6. The Parties acknowledge that there is no need for mid-term ground rules.

(Joint Exhibit 1, pp. 14-15.)

### **APPLICABLE STATUTORY PROVISIONS**

#### **5 USC §7114(a)(2)(A)**

(a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or ....

#### **5 USC §7116(a)(1) and (5)**

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

\* \* \*

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

\* \* \*

### **REMEDY REQUESTED**

[T]he Arbitrator should find for the Union, declaring that the Agency bypassed the Union and thereby committed multiple unfair labor practices, committed an unfair labor practice in refusing to bargain a change to workplace conditions, and violated Articles 3 and 7 of the collective bargaining agreement. The Arbitrator should order the Agency to post a notice stating they will not refuse to bargain with the Union, bypass the Union, and order the Agency and Union to engage in post-implementation bargaining. Additionally, the Arbitrator should award the Union the costs of this action, retain jurisdiction in this matter in the likely event that the Agency refuses to obey the arbitration award, and such other relief as the Arbitrator finds just, appropriate, and reasonable.

(Union Brief pp. 16-17.)

### **FACTS**

The salient facts of this case are undisputed.

The Agency is a division of the U. S. Department of Transportation and is responsible for ensuring the safety and efficiency of the nation's aerospace system. The Union is the duly elected bargaining unit representative for approximately 2,000 Agency employees working at the Agency's headquarters in various departments.<sup>1</sup>

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<sup>1</sup> This includes the Air Traffic Organization, Aviation Safety, Chief Counsel's Office, Airports, the Office of the Administrator, Aviation Policy, Planning and the Environment, Commercial Space Transportation, Office of Civil Rights, Office of Communications, and Office of Next Generation Air Transportation System (NextGen).

The Agency and the Union negotiated the Agreement, which became effective January 16, 2025, for a term of 4 years (Joint Exhibit 1). On January 28, 2025, OPM sent bargaining unit employees an email announcing the launch of the DRP. The subject line of the email was entitled “Fork in the Road” and stated as follows:<sup>2</sup>

During the first week of his administration, President Trump issued a number of directives concerning the federal workforce. Among those directives, the President required that employees return to in-person work, restored accountability for employees who have policymaking authority, restored accountability for senior career executives, and reformed the federal hiring process to focus on merit. As a result of the above orders, the reform of the federal workforce will be significant.

The reformed federal workforce will be built around **four pillars**:

- 1) **Return to Office**: The substantial majority of federal employees who have been working remotely since Covid will be required to return to their physical offices five days a week. Going forward, we also expect our physical offices to undergo meaningful consolidation and divestitures, potentially resulting in physical office relocations for a number of federal workers.
- 2) **Performance culture**: The federal workforce should be comprised of the best America has to offer. We will insist on excellence at every level — our performance standards will be updated to reward and promote those that exceed expectations and address in a fair and open way those who do not meet the high standards which the taxpayers of this country have a right to demand.
- 3) **More streamlined and flexible workforce**: While a few agencies and even branches of the military are likely to see increases in the size of their workforce, the majority of federal agencies are likely to be downsized through restructurings, realignments, and reductions in force. These actions are likely to include the use of furloughs and the reclassification to at-will status for a substantial number of federal employees.
- 4) **Enhanced standards of conduct**: The federal workforce should be comprised of employees who are reliable, loyal, trustworthy, and who strive for excellence in their daily work. Employees will be subject to enhanced standards of suitability and conduct as we move forward.

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<sup>2</sup> The DRP was a component of President Trump’s highly publicized effort to slash the number of federal workers, made notable by Elon Musk and his Department of Government Efficiency (“DOGE”). The “Fork in the Road” email was sent out to over 2 million federal employees and “[t]he missive reflected Musk’s determination to take an axe to the federal bureaucracy...” See, Politico “*Federal Workers Reeling Over Trump’s ‘Buyout’ Offer: ‘This is the Last Lifeboat in Town’*” January 30, 2025; See, Wall Street Journal, “*White House to Push Out Federal Workers Through Buyout Offer,*” January 28, 2025.

Employees who engage in unlawful behavior or other misconduct will be prioritized for appropriate investigation and discipline, including termination.

Each of the pillars outlined above will be pursued in accordance with applicable law, consistent with your agency's policies, and to the extent permitted under relevant collective bargaining agreements.

