66 FLRA No. 114

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1858
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
REDSTONE TEST CENTER
REDSTONE ARSENAL, ALABAMA
(Agency)

0-NG-3109

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

April 24, 2012

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

I. Statement of the Case

This matter is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute. The appeal concerns the negotiability of one proposal regarding the payment of hazard pay differential (HPD).[1] The Agency filed a statement of position (SOP), to which the Union filed a response (response). The Agency filed a reply (reply) to the response.

For the reasons that follow, we find that the proposal is within the duty to bargain.

II. Background

The Union submitted the proposal after the Agency notified the Union that it intended to implement an Agency regulation, Developmental Test Command Regulation No. 690-2 (DTC 690-2), that would discontinue the payment of HPD for certain duties.[2] Record of Post-Petition Conference (Record) at 2; *see* Response, Attach. 1 at 3 (DTC 690-2).

As part of its procedure for determining whether employees are entitled to HPD, the Agency assigns risk assessment code (RAC) levels to employee activities. Record at 2. Ranging from one to five, the RAC levels correlate to the severity of the risks that may accompany an employee's duties. *Id*. For example, a RAC 1 assignment indicates the highest level of risk, and a RAC 5 assignment indicates the lowest level of risk. *Id.* It is undisputed that, since 1997, the Agency paid HPD for activities designated as RAC 1, 2, or 3. *See* Petition, Attach. 2. Making the change to which the Union responded with the proposal at issue in this case, DTC 690-2 redefines RAC 3 duties as having a "[m]oderate"

[1] The parties use the terms "hazardous duty pay," "hazard duty pay," "hazard differential pay," and "hazard pay differential" interchangeably. As the term "hazard pay differential" is consistent with the statutory and regulatory provisions governing such pay, we use the term "hazard pay differential (HPD)" throughout this decision.

[2] DTC 690-2 provides, in pertinent part:

> 6. DELEGATION OF AUTHORITY. [The Agency] may approve the payment of H[PD] when ***all five*** of these conditions are met for specific hazard or physical hardship:
> a. The duty is contained in 5 CFR Part 550, Subpart I . . . .
> b. The performance of the duty ***is not*** considered anywhere in the classification of the employee's position description (PD). . . .
> c. The hazard ***cannot*** be mitigated to a *less than significant level of risk* via protective or mechanical devices, protective or safety clothing, protective or safety equipment or other measures.
> . . . .
> 7. TERMINATION OF [HPD]. [The Agency] will discontinue payment of H[PD] to an employee when:
> a. One or more of the conditions requisite for such payment cease(s) to exist.
> b. Safety precautions have reduced the element of hazard to a less than significant level of risk, consistent with generally accepted standards that may be applicable, such as those published by the Occupational Safety and Health Administration, Department of Labor; or protective or mechanical devices have adequately alleviated the hazard or physical discomfort or distress.
> 8. POLICY
> . . . .
> d. [HPD] will be authorized only for activities categorized as **extremely high** RAC 1 and **high** RAC 2 risks . . . . For any lesser severity level, the risk will be considered to be practically eliminated or a **'Less Than Significant Level of Risk'** and payment of H[PD] ***will not*** be authorized."

Response, Attach. 1 at 2-3.

level of risk, DTC 690-2 at 4 (Table 8-2), and would discontinue the payment of HPD for those duties, Record at 2; DTC 690-2 at 3.

III. The Proposal

A. Wording[3]

> Maintain threshold at RAC 3 and for that level, H[PD] will continue to be authorized. The Agency can always introduce generally accepted standards that would reduce the risk to low or lower (RAC 4 or 5). Employees retain the right to challenge through the negotiated grievance procedure, any changes in risk assessment if the effect has a negative impact on H[PD] payout determinations.

Record at 1.

