

67 FLRA No. 10

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1401
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
11TH WING
JOINT BASE ANDREWS, MARYLAND
(Agency)

0-AR-4855

DECISION

November 6, 2012

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator Mariann E. Schick filed by the Union under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency filed an opposition to the Union's exceptions.

The Arbitrator found that a grievance alleging that the Agency failed to engage in impact-and-implementation bargaining over Air Force Instruction 31-283 (the instruction) was substantively nonarbitrable under § 7117 of the Statute.¹ For the reasons that follow, we set aside the award and remand this matter to the parties for resubmission to an arbitrator of their choice, absent settlement.

II. Background and Arbitrator's Award

The Agency is a component of the Department of Defense (DoD), and certain DoD components set standards for the training, certification, and physical fitness of individuals employed as civilian police and security guards. *See* Award at 9. To that end, the Agency notified the Union of the instruction "establish[ing] the Department of the Air Force Civilian

Police and Security Guard . . . Program" and setting program standards, which would affect employees represented by the Union. *Id.* at 10 (quoting AFI 31-283, ch. 1, § 1.1). The Agency requested that the Union "provide any questions or concerns regarding this notification," *id.*, after which the Union requested bargaining over "this change in working conditions," *id.* at 11, as well as a briefing to "[en]able [the Union] to prepare its proposals" relating to the program's implementation, *id.* at 12. When the Agency asked which aspects of the instruction the Union wanted to bargain, the Union stated that it "wanted to 'negotiate the whole thing.'" *Id.* The Agency responded that: (1) the instruction "is a [Department of Defense] wide policy[.] for which [Agency management] has no authority to . . . bargain[.] regarding its implementation"; and (2) the Union did not "ha[ve] any standing to demand bargaining . . . [because such bargaining] would have occurred at the [n]ational level and not at the local level." *Id.*; *see also id.* at 19. Consequently, the Agency stated that it would "be implementing the instruction as appropriate." *Id.* at 12.

The Union filed a grievance alleging that the Agency violated the parties' agreement and the Statute by failing to bargain over the impact and implementation of the instruction. *See id.* at 2, 18, 19. When the grievance was not resolved, the parties submitted the following stipulated issue to arbitration: "[w]hether management violated the collective[-]bargaining agreement^[2] and . . . [§] 7117 [of the Statute] by failing to recognize that the [Union] is the FLRA[-]appointed [union] to bargain over impact and implementation of [the instruction] . . . for bargaining[-]unit members assigned to the [Agency]."³ *Id.* at 4.

The Arbitrator first reviewed the Statute and found that, under § 7117(a)(2), "bargaining does not extend to an agency[-]wide rule or regulation unless the [Authority] has found there is no compelling need for the regulation." *Id.* at 24. In this regard, the Arbitrator stated that she had no authority to make a compelling-need determination regarding the instruction. *Id.* The Arbitrator found further that § 7117(a)(3) makes § 7117(a)(2)'s "ban [on bargaining] . . . appli[cable] . . . to any rule or regulation issued by a subdivision of the Agency," except in circumstances not present in this dispute. *Id.* Applying those provisions of the Statute, the Arbitrator found that the instruction "seems to be a Department[-]wide regulation which would not be subject to bargaining with th[e] Union that represent[s] employees at Air Base Andrews alone, in view of the prohibitions of . . . § 7117." *Id.*

¹ The pertinent text of § 7117 is set forth in the appendix to this decision.

² The pertinent text of the parties' agreement is set forth in the appendix to this decision.

³ The Arbitrator also addressed the timeliness of the grievance. *See* Award at 23. As none of the exceptions involves that issue, we do not discuss it further.

