68 FLRA No. 145

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
IMMIGRATION AND CUSTOMS ENFORCEMENT
NATIONAL COUNCIL 118
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT
(Agency)

0-NG-3248

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

September 11, 2015

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

This case is before the Authority on a negotiability appeal under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).[1] Before the Authority is one proposal with three components.[2] The Agency filed a statement of position as well as an amended statement of position. The Union filed a response as well as an amended response. Additionally, the Agency filed a reply to the Union's amended response.

We must decide whether the proposal is: (1) contrary to § 7131 of the Statute; (2) contrary to 5 C.F.R. § 550.162 or other government-wide rules or regulations; or (3) inconsistent with an Agency regulation for which there is a compelling need. We also address the Agency's argument that the proposal is outside of its duty to bargain because the proposal is covered by a tentative agreement.

First, the Agency alleges that the mandatory language of § 7131 of the Statute granting official time for certain purposes precludes the Agency from authorizing administrative leave for negotiations. Because § 7131 of the Statute does not prohibit the authorization of administrative leave for negotiations, the proposal is not contrary to § 7131 of the Statute.

Second, the Agency argues that the proposal's requirement that the Agency authorize administrative leave is contrary to a government-wide rule or regulation. Insofar as the Agency's contention relies on the Federal Personnel Manual (FPM) – not a binding government-wide rule or regulation – this contention must fail. Additionally, the Agency argues that the proposal is contrary to 5 C.F.R. § 550.162 because this regulation does not provide an exception for official time. Since 5 C.F.R. § 550.162 does not address the subject of the proposal, the Agency's argument does not demonstrate that the proposal is contrary to this regulation.

Third, the Agency argues that the proposal is inconsistent with an Agency regulation for which there is a compelling need. Because the Agency does not demonstrate that there is a compelling need for the Agency regulation in question, we reject this contention.

Finally, the Agency contends that the proposal is outside of its duty to bargain because tentative ground rules cover the issue of the proposal. However, because the parties have yet to resolve the matter of the ground rules by bargaining and reaching an executed agreement, this argument does not provide a basis for finding the proposal outside the duty to bargain.

Consequently, we find that the proposal is negotiable.

II. Preliminary Matters

The Agency alleges that we should dismiss the Union's arguments concerning 5 C.F.R. § 610.102 and § 7131 of the Statute as bare assertions.[3] The Authority will not consider a position that a party does not support.[4] However, as the Agency acknowledges,[5] the Union presents arguments and cites to authority, including

[1] 5 U.S.C. §§ 7101-7135.

[2] Record of Post-Petition Conference at 1 (Record); Agency's Amended Statement at 1 (Amended Statement).

[3] Agency's Reply (Reply) at 5 n.4 ("As the Union has not supported its arguments, they should be dismissed as 'bare assertions' pursuant to Authority precedent."); *id.* at 11-12 ("Notably, the Union once again fails to cite any authority to support its argument, and therefore its position should be dismissed as a bare assertion.").

[4] *AFGE, Local 723*, 66 FLRA 639, 644 (2012); *AFGE, Local 221*, 64 FLRA 1153, 1158 n.7 (2010).

[5] Reply at 5 ("To support that argument, [the Union] cite[s] to certain [Authority] rulings.").

Authority precedent, to support its positions.[6] As such, we will consider the Union's arguments.

III. The Proposal

A. Wording

Ground Rules, Section VII.A.1

> Team members and alternates who are LEOs will not have their AUO computed in such a way that would result in reduction or decertification as a result of their participation in the negotiations process; official time for AUO certified team members and alternates will be classified and paid as "administrative leave."[7]

Ground Rules, Section VII.A.2

> The AUO computation period for Union CBA team members, who are in positions eligible to receive AUO will be 26 pay periods during CBA negotiation periods.[8]

Ground Rules, Section VII.B

> CBA team members will be permitted to work additional AUO hours at their duty stations between bargaining sessions when AUO certified work is available.[9]

B. Meaning

The parties agree that the purpose of Ground Rules, Section VII.A.1 (Section A.1) of the proposal is to prevent law-enforcement officers (LEOs) from suffering any loss in the amount of administratively uncontrollable overtime (AUO) pay, due either to a reduction in the rate of AUO pay or to a decertification of AUO eligibility, as a result of their participation in negotiations.[10] The parties also agree that the portion of this section after the semicolon indicates the method by which the Agency will achieve this purpose.[11] The Union states, and the Agency agrees, that this portion of the proposal requires the Agency "to grant administrative leave (and code it as such for administrative purposes) for time spent by AUO-certified team members and alternates in . . . negotiations, rather than granting or coding this time as official time."[12] The parties also agree that if time spent in negotiations "is paid as administrative leave, it would be excluded from the AUO-computation period."[13]