B. Meaning

As relevant here, the parties agree that the proposal has the following meaning. The proposal would require the Agency to maintain the status quo and continue to pay HPD for RAC 3 duties, unless those duties had been taken into account in the classification of an employee's position. *Id.* at 2. It would also allow the Agency to re-assess or reduce the risks of a particular duty such that an employee would no longer be entitled to HPD. *Id.* at 3. Finally, it would allow employees to challenge any RAC assignment that would result in an employee not receiving HPD. *Id.*

C. Positions of the Parties

1. Agency

The Agency asserts that the proposal is outside the duty to bargain because it is inconsistent with 5 C.F.R. § 550.906, which governs the termination of HPD.[4] SOP at 4. According to the Agency, under § 550.906(b) and (c), HPD "is not authorized" and "must be discontinued" when either safety conditions have reduced the element of hazard to a less than significant level of risk, or protective or mechanical devices have adequately alleviated the hazard or physical discomfort or stress. *Id.*; *see also id.* at 2-3. The Agency asserts that, because DTC 690-2 defines the risks associated with RAC 3 duties as "'[m]oderate,'" those duties do not "warrant [the payment of] H[PD]" because they do not rise to a "significant level of risk" as "required by § 550.906(b)." *Id.* at 4 (quoting DTC 690-2 at 4 (Table 8-2)). As support for this claim, the Agency states that the Union's proposal "does not alter" the Agency's definition of RAC 3 duties set forth in DTC 690-2. *Id.*; *see also id.* at 3. The Agency also argues that the Union's proposal would require the payment of HPD for RAC 3 duties even where "protective or mechanical devices have adequately alleviated physical discomfort or distress" in violation of § 550.906(c). *Id.* Based on the foregoing, the Agency claims that the Union's proposal mandates the payment of HPD for all RAC 3 duties in violation of 5 C.F.R. § 550.906(b) and (c).

2. Union

Citing 5 C.F.R. § 550.906, the Union asserts that, absent Agency evidence to support a claim that safety precautions have reduced the element of hazard of RAC 3 duties to a "less than significant level of risk," the Agency should continue to pay HPD for those duties as it has done "for over 12 years." Petition, Attach. 1 at 2. In this connection, the Union claims that the Agency has failed to demonstrate that 5 C.F.R. § 550.906(b) or (c) authorizes the Agency to terminate HPD for RAC 3 duties. Response at 2. According to the Union, there is no evidence that safety precautions have reduced the level of risk of RAC 3 duties to less than a significant level of risk as required under 5 C.F.R. § 550.906(b). *See id.* In addition, the Union argues that no protective or mechanical devices have adequately alleviated physical discomfort or distress consistent with terminating HPD under § 550.906(c). *Id.*

D. Analysis and Conclusions

The Agency's sole claim of nonnegotiability is that the Union's proposal is inconsistent with 5 C.F.R. § 550.906(b) and (c).

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[3] At the post-petition conference, the parties agreed that the language of the proposal had been modified after the Union filed its petition. Record at 1.

[4] In pertinent part, 5 C.F.R. § 550.906 provides:

> An agency shall discontinue payment of hazard pay differential to an employee when –
>
> . . . .
>
> (b) Safety precautions have reduced the element of hazard to a less than significant level of risk, consistent with generally accepted standards that may be applicable, such as those published by the Occupational Safety and Health Administration, Department of Labor; or
>
> (c) Protective or mechanical devices have adequately alleviated physical discomfort or distress.

Section 550.906 addresses the termination of HPD.[5] Specifically, § 550.906(b) states that "[a]n agency shall discontinue payment of [HPD] to an employee when . . . [s]afety precautions have reduced the element of hazard to a less than significant level of risk, consistent with generally accepted standards that may be applicable . . . ." 5 C.F.R. § 550.906(b). Section 550.906(c) authorizes agencies to discontinue the payment of HPD to an employee when "[p]rotective or mechanical devices have adequately alleviated physical discomfort or distress." 5 C.F.R. § 550.906(c). Thus, § 550.906 sets forth the conditions when an agency is authorized to *terminate* the payment of HPD.