As for the Agency's bargaining obligations under Article 3 of the parties' agreement, the Arbitrator found that Section 2 of that article requires bargaining over "mandatory subjects," as well as impact-and-implementation bargaining "over issues which are the subject of management rights" under § 7106(a) of the Statute. *Id.* at 25. But the Arbitrator found that the Union has no contractual right to impact-and-implementation bargaining over the instruction because "such [a] right arises with respect to matters covered by [§] 7106, not [§] 7117." *Id.* And the Arbitrator found that she could not interpret Article 3's bargaining obligations to encompass "prohibited subjects . . . , such as those set forth in [§ 7117(a)(2),] unless exempted by [§ 7117(a)(3)]," because any such interpretation "would be contrary to law." *Id.*

For those reasons, the Arbitrator held that if the Union wanted to bargain over the impact and implementation of the instruction, then it "should have filed a negotiability petition." *Id.* at 24. Because she found that "[a]ny relief available to the Union lies with the . . . Authority," the Arbitrator denied the grievance as substantively nonarbitrable. *Id.* at 25.

III. Positions of the Parties

A. Union's Exceptions

The Union asserts that the Arbitrator's finding that the Agency had no duty to bargain due to the prohibitions of § 7117 is contrary to law. Exceptions at 3-5. In this regard, the Union argues that the "Arbitrator erred in determining that . . . whether the Agency had a duty to bargain depended on whether the [Agency] had a compelling need for [the instruction]." *Id.* at 4. According to the Union, the instruction "changed conditions of employment for employees in the bargaining unit," and, therefore, the Agency was obligated to negotiate with the Union – as the exclusive representative of those employees – prior to implementing the instruction. *Id.* at 4-5 (citing 5 U.S.C. § 7114;⁴ *U.S. DOJ, INS, 55 FLRA 892 (1999) (DOJ); Dep't of the Air Force, Scott Air Force Base, Ill., 5 FLRA 9 (1981); see also id.* at 8 (quoting Collective-Bargaining Agreement, Art. 1, § 3.0 ("The [Agency] hereby recognizes that the Union is the [e]xclusive representative of all the employees included in the bargaining units as defined in [Article I,] Section 4.0.")). In addition, the Union argues that the Arbitrator erred as a matter of law in finding that she lacked the authority to resolve the grievance. *Id.* at 6. In this regard, the Union asserts that the Arbitrator erroneously found that she could not decide whether the Agency's refusal to bargain violated the parties'

agreement or constituted an unfair labor practice (ULP) without a prior compelling-need determination by the Authority under § 7117. *See id.* at 5-6.

Further, the Union alleges that the award is contrary to part 2424 of the Authority's Regulations (part 2424).⁵ *Id.* at 6-8. The Union argues that, as relevant here, part 2424 requires that a union submit particular proposals to an agency and that the agency declare those particular proposals nonnegotiable *before* the Authority will consider the merits of a petition for review of negotiability issues. *Id.* at 7-8 (citing *AFGE, Local 1513*, 36 FLRA 82, 83 (1990); *Ass'n of Civilian Technicians, Ala. ACT*, 2 FLRA 313, 315-16 (1979)). In this case, the Union asserts that "the Agency refused to negotiate *at all*, [so] it would have been futile" for the Union to submit particular proposals to the Agency. *Id.* at 8; *see also id.* at 2. Without particular proposals in dispute, the Union argues that it could not have filed a negotiability petition, and, therefore, the Arbitrator's finding that "[t]he Union should have filed a negotiability petition to bring this matter" before the Authority is contrary to part 2424. *Id.* at 6.

Moreover, the Union argues that the Arbitrator's interpretation of the parties' agreement is deficient because Article 3, Section 2.3(1) "clearly requires that the Agency negotiate with the Union upon request over any proposed changes in conditions of employment, prior to implementing those changes." *Id.* at 9.

Finally, the Union requests that the Authority remedy the award's alleged deficiencies by "overturn[ing] the [a]ward and direct[ing] the Agency to negotiate with the Union on demand over" procedures and appropriate arrangements related to implementation of the instruction. *Id.* at 10.