The parties agree that Ground Rules, Section VII.A.2 (Section A.2) of the proposal means that the Agency will extend the AUO-computation period for AUO-eligible employees involved in the negotiations from twelve pay periods to twenty-six pay periods.[14] The Union clarified that a "computation period" is a period of time during which the Agency makes the determinations of the continuing eligibility for and appropriate rate of AUO pay.[15]

The parties agree that Ground Rules, Section B (Section B) of the proposal means that the Agency will permit AUO-certified employees on the negotiation team to work additional AUO at their duty stations when it is available and when those employees are not in negotiations.[16] The Union defined "additional AUO hours" as AUO hours in addition to an employee's regular shift time as AUO work arises.[17] The Union also explained that Section B reflects the Agency's current practice.[18] The parties also agree that this section of the proposal, as understood by the parties, does not present any negotiability issues.[19]

In arguing that the proposal is nonnegotiable, the Agency presents arguments that address specific portions of the proposal. Although considering the proposal as a whole, we address individual components of the proposal when the Agency raises arguments specific to that component.

C. Analysis and Conclusions

1. Section A.1 of the proposal is not contrary to § 7131(a) of the Statute.

The Agency argues that Section A.1 of the proposal – specifically the portion classifying official time as administrative leave – is contrary to the Statute because § 7131(a) of the Statute mandates the authorization of official time to employee representatives

[6] Union's Response to Amended Statement (Response) at 4 (citing *Nat'l Border Patrol Council, AFGE, AFL-CIO*, 23 FLRA 106, 109 (1986) (*NBPC*)); *id.* at 6 (citing 5 U.S.C. § 7131).
[7] Record at 2.
[8] *Compare id.* at 3, *with* Order at 1-2 (rescinding modification).
[9] Petition, Attach. 2 at 1.
[10] Record at 2-3; Amended Statement at 4.
[11] Record at 2; Amended Statement at 4.
[12] Record at 2.
[13] *Id.* at 3.
[14] *Id.*
[15] *Id.* (internal quotation marks omitted).
[16] *Id.* at 3-4.
[17] *Id.* at 4 (internal quotation marks omitted).
[18] *Id.*
[19] Amended Statement at 15-16; Response at 10; Reply at 17.

at negotiations.[20] Under § 7131(a) of the Statute, "any employee representing an exclusive representative in the negotiation of a collective[-]bargaining agreement under this chapter shall be authorized official time for such purposes . . . during the time the employee otherwise would be in a duty status."[21] Citing 5 C.F.R. § 2635.705, the Agency first notes that official time is distinct from administrative leave; the Union does not dispute this.[22] The Agency then argues that the use of "shall" in § 7131 of the Statute means that the Agency only has authority to grant official time for time spent in negotiations, and it would be contrary to the Statute to grant administrative leave for such time. However, although § 7131 of the Statute requires the authorization of official time for negotiations, it does not prohibit the Agency from authorizing administrative leave for negotiations or other union activities. Consequently, the Agency does not demonstrate that the proposal is contrary to § 7131 of the Statute.[23]

2. Section A.1 of the proposal is not contrary to a government-wide rule or regulation.

i. Section A.1 of the proposal is not nonnegotiable as contrary to the FPM.

The Agency argues that Section A.1 of the proposal would require the authorization of "[s]ignificant and [r]ecurrent" amounts of administrative leave, which is contrary to government-wide regulations.[24] However, for this contention, the Agency relies exclusively on precedent – Authority decisions and opinions of the Comptroller General – concerning the FPM. As the Agency concedes,[25] the FPM is no longer a binding government-wide regulation.[26] As such, the Agency does not cite to any binding government-wide regulation to support this argument. Consequently, this argument does not demonstrate that the proposal is contrary to a government-wide rule or regulation.

The Agency, relying on opinions of the Comptroller General applying the FPM, also argues that Section A.1 of the proposal is contrary to a government-wide rule or regulation. Specifically, the Agency contends that this precedent indicates that "once a supervisor no longer has a reasonable expectation that the employee is going to be performing AUO[-]qualifying duties of sufficient duration and frequency, that employee must be decertified."[27] However, not only does this argument rely on precedent applying the defunct FPM, but the Agency ignores the fact that AUO-eligible employees return to AUO-qualifying duties when not involved in negotiations.[28] Because there is a reasonable expectation that any affected employees would be performing AUO-qualifying duties when not in negotiations, the premise of this argument is faulty, and it provides no basis for finding the proposal nonnegotiable. As a result, we reject this argument.

ii. Section A.1 is not contrary to 5 C.F.R. § 550.162.