Contrary to the Agency's claims, there is nothing in the proposal that prohibits the Agency from terminating the payment of HPD consistent with § 550.906(b) and (c). The proposal would require the Agency to maintain the status quo and continue to pay HPD for RAC 3 duties, Record at 2, absent one of the conditions in § 550.906(b) or (c), Response at 2. If one of the conditions in § 550.906(b) or (c) exists, then the proposal allows the Agency to re-assess or reduce the risks of a particular duty such that an employee would no longer be entitled to HPD. Record at 3. The plain language of § 550.906(b) makes clear that the payment of HPD may be terminated when "[s]afety precautions have reduced the element of hazard to a less than significant level of risk." 5 C.F.R. § 550.906(b). It does not, as the Agency claims, authorize the termination of HPD merely because the Agency unilaterally redefines RAC 3 duties as having a "[m]oderate" level of risk, which the Agency asserts means "less than significant." *Id.* Moreover, the proposal does not preclude the Agency from changing the duties that it lists as RAC 3 duties.

In addition, the proposal does not require the Agency to make HPD payments that § 550.906 prohibits. In particular, the Agency fails to argue or establish that either condition for terminating the payment of HPD has been satisfied. Regarding the first condition, the Agency fails to argue or establish that it introduced "[s]afety precautions [that] have reduced the element of hazard" of RAC 3 duties to a "less than significant level of risk," 5 C.F.R. § 550.906(b). Similarly, regarding the second condition, the Agency fails to argue or establish that "[p]rotective or mechanical devices have adequately alleviated physical discomfort or distress" of RAC 3 duties, 5 C.F.R. § 550.906(c). Moreover, the Agency identifies nothing in the proposal that would prohibit the termination of HPD when either of those conditions is met. Accordingly, we find that the Agency has failed to establish that the proposal is inconsistent with 5 C.F.R. § 550.906(b) and (c).

We note that, although the Agency relies on the definitions set forth in DTC 690-2 as support for its claim that the proposal is outside the duty to bargain, it does not argue that the proposal is inconsistent with DTC 690-2. However, to the extent the Agency's arguments could be read as raising such a claim, they provide no basis for finding the proposal outside the duty to bargain. In order to demonstrate that a proposal is outside the duty to bargain because it conflicts with an agency regulation, an agency must: (1) identify a specific agency-wide regulation; (2) show that there is a conflict between the regulation and the proposal; and (3) demonstrate that its regulation is supported by a compelling need within the meaning of § 2424.11 of the Authority's Regulations. *AFGE, Local 3824*, 52 FLRA 332, 336 (1996). Here, the Agency makes no claim either that the proposal is inconsistent with DTC 690-2, or that the Agency regulation is supported by a compelling need. Accordingly, to the extent the Agency's arguments could be read as asserting that the proposal is outside the duty to bargain because it is inconsistent with DTC 690-2, they provide no basis for finding the proposal nonnegotiable. Accordingly, we find that the Agency's claim that the proposal does not alter the definitions set forth in DTC 690-2 fails to establish that the proposal is outside the duty to bargain.

Based on the foregoing, we find that the proposal is within the duty to bargain.

IV. Order

The Agency shall, upon request or as otherwise agreed to by the parties, negotiate with the Union over the proposal.[6]

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[5] HPD is authorized by the Hazardous Duty Act, 5 U.S.C. § 5545 and the implementing regulations contained in 5 C.F.R. §§ 550.901-907 and Appendix A to 5 C.F.R. Part 550. *NTEU, NTEU Chapter 51*, 40 FLRA 614, 621 (1991). HPD is based on a schedule established by the Office of Personnel management and set forth in Appendix A to 5 C.F.R. Part 550, Subpart I. Title 5 C.F.R. § 550.904, "Authorization of [HPD]," states, in pertinent part:

> An agency shall pay the [HPD] listed in appendix A of this subpart to an employee who is assigned to and performs any duty specified in appendix A of this subpart. However, [HPD] may not be paid to an employee when the hazardous duty or physical hardship has been taken into account in the classification of his or her position . . . .

The Agency has not asserted to the Authority that the proposal is inconsistent with § 550.904.

[6] In finding this proposal within the duty to bargain, we make no judgment as to its merits.