B. Agency's Opposition

The Agency alleges that the Union's exceptions do not address, or show to be nonfacts, the Arbitrator's "finding[s] of fact" that: (1) the instruction "implement[s] a Department of Defense wide regulation which [is not] subject to bargaining with this [u]nion, in view of the prohibitions" of § 7117; and (2) the Agency's refusal to bargain over implementation of the instruction did not violate the parties' agreement. Opp'n at 4. In addition, the Agency argues that "[w]here law or applicable regulation vests an [a]gency with sole and exclusive discretion over a matter, it would be contrary to law to require that discretion to be exercised through

⁴ The pertinent text of § 7114 of the Statute is set forth in the appendix to this decision.

⁵ The relevant text of part 2424 is set forth in the appendix to this decision. Although certain sections in part 2424 – specifically, §§ 2424.1, 2424.22, 2424.24, 2424.25, and 2424.26 – were revised effective June 4, 2012, *see* 77 Fed. Reg. 26,430, 26,433-34 (2012), those revisions did not alter the text of part 2424 that is relevant in this case.

collective bargaining.” *Id.* at 5 (citing *IAMAW, Franklin Lodge No. 2135*, 50 FLRA 677, 692 (1995)). Thus, the Agency argues that the Arbitrator correctly found that the Union’s failure to file a negotiability petition “prevent[ed] collective bargain[ing]” over the instruction’s implementation. *Id.*

IV. Preliminary Matter: Section 2429.5 of the Authority’s Regulations bars consideration of the Agency’s “sole and exclusive discretion” argument.

Under § 2429.5 of the Authority’s Regulations, the Authority will not consider any evidence or arguments that could have been, but were not, presented to the arbitrator.⁶ *E.g.*, *U.S. Dep’t of the Treasury, IRS*, 66 FLRA 120, 121 (2011) (barring argument in opposition under § 2429.5). The Agency presented several arguments to the Arbitrator regarding its reasons for denying the Union’s bargaining request, *see* Award at 22, but the record does not indicate that the Agency argued that the bargaining request concerned a matter over which the Agency possesses sole-and-exclusive discretion. As the Agency could have presented, but did not present, its sole-and-exclusive-discretion argument at arbitration, § 2429.5 bars consideration of that argument here.

V. Analysis and Conclusions

A. The award is contrary to law and regulation.

When exceptions involve an award’s consistency with law or regulation, the Authority reviews any question of law raised by the exceptions and the award *de novo*. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (*NTEU*) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In applying the standard of *de novo* review, the Authority assesses whether an arbitrator’s legal conclusions are consistent with the applicable standard of law. *U.S. Dep’t of Def., Dep’ts of the Army & the Air Force, Ala. Nat’l Guard, Northport, Ala.*, 55 FLRA 37, 40 (1998) (*Ala. Nat’l Guard*). In making that assessment, the Authority defers to the arbitrator’s underlying factual findings. *Id.*

With exceptions not relevant here, it is well established that, prior to implementing a change in conditions of employment, an agency is required to provide an exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change within the duty to bargain. *See* 5 U.S.C. § 7103(a)(12), (14); *U.S. Dep’t of the Air Force*,

355th *MSG/CC, Davis-Monthan Air Force Base, Ariz.*, 64 FLRA 85, 89 (2009) (citing *U.S. Dep’t of the Treasury, IRS*, 56 FLRA 906, 913 (2000)); *Dep’t of the Army, U.S. Army Soldier Support Ctr., Fort Benjamin Harrison, Office of the Dir. of Fin. & Accounting, Indianapolis, Ind.*, 48 FLRA 6, 17-19 (1993). The Authority has held that an agency violates the Statute when it expressly refuses to negotiate over a matter within the duty to bargain, even if the refusal occurs before an exclusive representative has submitted bargaining proposals, given that the refusal renders the submission of proposals futile. *Dep’t of HHS, SSA*, 26 FLRA 865, 881-82 (1987) (*SSA II*); *accord Fed. Bureau of Prisons, Fed. Corr. Inst., Bastrop, Tex.*, 55 FLRA 848, 854-55 (1999) (*BOP*); *U.S. Dep’t of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 38 FLRA 887, 888-89 (1990); *U.S. Customs Serv. (Wash., D.C.)*, 29 FLRA 891, 900 (1987); *see also DOJ*, 55 FLRA at 900-02 & 900 n.8 (“[T]he bargaining process involves more than the exchange of proposals.”).