If you choose to remain in your current position, we thank you for your renewed focus on serving the American people to the best of your abilities and look forward to working together as part of an improved federal workforce. At this time, we cannot give you full assurance regarding the certainty of your position or agency but should your position be eliminated you will be treated with dignity and will be afforded the protections in place for such positions. If you choose not to continue in your current role in the federal workforce, we thank you for your service to your country and you will be provided with a dignified, fair departure from the federal government utilizing a deferred resignation program. This program begins effective January 28 and is available to all federal employees until February 6. If you resign under this program, you will retain all pay and benefits regardless of your daily workload and will be exempted from all applicable in-person work requirements until September 30, 2025 (or earlier if you choose to accelerate your resignation for any reason). The details of this separation plan can be found below.

Whichever path you choose, we thank you for your service to The United States of America.

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Upon review of the below deferred resignation letter, if you wish to resign:

- 1) Select "Reply" to this email. You must reply from your government account. A reply from an account other than your government account will not be accepted.
- 2) Type the word "**Resign**" into the body of this reply email. Hit "Send".

THE LAST DAY TO ACCEPT THE DEFERRED RESIGNATION PROGRAM IS FEBRUARY 6, 2025.

Deferred resignation is available to all full-time federal employees except for military personnel of the armed forces, employees of the U.S. Postal Service, those in positions related to immigration enforcement and national security, and those in any other positions specifically excluded by your employing agency.

**DEFERRED RESIGNATION LETTER**

January 28, 2025

Please accept this letter as my formal resignation from employment with my employing agency, effective September 30, 2025. I understand that I have the right to accelerate, but not extend, my resignation date if I wish to take advantage of the deferred resignation program. I also understand that if I am (or become) eligible for early or normal retirement before my resignation date, that I retain the right to elect early or normal retirement (once eligible) at any point prior to my resignation date.

Given my impending resignation, I understand I will be exempt from any "Return to Office" requirements pursuant to recent directives and that I will maintain my current compensation and retain all existing benefits (including but not limited to retirement accruals) until my final resignation date.

I am certain of my decision to resign and my choice to resign is fully voluntary. I understand my employing agency will likely make adjustments in response to my resignation including moving, eliminating, consolidating, reassigning my position and tasks, reducing my official duties, and/or placing me on paid administrative leave until my resignation date.

I am committed to ensuring a smooth transition during my remaining time at my employing agency. Accordingly, I will assist my employing agency with completing reasonable and customary tasks and processes to facilitate my departure.

I understand that my acceptance of this offer will be sent to the Office of Personnel Management ("OPM") which will then share it with my agency employer. I hereby consent to OPM receiving, reviewing, and forwarding my acceptance.

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Upon submission of your resignation, you will receive a confirmation email acknowledging receipt of your email. Any replies to this email shall be for the exclusive use of accepting the deferred resignation letter. Any other replies to this email will not be reviewed, forwarded, or retained other than as required by applicable federal records laws.

Once your resignation is validly sent and received, the human resources department of your employing agency will contact you to complete additional documentation, if any.

(Union Exhibit 1.) (Emphasis in original.)

OPM sent subsequent e-mails pertaining to the DRP to bargaining unit members on January 30, February 2, February 4, February 6, and February 10, 2025 (Union Exhibits 2-7). Several of these emails contained “Frequently Asked Questions” including the following Q&A:

Q: Is there a formal agreement I can sign with my agency reflecting the terms of this offer?

A: Yes. If you are eligible for the deferred resignation program and accept it, your agency can execute paperwork reflecting the terms.

(Union Exhibit 3, p. 2.) The DRP ended on February 12, 2025 (Union Exhibit 8).<sup>3</sup>

It is undisputed neither OPM, nor the Agency, provided the Union with any advance notice of the “Fork in the Road” email, nor any of the subsequent e-mails being sent. The Agency never provided the Union with the opportunity to bargain over the program or exemptions to the program, or the effects thereof. No formal notification was sent to the Union after the program ended. No briefings or information about the DRP was shared with the Union at any time. It is also undisputed that the Agency had no advance notice of the DRP prior to OPM sending the “Fork in the Road” email.