The Agency contends that Section A.1 of the proposal is contrary to a government-wide rule or regulation because 5 C.F.R. § 550.162 does not provide an exception for official time.[29] With regard to AUO, heads of agencies may, pursuant to regulations prescribed by the Office of Personnel Management (OPM) at 5 C.F.R. §§ 550.151 to 550.164 and consistent with law, authorize what the regulations refer to as "premium pay" on an annual basis for an employee in a position for which the hours of duty cannot be controlled administratively and which requires substantial amounts of irregular, unscheduled overtime.[30] While the Agency's arguments focus on 5 C.F.R. § 550.162, entitled "[p]ayment provisions," this particular section must be read in concert with §§ 550.141-550.164 because these sections together govern AUO and how it is to be paid.

There are three steps to determining the eligibility for, and the amount of, AUO pay. First, an agency determines whether 5 C.F.R § 550.153 authorizes a position to receive AUO. This first step analyzes the position in general.[31] Because the proposal only applies to AUO-eligible positions, we will not address this step further. Second, an agency determines whether an

[20] Amended Statement at 10-11.
[21] 5 U.S.C. § 7131(a).
[22] Response at 6.
[23] *Cf. Am. Fed'n of Teachers, Indian Educators Fed'n, Local 4524*, 63 FLRA 585, 586 (2009) (finding no conflict where plain language of a regulation did not conflict with the proposal); *AFGE, Locals 3807 & 3824*, 55 FLRA 1, 2 (1998) (same).
[24] Amended Statement at 13-15.
[25] *Id.* at 12 ("The Agency acknowledges that the FPM and its rules regarding excused absences are no longer binding.").
[26] *De Laet v. OPM*, 70 M.S.P.R. 390, 393 n.6 (1996) (referencing the sunset of the FPM on Dec. 31, 1994).
[27] Amended Statement at 10.
[28] Response at 3-4.
[29] Amended Statement at 8.
[30] *NBPC*, 23 FLRA at 106-07.
[31] 5 C.F.R. § 550.153(a) ("The requirement in [5 C.F.R.] § 550.151 that a position be one in which the hours of duty cannot be controlled administratively is inherent in the nature of such a position.").

individual employee performs the requisite amount of AUO – at least an average of three hours a week.[32] The Agency refers to this step as certification for AUO.[33] Third, an agency determines the amount of AUO pay based on the average number of AUO hours performed per week.[34] In regard to the second and third steps, it is an agency's responsibility to "determin[e] the number of hours of irregular or occasional overtime work" that qualifies as AUO,[35] and the Agency reviews this determination "at appropriate intervals."[36]

As to the second step, the Agency argues that it can only certify an individual for AUO pay if the actual duties of that individual "meet all of the regulatory requirements."[37] Furthermore, the Agency argues that the AUO-eligible employees will not be performing duties that meet these requirements when the Union is involved in negotiations. The Agency notes that there are exceptions to AUO requirements, but argues that 5 C.F.R. § 550.162 provides the only exceptions where AUO pay can continue during a period where an employee would not otherwise meet the statutory requirements for AUO pay. In relevant part, 5 C.F.R. § 550.162(c) states that:

> [a]n agency may continue to pay an employee [AUO] . . . (1) [f]or a period of not more than [ten] consecutive prescribed workdays on temporary assignment to other duties in which conditions do not warrant payment of [AUO] on an annual basis, and for a total of not more than [thirty] workdays . . . while on such a temporary assignment[; and] (2) [f]or an aggregate period of not more than [sixty] prescribed workdays on temporary assignment to a formally approved program for advanced training duty directly related to duties for which [AUO] on an annual basis is payable.

This regulation also provides that "[a]n agency shall continue to pay an employee [AUO] . . . while he is on leave with pay during a period in which [AUO] is payable."[38] The Agency argues that the exceptions in 5 C.F.R. § 550.162 do not include official time. The Agency continues that, outside of the exceptions in 5 C.F.R. § 550.162, "agencies must immediately discontinue [the] payment of AUO when an employee is not performing qualifying duties or sufficient amounts of [AUO]."[39] Therefore, the Agency concludes, there is no authorization for continuing AUO pay during official time, and, as a result, any such unauthorized pay is contrary to a government-wide regulation.