If and when a union provides an agency with bargaining proposals, then the agency may allege under § 7117 and part 2424 that “it has no duty to bargain because a proposal conflicts with an agency regulation for which a compelling need exists.” *FEMA*, 32 FLRA 502, 505 (1988) (emphasis added); *see* Appendix for pertinent statutory and regulatory text.⁷ After the agency makes such an allegation with regard to a specific proposal, the union may petition the Authority to determine, in a negotiability proceeding under part 2424, whether “the proposal submitted by [the union] is subject to, or conflicts with, the cited agency . . . regulation” and whether “there is a compelling need for the . . . regulation.” *FEMA*, 32 FLRA at 506 (emphasis added); *accord AFGE, Local 1786*, 49 FLRA 534, 542 (1994); *SEIU, Local 556*, 37 FLRA 320, 333-34 (1990); *NFFE, Local 1789*, 4 FLRA 708, 710 (1980) (quoting *AFGE, AFL-CIO, Local 1928*, 2 FLRA 450, 454 (1980)) (Authority determines existence of compelling need for regulation “vis[à]-vis particular conflicting union bargaining proposals” (emphasis added)). In other words, a compelling need for an agency regulation provides a basis for “declar[ing] a particular proposal nonnegotiable,” but does not relieve an agency of all bargaining obligations over matters addressed in an agency regulation. *U.S. Dep’t of the Air Force, Williams Air Force Base, Chandler, Ariz.*, 38 FLRA 549, 559-60 (1990) (*Williams*) (emphasis added). Consequently, a union need not seek a compelling-need determination in a negotiability proceeding under § 7117 and part 2424 in order to establish that an

⁶ Section 2429.5 provides, in pertinent part, that the “Authority will not consider any evidence, factual assertions, [or] arguments . . . that could have been, but were not, presented . . . before the . . . arbitrator.” 5 C.F.R. § 2429.5.

⁷ A negotiability dispute may concern a proposal offered for bargaining, *see* 5 C.F.R. § 2424.2(e), or a provision disapproved by an agency head on review, *see id.* § 2424.2(f). *Id.* § 2424.2(c). The discussion here is limited to negotiability disputes involving proposals.

agency's blanket refusal to bargain concerning the implementation of a regulation is a ULP. *Id.*

In addition, an agency cannot avoid its bargaining obligations by asserting that it lacks the authority to engage in negotiations, because the duty to bargain in good faith includes the obligation to appoint representatives empowered to negotiate. 5 U.S.C. § 7114(b)(2); *see, e.g., Headquarters, Def. Logistics Agency, Wash., D.C.*, 22 FLRA 875, 879-80 (1986); *Bos. Dist. Recruiting Command, Bos., Mass.*, 15 FLRA 720, 724 n.6 (1984). Further, an agency may not refuse to bargain merely because the matters over which the union demands bargaining are, or may be, subject to negotiations at a higher organizational level. *See Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan Air Force Base, Cal.*, 39 FLRA 1357, 1358-59, 1363-71 (1991) (*McClellan*) (where local union, as agent for exclusive representative of nationwide consolidated unit, requested bargaining over Air Force base's plan to implement Air-Force-wide regulation, management's refusal to bargain over local plan due to "Command-wide implications" constituted ULP);⁸ *SSA (Balt., Md.)*, 21 FLRA 546, 549, 569 (1986) (*SSA I*) (Authority found "no merit to . . . contention[] that [Agency was] relieved of the duty to bargain because . . . proposals involv[ed] issues under negotiation at the national level [and, thus,] could not be negotiated at the regional or local levels").