On February 9, 2025, the Union filed a national grievance with Executive Director of Labor and Employee Relations, Kevin Androsian, pursuant to Article 9, Section 8 of the Agreement. The grievance alleges the following claims:

1. Bypass of the Union, as a violation of 5 USC §7114(a)(2)(A) as to each email;
2. Bypass of the Union, as an unfair labor practice under 5 USC § 7116(a)(1) as to each email;
3. Bypass of the Union, as a violation of the CBA under Article 3, Section (1)(a) as to each email;
4. Violation of notification and duty to bargain as to the entire program, as an unfair labor practice under 5 USC § 7116(a)(5);
5. Violation of notification and duty to bargain as to the entire program, as a violation of the CBA under Article 7.

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<sup>3</sup> A court order extended the DRP an additional six days.

The grievance demands bargaining over the DRP and seeks the following remedies:

1. Cease and desist from bypassing the Union in communicating changes to working conditions;
2. Bargaining over the program;
3. Electronic posting consistent with FLRA ULP violation settlements indicating the Agency will not refuse to bargain changes to working conditions and the agency will not bypass the Union in communicating changes to working conditions;
4. Relief for individual employees who seek to rescind their so-called “deferred resignation”);
5. Costs of the litigation as provided by the CBA, regulation, or statute.

(Joint Exhibit 2.)

The Agency responded to the grievance on March 6, 2025. The Agency’s defense states as follows:

The Agency did not direct or send emails/updates directly to AFSCME BUEs entitled ‘A Fork in the Road.’ In fact, as stated in the grievance, the emails were sent by HR@OPM.gov. As such no actions by the Agency bypassed the Union. There are no violations of Article 3 § 1(a), 5 USC § 7114(a)(2)(A), or 5 USC §7116(a)(1), and no obligation to bargain.

(Joint Exhibit 3, p. 1.)

### **PARTIES’ POSITIONS**

The parties’ positions can be briefly summarized.

**The Union** contends that the Agency violated both Article 3(1)(a) of the Agreement and 5 USC §7114(a)(2)(A) of the FSLMRS when it bypassed the Union and went directly to bargaining unit employees when launching the DRP. Citing to the Agreement, the statutory provisions and the FLRA Handbook *Guidance on Meetings* (2011), the Union maintains that the Agency is prohibited from entering into “formal discussions” with

bargaining unit employees concerning “personnel policy or practices or other general conditions of employment” without Union representatives present. The Handbook states that

[b]y attending formal discussions, the exclusive representative is ‘assured the opportunity to hear, along with unit employees, about matters of interest to unit employees and be in a position to take appropriate action to safeguard those interests’ [see DOD, Nat’l Guard Bureau, Tex. Adjutant General’s Dep’t, 149th TAC Fighter Group, Kelly AFB, 15 FLRA 529, 532 (1984) (Kelly AFB)].

(Union Brief pp. 5-6.)

The Union rejects the Agency’s contention that since the Agency did not send the email to bargaining unit employees, it cannot be found to have bypassed the Union. The Union references language and cited cases from the Handbook making clear that outside, non-agency actors may be considered “representatives of the agency” for the purpose of the “bypass” prohibition. In this regard it asserts that

[t]his assertion is wrong on the facts and the law. Union representatives are present when members of the bargaining unit are interviewed by the National Transportation Safety Board (NTSB), an independent federal agency, the Federal Bureau of Investigation (FBI), the Equal Opportunity Employment Commission (EEOC), Inspectors General (IG), and others, all of them outside the Agency, but all agents of the employer.

(*Id.* at p. 7.) Additionally, the Union asserts that “[a] failure to afford a union an opportunity to be represented at a Section 7114(a)(2)(A) formal discussion constitutes a violation of sections 7116(a)(1) and (8) of the Statute.”

The Union also contends that the Agency’s actions violated its statutory and contractual obligations to provide notice and an opportunity to bargain with the Union prior to implementing the DRP. 5 USC §7116(a)(5) states that it is an unfair labor practice for an agency “to refuse to consult or negotiate in good faith with a labor

organization as required by this chapter.” Article 7 of the parties’ collective bargaining agreement expands upon this statutory requirement, stating in relevant parts:

Section 1. The Parties agree that personnel policies, practices, and matters affecting working conditions of bargaining unit employees not covered by this Agreement shall not be changed by the Agency without prior notice to and negotiations with the Union in accordance with applicable law. The provisions of this Article apply to substance bargaining when allowable by law and to procedures which the Agency will observe in exercising a management right, and/or appropriate arrangements for employees adversely affected by the exercise of a Management right in accordance with 5 USC Section 7106.