The Authority previously addressed this argument in *National Border Patrol Council, AFGE, AFL-CIO* (*NBPC*).[40] In *NBPC*, the Authority first determined that, regarding the calculation of AUO hours in 5 C.F.R. §§ 550.151 to 550.164, an agency has discretion "to determine the specific procedures by which computations as to appropriate rates of premium pay for AUO will be made."[41] The Authority determined that such a computation was a matter within the agency's discretion, and therefore a matter within the duty to bargain. As here, the agency in *NBPC* also argued that 5 C.F.R. § 550.162 "set forth specific exclusions for AUO computation purposes and that, because the exclusions proposed by the Union are not among those specified by OPM, [the] proposal [excluding all negotiation time for AUO purposes] therefore conflicts with the regulation."[42] However, the Authority noted that 5 C.F.R. § 550.162

> directly concern[s] the actual payment of premium pay when employees are on temporary assignments and leave with pay. They do not concern the determination of future eligibility for, and appropriate rates of, such pay. As the regulatory provisions relied upon by the [a]gency concern not computation but actual payment of premium pay under AUO, the [a]gency's assertion that a conflict exists cannot be sustained.[43]

[32] *Id.* § 550.153(b) ("In order to satisfactorily discharge the duties of a position referred to in [5 C.F.R.] § 550.151, an employee is required to perform . . . [a] substantial amount of irregular or occasional overtime work[, which] means an average of at least [three] hours a week of that overtime.").
[33] Amended Statement at 7-8.
[34] 5 C.F.R. § 550.154.
[35] *Id.* § 550.161(d).
[36] *Id.* § 550.161(f).
[37] Amended Statement at 8.
[38] 5 C.F.R. § 550.162(e).
[39] Amended Statement at 9.
[40] *NBPC*, 23 FLRA at 109.
[41] *Id.*
[42] *Id.*
[43] *Id.*

The analysis in *NBPC* is equally applicable here. The Agency has discretion as to, and Section A1. of the proposal concerns, the calculation of AUO hours in order to determine whether an employee is performing the requisite type and amount of overtime to be AUO certified and to receive AUO pay.[44] However, 5 C.F.R § 550.162 deals with the continuation of AUO pay, not the computation of eligibility or the amount of that pay. In short, the exceptions in 5 C.F.R § 550.162 do not deal with the computation of AUO hours, the subject of the proposal. Therefore, there is no conflict between 5 C.F.R. § 550.162 and the proposal.

The Agency argues that we should reconsider *NBPC* since OPM's guidance (guidance) released after *NBPC* "clearly state[s] that the only days which may be excluded from the computation of the AUO rate are those which are listed in the regulations."[45] However, the guidance does not support the Agency's position. The guidance distinguishes between excluding hours and excluding days from the AUO computation, specifically addressing the former while, apart from one exception not applicable here, not addressing the latter. The guidance states that:

> in determining the number of weeks in a review period, there is no authority to reduce the number of weeks by subtracting hours of paid leave (such as annual leave or sick leave), hours of unpaid leave (such as hours of leave without pay, including leave without pay under the . . . [Family and Medical Leave Act of 1993], or hours during which an employee is suspended without pay), hours of excused absence with pay, hours or days during which an employee has been detailed to other duties for which employees seldom or never perform irregular or occasional overtime work, or hours in a training status.[46]

With one inapplicable exception, the guidance does not state that agencies have no authority to exclude entire days, as opposed to hours, from the computation of AUO certification and AUO pay. According to the Union, negotiations last for weeks at a time, indicating that Section A.1 intends to exclude days of negotiations, not hours.[47] Furthermore, the guidance does not address the subject of the proposal, the exclusion of official time from the computation of AUO certification and AUO pay. In light of this analysis of the guidance, we decline to reconsider *NBPC*.

Consequently, the Agency's arguments do not demonstrate that Section A.1 of the proposal is contrary to a government-wide rule or regulation.