The Union argues that the Arbitrator erred as a matter of law by finding that the Union was required to obtain a compelling-need determination from the Authority before the Agency had any duty to bargain over the instruction. Exceptions at 4. The Union had not yet advanced specific proposals addressing the impact and implementation of the instruction when the Agency notified the Union that a compelling need for the instruction foreclosed all bargaining on those matters. *See Award* at 12, 19. However, as compelling-need assertions depend on an identified conflict between a particular proposal and an agency regulation, the Agency had no basis to assert the existence of a "compelling need" – as that term is used in § 7117 and part 2424 – prior to receiving proposals from the Union. *See* 5 C.F.R. § 2424.2. In other words, bargaining between the parties had not reached a point where the Agency could disclaim bargaining obligations based on an assertedly compelling need for the instruction. *See Williams*, 38 FLRA at 559-60; *FEMA*, 32 FLRA at 506. And as the Agency does not dispute the contention that its refusal to negotiate made the submission of proposals futile,

see Exceptions at 8, the Union was not obligated to submit proposals in order to show that the Agency violated its duty to bargain, *see, e.g., DOJ*, 55 FLRA at 900-02; *BOP*, 55 FLRA at 854-55; *SSA II*, 26 FLRA at 881-82.

With regard to the Agency's assertion that the Arbitrator made a "finding of fact" that, under § 7117, the instruction is not "subject to bargaining with this [u]nion," Opp'n at 4, the application of § 7117 presents a question of law that the Authority reviews de novo, *NTEU*, 50 FLRA at 332 – not a factual finding to which the Authority defers in its legal analysis, *see Ala. Nat'l Guard*, 55 FLRA at 40. To the extent that the Agency's reference to "this [u]nion," Opp'n at 4, is an argument that the Agency had no obligation to bargain with the Union because negotiations over the instruction would or should occur at the national level, as mentioned above, the Authority has previously rejected such arguments in circumstances similar to these, *see McClellan*, 39 FLRA at 1358-59; *SSA I*, 21 FLRA at 549, 569.

Consequently, we find that, under these circumstances, the Arbitrator's finding that the Agency's bargaining obligations depended on whether a compelling need existed for the instruction is contrary to § 7117. And because the Arbitrator's finding that she lacked the authority to resolve the grievance was based on her assessment that a compelling-need determination was a prerequisite to resolving the dispute, we find further that the Arbitrator erred as a matter of law in concluding that she was without authority to determine whether the Agency violated the parties' agreement or the Statute.

The Union also alleges that the award is contrary to part 2424 because the Arbitrator found that the Union "should have filed a negotiability petition . . . [with the] Authority." Exceptions at 6-8. Under § 2424.2(d), a petition for review is "an appeal filed with the Authority . . . requesting resolution of a negotiability dispute," 5 C.F.R. § 2424.2(d) (emphasis added); and under § 2424.2(c), as relevant here, a negotiability dispute is "a disagreement . . . concerning the legality of a proposal," *id.* § 2424.2(c) (emphasis added). Because there were no proposals at issue here, the Union is correct that the violations alleged in the grievance do not amount to negotiability disputes, and, thus, the Union could not have filed a petition for review in order to obtain a decision on the merits of those allegations. As such, we find that the award is contrary to part 2424 for holding that the Union should have filed a negotiability petition to resolve the allegations in the grievance.

⁸ See Article I, Sections 2.0, 3.0, and 4.0 of the parties' agreement – set forth in the appendix to this decision – for the Agency's recognition of the Union's authority to act as exclusive representative for unit employees at Joint Base Andrews. *See also Award* at 22 ("Agency states in its brief that . . . it has an obligation to negotiate over the impact and implementation of many items in the [instruction].").

- B. The Arbitrator's interpretation of the parties' agreement is deficient.