Section 2. Should the Agency propose a change described in Section 1, thirty (30) days written notice of the proposed change shall be provided to the Union...

(Union Brief p. 11.)

The Union argues that by unilaterally implementing the DRP, the Agency violated its obligation to engage in midterm negotiations when the Union requests bargaining over subjects the parties have not bargained over. *See U.S. Dep’t of the Interior, Wash., D.C.*, 56 FLRA 45, 50-51 (2000). It also violated its obligation to bargain over Agency-proposed changes in conditions of employment. *See Fed. Bur. of Prisons, FCI, Bastrop, Tex.*, 55 FLRA 848 (1999). The Union rejects any contention that since OPM sent the email without notifying the Agency, the Agency had no duty to bargain with the Union over the DRP or the impact of it. As stated by the Union:

The Agency was responsible for accepting and processing these deferred resignations. Resignation agreements were produced by the Agency, processed by the Agency, and accepted by the Agency. Exemptions to the program were determined by the Agency, and denials to the resignation process were issued by the Agency. The Agency determined when and how employees were placed on administrative leave. The Agency determined what actions were taken and how they were taken to transition employees out of the Agency. All of these issues, under the direct control of the Agency, were bargainable, at least with regard to impact and implementation, for this program.

(Union Brief p. 15.)

**The Agency** contends that the Union’s “bypass” claim must fail because the Agency did not initiate the DRP and did not have prior knowledge of the program. Furthermore, it asserts that an email sent to every federal employee is not a “discussion,” and the Union cites no contractual or legal precedent holding otherwise. The Agency also insists that “OPM is not organizationally affiliated with the FAA or DOT, OPM is not an FAA subcomponent, and the FAA had no control over OPM’s deferred resignation program email.” Therefore, the Union has failed to show that even assuming the email was a discussion, it was conducted between the Agency and bargaining unit employees.

According to the Agency, the Union has also failed to produce any evidence that the Agency’s alleged “bypass” of the Union coerced employees so as to also constitute a violation of Section 7116(a)(1). In any event, the fact the DRP was completely voluntary weighs against any such finding. Regarding the refusal to bargain allegations, the Agency posits that an outside federal entity’s alleged violation of the Agreement cannot support a claim against the Agency. “OPM is not a party to the CBA, and its conduct cannot create contractual obligations for the [Agency],” especially where the Agency had no advance notice of OPM’s actions.

In any event, the Agency insists it is not required to provide notice of a change and an opportunity to bargain unless there is a change and the change has a greater than de minimis effect on employees' conditions of employment. *DHS, U.S. Customs and Border Protection, El Paso*, 70 FLRA 501 (2018). In this regard, the Agency stresses that employees have always had the right to voluntarily resign, and the Union has provided

no evidence that any alleged change was more than de minimis or impacted bargaining unit employees in any way. *American Federation of Government Employees v. Federal Labor Relations Authority*, No. 20-1396 (D.C. Cir. 2022).

The Agency emphasizes that where the FLRA has found an agency refused to bargain in good faith, unlike here the unions presented substantial evidence of the impact the change had on bargaining unit employees. *See, U.S. Department of the Treasury, Immigration and Naturalization Service*, 56 FLRA 906 (2000); *U.S. Dep't of Homeland Sec., Border & Transp. Sec. Directorate, Bureau. of Customs & Border Prot., Wash., D.C.*, 59 FLRA 728 (2004). According to the Agency, there was also no obligation to negotiate over the DRP because this is a matter that is regulated by federal law and involves an area of management rights retained by the Agency. *See*, 5 C.F.R. § 715.202 and 5 U.S.C. § 7106(a). “These management rights preclude bargaining in contravention of Management’s ‘right to establish policies or practices that encourage or discourage employees from remaining employed by an agency’.” (Quoting *Am. Fed’n of Gov’t Emps. Loc. 1827*, 58 FLRA 344, 345 (2003)).