3. Section A.2 of the proposal is not inconsistent with an Agency regulation for which there is a compelling need.

The Agency alleges that Section A.2 of the proposal is inconsistent with an Agency regulation – Administrative Manual (AM) 1.3.103 concerning the calculation of an employee's AUO rate – for which there is a compelling need.[48] To establish that a conflict with an agency rule or regulation relieves an agency of its duty to bargain, the agency must: (1) identify a specific agency-wide regulation; (2) show that there is a conflict between its regulation and the proposal; and (3) demonstrate that its regulation is supported by a compelling need within the meaning of § 2424.50 of the Authority's Regulations.[49] As relevant here, a compelling need exists for an agency rule or regulation when the agency demonstrates that the rule or regulation is necessary to ensure the maintenance of basic merit principles.[50]

Even assuming that Section A.2 is in conflict with AM 1.3.103, the Agency has failed to demonstrate that there is a compelling need for that Agency rule or regulation. The Agency claims that the proposal, by "depart[ing] from th[e] consistent treatment [of AUO computation,] is inconsistent with [m]erit [s]ystem [p]rinciples, to include . . . 5 [C.F.R.] § 2635.101(b)(8) and (14), and the principle that similarly[]situated employees must be treated consistently."[51] First, the regulation cited by the Agency applies to the actions of employees interacting with private organizations and

[44] Record at 2 ("Section [A.1] means that the Agency must not compute . . . [AUO] in a way that would result in" a reduction of AUO pay or "ineligibility to receive AUO, thus becoming decertified.").
[45] Reply at 11 (emphasis removed) (citing Compensation Policy Memoranda (CPM) 97-5).
[46] *Id.* at 11, n.10 (emphasis removed) (quoting CPM 97-5, § VII, Finding 4).
[47] Response at 3-4.
[48] Amended Statement at 18.
[49] *AFGE, SSA Gen. Comm.*, 68 FLRA 407, 408 (2015) (*AFGE, SSA*); *AFGE, Local 3824*, 52 FLRA 332, 336 (1996).
[50] 5 C.F.R. § 2424.50; *see also AFGE, AFL-CIO, Local 3804*, 7 FLRA 217, 219 (1981).
[51] Amended Statement at 18.

individuals, and is, therefore, inapplicable here.[52] Second, the Authority has found that:

> neither the governing statute nor the related OPM regulations . . . requires absolute equity between . . . similarly situated employees within an agency. Rather, the law and regulations leave agencies with discretion to decide how to arrive at individual AUO [premiums]. To the extent that an agency has discretion respecting a matter sought to be bargained affecting conditions of employment . . . and where the grant of discretion is not sole and exclusive, the matter is within the duty to bargain.[53]

Consequently, the Agency has failed to demonstrate that Section A.2 of the proposal is contrary to an Agency rule or regulation for which there is a compelling need.

4. The proposal is not outside of the duty to bargain as covered by a tentative agreement.

The Agency argues that the proposal is outside of its duty to bargain because the "tentative ground rules" between the parties incorporate both "existing practice[s]" – including the Agency's computation of AUO – and the parties' previous agreement, which in turn incorporates by reference the AM – including Agency policy governing AUO calculations.[54] Under the Authority's covered-by doctrine, a party is not required to bargain over terms and conditions of employment that have already been resolved by bargaining.[55] However, for the covered-by doctrine to apply, the subject matter of the disputed proposals must be either "expressly contained in" the parties' collective-bargaining agreement, or "inseparably bound up with," and thus "plainly an aspect of" a subject expressly covered by the agreement.[56] Here, however, the Agency concedes that its argument relies on ground rules that are themselves "currently at issue" and that the parties have only "tentatively agreed upon."[57] As such, the parties have yet to resolve the matter of the ground rules by bargaining, and there is no executed agreement. Therefore, the Agency has failed to demonstrate that the covered-by doctrine renders the proposal outside of the duty to bargain.

In conclusion, we find that the Agency has not demonstrated that the proposal is nonnegotiable. In light of this determination, we find it unnecessary to address the Union's request to sever the individual sections of this proposal.[58]

IV. Order

We order the Agency to bargain, upon request, over the proposal.

[52] 5 C.F.R. § 2635.101(b)(8) ("Employees shall act impartially and not give preferential treatment to any private organization or individual."); *id.* § 2635.101(b)(14) ("Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part.").

[53] *AFGE, AFL-CIO, Nat'l Border Patrol Council*, 23 FLRA 146, 149 (1986).

[54] Amended Statement at 17.

[55] *NATCA, AFL-CIO*, 62 FLRA 174, 176 (2000); *U.S. Dep't of HHS, SSA, Balt., Md.*, 47 FLRA 1004, 1017-18 (1993) (*SSA*).

[56] *SSA*, 47 FLRA at 1018; *see also NTEU*, 68 FLRA 334, 338 (2015) (inapplicability of covered-by doctrine).

[57] Amended Statement at 17.

[58] *AFGE, SSA*, 68 FLRA at 409; *AFGE, Local 1164*, 65 FLRA 836, 840 n.3 (2011).