The Union argues that the Arbitrator's interpretation of Article 3, Section 2.3(1) of the parties' agreement is deficient. Exceptions at 9. The Authority has held that when an arbitrator's interpretation of a collective-bargaining agreement is based on an erroneous interpretation of applicable law or regulation, the interpretation of the agreement is deficient. *See, e.g., U.S. Dep't of Def., Def. Mapping Agency Aerospace Ctr., St. Louis, Mo.*, 39 FLRA 286, 289-90 (1991) (award deficient because it found contractual provision unenforceable based on erroneous interpretation of § 7106); *U.S. Dep't of Veterans Affairs, Med. Ctr., Newington, Conn.*, 37 FLRA 111, 117-18 (1990) (portion of award finding grievance nonarbitrable was deficient because it was based on erroneous interpretation of applicable law). Although the Agency contends that the Arbitrator made a factual finding that the Agency did not violate the contract, Opp'n at 4, an arbitrator's conclusion that is based on an interpretation of the parties' agreement does not constitute a factual finding, *see NLRB*, 50 FLRA 88, 92 (1995). Here, the Arbitrator stated that § 7117 required her to interpret the parties' agreement in a particular manner because any other interpretation "would be contrary to law." Award at 25. Because we have found that the Arbitrator erred in her interpretation of § 7117, and as the Arbitrator's interpretation of the parties' agreement is based on that erroneous interpretation of the Statute, we find that the Arbitrator's interpretation of the agreement is deficient.

- C. The appropriate remedy for the award's deficiencies is a remand to the parties.

The Union asserts that, if the Authority grants its exceptions, then the deficiencies in the award should be remedied by "direct[ing] the Agency to negotiate with the Union on demand over" procedures and appropriate arrangements related to implementation of the instruction. Exceptions at 10. However, where the Authority sets aside an arbitrator's finding of substantive nonarbitrability, the Authority's general practice is to remand the award to the parties for resubmission to an arbitrator of their choice, absent settlement, for further action consistent with the Authority's decision. *E.g., AFGE, Local 2823*, 64 FLRA 1144, 1147 (2010) (citing *AFGE, Local 1045*, 64 FLRA 520, 522 (2010)). In this regard, when the merits of a grievance have not been addressed, the Authority has found "no compelling reason" for depriving the parties of their choice of arbitrator on remand. *AFGE, Local 1757*, 58 FLRA 575, 576-77 (2003) (citing *AFGE, Local 1997*, 53 FLRA 342, 348 (1997)); *AFGE, Local 2145*, 39 FLRA 1045, 1050 (1991); *Panama Canal Comm'n*, 34 FLRA 740, 744 (1990)). Consistent with this general practice, we find that the appropriate remedy for the award's

deficiencies is to remand this matter to the parties for resubmission to an arbitrator of their choice, absent settlement, for further action consistent with this decision.

VI. Decision

The award is set aside, and this matter is remanded to the parties for resubmission to an arbitrator of their choice, absent settlement.

APPENDIX

Section 7114 of the Statute states, in pertinent part:

[(a)](4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement.

....

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement; [and]

(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment[.]

5 U.S.C. § 7114(a)(4), (b)(1)-(2).

Section 7117 of the Statute provides, in relevant part:

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

(3) Paragraph (2) of th[is] subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

(b)(1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a)(3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

....

(B) the Authority determines that a compelling need for a rule or regulation does not exist.

....

(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

5 U.S.C. § 7117(a)(1)-(c)(1); *see also* Award at 7-8 (quoting § 7117).

The parties' agreement provides, in pertinent part:

ARTICLE 1

Exclusive Recognition and Coverage of Agreement

....

Section 2.0

This Agreement is between [AFGE,] Local 1401 . . . and Joint Base Andrews NAF Washington, Maryland. In the language of the Agreement, Local 1401 will be referred to as the Union and the Installation Commander or designee will be referred to as the Employer. Collectively, the Union and the Employer will be referred to as the Parties. . . .

Section 3.0

The Employer hereby recognizes that the Union is the [e]xclusive representative of all the employees included in the bargaining units as defined in Section 4.0 and any other unit that may be added to Joint Base Andrews in the future.