Finally, the Agency rejects the Union’s requested remedies, referring to them as “illegal, or inappropriate.” To permit employees to withdraw their DRP resignations is at odds with 5 C.F.R. § 715.202(a), which prevents employees from withdrawing resignations upon their elections. The cease-and-desist and post-implementation bargaining requests are moot since the DRP concluded on February 12, 2025. The Agency also dismisses the need for any posting requirement, inasmuch as OPM implemented the program – not the Agency. Additionally, any changes to the DRP at this juncture could adversely affect federal employees who voluntarily participated and

the Union has presented no evidence that any of the affected employees were coerced into resigning under the DRP.

### **DISCUSSION**

The undersigned must determine whether the Agency violated Article 7 and Article 3(1)(a) of the parties' Collective Bargaining Agreement, as well as the Federal Service Labor-Management Relations Statute, when on January 28, 2025, the Deferred Resignation Program was initiated without advance notice and bargaining.

Initially, I cannot sustain the Agency's defense that it cannot be liable for violating either the Agreement or the FSLMRS here because OPM initiated the DRP and the Agency had no advance notice of the same. The record shows that OPM and the Agency worked together to implement the DRP; thus, the Agency cannot reasonably claim it was an innocent bystander. Rather, as noted by the Union, it is undisputed that

[t]he Agency was responsible for accepting and processing these deferred resignations. Resignation agreements were produced by the Agency, processed by the Agency, and accepted by the Agency. Exemptions to the program were determined by the Agency, and denials to the resignation process were issued by the Agency. The Agency determined when and how employees were placed on administrative leave. The Agency determined what actions were taken and how they were taken to transition employees out of the Agency.

Additionally, employees choosing to enter the DRP were instructed to "assist [their] employing agency with completing reasonable and customary tasks and processes to facilitate [their departure[s]]," and were told that the Agency would contact them to "complete additional documentation."

The Agency wishes to inoculate itself from any responsibility for consequences arising out of OPM's action and its impact on its own employees, yet clearly facilitated

the implementation of the DRP without ever distancing itself from, or in any way objecting to it. Under these circumstances, it is reasonable to conclude that the Agency acted in concert with OPM and shared the same interests as OPM by implementing the DRP. It was not merely a casual onlooker as suggested by the Agency.<sup>4</sup>

Turning to the merits of the grievance, Section 7114(a)(2)(A) of the FSLMRS was established “to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit viewed in the context of a union’s full range of responsibilities under the Statute” *See, DOJ, BOP, FCI, Ray Brook*, 29 FLRA 584, 589 (1987). The parties memorialized this obligation when they negotiated Article 3(1)(a) of the Agreement and incorporated the terms of Section 7114(a)(2)(A). For the following reasons, I find that, on balance, the DRP involved “personnel policies ... or other general conditions of employment” that triggered the Agency’s obligation to include the Union when “discussing” the DRP with bargaining unit members.

The DRP clearly generated for bargaining unit employees important “conditions of employment” such as separation from service, severance pay, benefits and future employment consequences if they chose not to accept the DRP offer. These are not minor administrative matters but concern significant terms and conditions of employment, some of which are addressed by the parties’ Agreement.<sup>5</sup> This becomes clearer when considering the language contained in the initial “Fork in the Road” email, which provided that

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<sup>4</sup> The Agency’s position that only its own actions can implicate statutory or contractual obligations is also at odds with the parties’ acknowledgment in Article 68 of the Agreement that changes in federal law or regulations can trigger the reopening of the Agreement.

<sup>5</sup> Articles 40 and 41 of the Agreement address “Severance Pay” and “Retirement and Benefits Information,” respectively. Neither of these provisions encompass or contemplate the type of voluntary resignation program implemented here.

[a]t this time, we cannot give you full assurance regarding the certainty of your position or agency but should your position be eliminated you will be treated with dignity and will be afforded the protections in place for such positions.

In no uncertain terms, this provision had the clear potential of creating uncertainty and confusion for bargaining unit employees, who had to choose between accepting the favorable severance offer within the looming nine-day filing period or, accept working under the new conditions set forth in the “four pillars” under the threat of being furloughed or downsized. The Union clearly had an interest in ensuring its members made this important career-changing decision only after having all their questions addressed and relevant information provided. Here, the Union was never given “the opportunity to hear, along with unit employees, about matters of interest to unit employees and be in a position to take appropriate action to safeguard those interests.” *See, DOD, Nat’l Guard Bureau, Tex. Adjutant General’s Dep’t, 149th TAC Fighter Group, Kelly AFB, 15 FLRA 529, 532 (1984) (Kelly AFB)*].