Section 4.0

This is a multi-unit agreement applicable to all professional and nonprofessional General Schedule (GS) employees employed of Department of the Air Force, Joint Base Andrews NAF Washington serviced by Civilian Personnel Flight (CPF) and all Wage Grade (WG) employees employed by the Department of the Air Force on Joint Base Andrews NAF Washington or at Brandywine and Davidsonville facilities served by Civilian Personnel Flight (CPF).

Section 5.0

Excluded from the [u]nit by this Agreement are the following: All firefighters, non-appropriated fund employees, Air National Guard (ANG), management officials, supervisors, temporary employees with appointments of 90-days or less[,] and employees described in 5 USC [§ 7112(b)(2), (3), (4), (6), and (7)].

....

ARTICLE 3

Matters Appropriate for Negotiations/Mid-Term Bargaining

In the administration of this Agreement, the Parties shall be governed by all statutes and existing government-wide rules and regulations, as defined in 5 USC [§ 7100 *et seq.* . . .

....

Section 2.1 *Notice of Proposed Change*

Either Party may propose changes in conditions of employment during the life of this Agreement which is not already covered specifically by the Agreement. The initiating Party will provide the other Party with reasonable advance written notice

Section 2.2

The receiving Party will review the proposal and may respond to the initiating party in one of the following ways:

1. If the receiving Party wishes additional information or an explanation of the proposal, that Party may . . . make a written request for a briefing by the initiating Party, and/or for additional information, in writing, in order to clarify or determine the impact of the proposed change; or
2. If the receiving Party wishes to negotiate over any aspect of the proposed change, it shall notify the

other Party by submitting a demand to bargain

Section 2.3 *Agreement to Negotiate*

1. Upon request by the receiving Party, the Parties will meet and negotiate in good faith through appropriate representatives for the purpose of collective bargaining as required by law and this Agreement. Following this request to negotiate, . . . [i]mplementation shall be postponed to allow for the completion of bargaining, up to and including negotiability disputes and/or impasse proceedings, except as required by law.

Exceptions, Attach. 2, at 11 (Art. 1 text), 17-18 (Art. 3 text); *see also* Award at 4-5 (quoting Art. 3, §§ 2.1-2.3), 9 (quoting Art. 1, § 4.0).

Part 2424 of the Authority’s Regulations states, as relevant here:

§ 2424.2 *Definitions*

. . . .

(a) *Bargaining obligation dispute* means a disagreement . . . 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. . . .

. . . .

(c) *Negotiability dispute* means a disagreement . . . concerning the legality of a proposal. . . . A negotiability dispute exists when an exclusive representative disagrees with an agency contention that (without regard to any bargaining obligation dispute) a proposal is outside the duty to bargain

(d) *Petition for review* means an appeal filed with the Authority by an exclusive representative requesting resolution of a negotiability dispute. An appeal that concerns only a bargaining obligation dispute may not be resolved under this part.

(e) *Proposal* means any matter offered for bargaining that has not been agreed to by the parties. If a petition for review concerns more than one proposal, then the term includes each proposal concerned.

. . . .

§ 2424.21 *Time limits for filing a petition for review.*

(a) A petition for review must be filed within fifteen (15) days after the date of service of . . . :

(1) An agency’s written allegation that the exclusive representative’s proposal is not within the duty to bargain[.]

. . . .

§ 2424.22 *Exclusive representative’s petition for review; purpose. . . .*

(a) *Purpose.* The purpose of a petition for review is to initiate a negotiability proceeding and provide the agency with notice that the exclusive representative requests a decision from the Authority that a proposal . . . is within the duty to bargain [T]he exclusive representative is required in the petition for review to . . . inform the Authority of the exact wording and meaning of the proposal . . . as well as how it is intended to operate

5 C.F.R. §§ 2424.2(a), (c), (d), (e), 2424.21(a)(1), 2424.22(a).