The Agency’s only defense was its contention that it did not send the “Fork in the Road” email and therefore could not be liable for violating the FSLMRS or the Agreement. In its post-hearing briefs it raises for the first time substantive contentions in support of denying the Union’s statutory and contractual claims. Although the Union did not have an opportunity to address these arguments prior to this arbitration proceeding, they can be summarily addressed here.

I cannot sustain the Agency’s contention that Section 7114(a)(2)(A) is inapplicable because an email does not constitute a “formal discussion” or “meeting” with employees. This argument clearly places form over substance and would permit an agency to circumvent its obligations under the statute by simply using written communication

rather than face-to-face interaction. The mode of communication is less important than the substance and context of the communication.

Additionally, the subject matter of the communication was a major policy announcement rolling out a new opportunity to resign and receive eight months of severance pay or remain and risk being furloughed. It applied to all Agency employees (with minor exemptions), including all bargaining unit employees. The subject matter title -- “Fork in the Road” – unignorably connoted this involved a life-changing decision, not a minor administrative “housekeeping” matter.<sup>6</sup>

The voluntary nature of the DRP does not outweigh these compelling factors. Given the potential ramifications and consequences of not participating and later being furloughed, this clearly involved “general conditions of employment.” I conclude that the OPM emails were the functional equivalent of a formal discussion or meeting with employees concerning a personnel policy or general condition of employment. Therefore, by failing to provide notice to the Union and invite it to represent/assist bargaining unit employees throughout this process the Agency violated the “bypass” provisions contained in 5 USC §7114(a)(2)(A) and Article 3(1)(a) of the Agreement.

The Union’s contention that the Agency violated 5 USC §7116(a) (1) and (5) and Article 7 of the Agreement must also succeed. 5 USC §7116(a)(5) states that it is an

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<sup>6</sup> As set forth in *Politico*:

With the terms of a stark but murky ultimatum unclear and likely subject to legal interpretations and challenges, upwards of hundreds of thousands of individual employees were struggling with what to do, increasingly uncertain about the stability of their jobs and their agencies.... In fact, the subject line “Fork in the Road” was the exact same one [Musk] used when giving staffers at Twitter a similar ultimatum to either become more ‘hardcore’ or leave the company: ‘Fork in the road.’

*Politico*, *supra*; Wall Street Journal, *supra*.

unfair labor practice for an agency “to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.” Article 7 of the parties’ Agreement expands upon this statutory requirement, stating that

The Parties agree that personnel policies, practices, and matters affecting working conditions of bargaining unit employees not covered by this Agreement shall not be changed by the Agency without prior notice to and negotiations with the Union in accordance with applicable law.

The FLRA has determined that it is an unfair labor practice to deny the exclusive representative an opportunity to bargain over the impact and implementation of a change in unit employees’ conditions of employment, provided that the change has more than a de minimis effect. In assessing whether the effect of a decision on conditions of employment is more than de minimis, the FLRA examines the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees’ conditions of employment. *See, e.g., GSA, Region 9, San Francisco, Calif.*, 52 FLRA 1107, 1111(1997).

For all the reasons previously stated, I conclude that the DRP had a significant and reasonably foreseeable effect on employees’ conditions of employment. The FLRA has held that even *voluntary* early retirement programs implemented by an Agency trigger the bargaining obligation, inasmuch as they “affect future career and retirement plans” and the loss of benefits. *See, U.S. Dep’t of the Air Force, Air Force Materiel Command*, 54 FLRA 914 (1998). Here, employees were given less than two weeks to determine whether they wanted to terminate their employment relationship in return for a favorable severance package, or (as set forth in the “Fork in the Road” email) “likely be downsized through restructurings, realignments, and reductions in force.” Under these circumstances, I cannot conclude the change in conditions of employment were

de minimis.<sup>7</sup> The Arbitrator concludes that the implementation of the DRP, facilitated by the Agency, violated 5 USC §7116(a) (1) and (5) and Article 7 of the Agreement.

Furthermore, I cannot sustain the Agency's claim that federal law/regulations pertaining to resignations, as well as the management rights clause, preempt a finding that the Agency had an obligation to provide notice and bargain over the DRP. Again, the Agency never raised this issue during the grievance process. Rather, it simply defended the grievance by claiming only OPM was responsible for the DRP. Had the Agency not ignored the Union when implementing the DRP, issues involving the management rights clause and preemption might have been discussed or resolved prior to this proceeding, rather than dropped in this Arbitrator's lap.

Nonetheless, for the reasons stated earlier I find that the DRP implemented herein addressed matters that are not exclusively covered by the management rights clause. I also find that the provision contained in 5 C.F.R. § 715.202 permitting federal employees "to resign at any time" is far too general to override the Agency's bargaining obligations set forth in 5 USC §7116(a) (1) and (5) and Article 7 of the Agreement.

Accordingly, based on the foregoing the grievance is sustained. The Agency violated Article 7 and Article 3(1)(a) of the parties' Agreement, as well as the FSLMRS, when on January 28, 2025, the DRP was initiated without advance notice and bargaining.

Turning to the remedy, the record shows that the DRP concluded on February 12, 2025. Because of this, and since the record before me does not provide sufficient

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<sup>7</sup> Cf. *Soc. Sec. Admin, Office of Hearings & Appeals, Charleston, S.C.*, 59 FLRA 646 (2004) (effect of reduction in reserved parking spaces found to be de minimis where employees had no problem getting alternate parking).

data concerning the potential disruption to Agency operations, the number of participants, and the potential unfairness to employees who opted to receive the severance benefit, I am reluctant to order a *status quo ante* remedy. However, going forward the Agency shall cease and desist from bypassing the Union in communicating with members of the bargaining unit regarding a DRP and any other changes to working conditions. The Agency shall also bargain with the Union, at the very least, over the implementation and impact of any future DRP with the Union and complete such bargaining prior to it being implemented for bargaining unit employees.

The Agency shall also publish, electronically on all electronic bulletin boards and post on every management controlled physical bulletin board, where bargaining unit employees are employed, a posting signed by the Acting Administrator that the Agency will not bypass the Union in communicating changes to working conditions to the bargaining unit, and further that the Agency will not refuse to negotiate changes to working conditions with the Union. Such notice shall be posted within 30 days of this Order and remain posted for a minimum of 60 days.

Given the unique circumstances involving the initiation of the DRP by OPM (according to the parties, a case of first impression), and the evidence showing that the Agency was not acting willfully (but following a directive from OPM and the White House), the Union's request that the Agency pay the costs of the Union's processing of this grievance, any and all attorney's fees, arbitration fees, and other costs as provided by the collective bargaining agreement, regulation, or statute is denied.

Consistent with the foregoing discussion and findings, the Arbitrator renders the following

**AWARD**

The grievance is sustained.

The Agency violated Article 7 and Article 3(1)(a) of the Agreement, as well as the FSLMRS, when on January 28, 2025, the Deferred Resignation Program was initiated without advance notice and bargaining. As a remedy, the Agency shall:

1. Cease and desist from bypassing the Union in communicating with members of the bargaining unit regarding a DRP and any other changes to working conditions.
2. Bargain with the Union over the implementation and impact of any future DRP with the Union and complete such bargaining prior to it being offered to bargaining unit employees.
3. Publish, electronically on all electronic bulletin boards and post on every management controlled physical bulletin board, where bargaining unit employees are employed, a posting signed by the Acting Administrator that the Agency will not bypass the Union in communicating changes to working conditions to the bargaining unit, and further that the Agency will not refuse to negotiate changes to working conditions with the Union. Such notice shall be posted within 30 days of this Order and remain posted for a minimum of 60 days.
4. The Union's request that the Agency pay the costs of the Union's processing of this grievance, any and all attorney's fees, arbitration fees, and other costs as provided by the collective bargaining agreement, regulation, or statute is denied.

The undersigned will retain jurisdiction for 60 days to resolve any disputes that may arise over the Agency's implementation of this remedy.

A handwritten signature in black ink, appearing to read 'James M. Darby', with a large, stylized flourish at the end.

JAMES M. DARBY  
Arbitrator  
Long Beach, N.Y  
January 8, 2026