

70 FLRA No. 62

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1547
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
56 FSS/FSMC
LUKE AIR FORCE BASE, ARIZONA
(Agency)

0-NG-3332

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

July 31, 2017

Before the Authority: Patrick Pizzella, Acting Chairman,
and Ernest DuBester, Member
(Member DuBester concurring)

I. Statement of the Case

This matter is before the Authority on a negotiability appeal filed under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).¹ The case concerns the negotiability of one provision – which was disapproved by the Agency head under § 7114(c) of the Statute.² The provision would require the Agency to identify a “Chief Negotiator” for the Union to submit its bargaining proposals to.³ The Agency asks us to find that the proposal is nonnegotiable.

The main question before us is whether the provision impermissibly affects management’s right to assign work under § 7106(a)(2)(b) of the Statute. For the reasons discussed below, we find that the provision does impermissibly affect that right. Accordingly, we find the provision nonnegotiable.

II. Background

The parties executed a memorandum of understanding (MOU) concerning ground rules for

negotiating a labor agreement, and submitted it for review and approval by the Agency head, under § 7114(c) of the Statute.⁴ The Agency head disapproved seven of the MOU’s ground-rules provisions. Subsequently, the Union filed a negotiability petition (petition) under § 7105(a)(2)(E) of the Statute,⁵ concerning those provisions. While the petition was pending before the Authority, the parties elected to use the Authority’s Collaboration and Alternative Dispute Resolution Office, and entered into a settlement agreement resolving four of the seven provisions.⁶ The Authority then conducted a post-petition conference pursuant to § 2424.23 of the Authority’s Regulations.⁷ At the conference, the parties resolved two more provisions, leaving only one provision in dispute.⁸

III. The Provision**A. Wording**

Section 3. The Bargaining Routine.

- a. Upon the execution of this MOU the Union team members noted in Section 1 of this agreement will be allowed the official time to prepare a bargaining proposal for negotiations. *Once that official time grant is exhausted the Union will email the Employer’s Chief Negotiator the Union’s proposals within seven days.* The Employer will have 21 calendar days to review and come up with their counter proposals. Using the same numbering and lettering system, the Employer will respond to the Union’s respective proposal. Any new proposal for other subjects may be offered with a new number or letter following what the Union has presented. The parties will agree upon final layout when all articles are completed. At the end of that 21-day review period the Employer will provide the Union’s Chief Negotiator with its counter proposals through email.⁹

¹ 5 U.S.C. § 7105(a)(2)(E).

² *Id.* § 7114(c).

³ Pet. at 10.

⁴ 5 U.S.C. § 7114(c).

⁵ *Id.* § 7105(a)(2)(E).

⁶ Statement at 5-6.

⁷ 5 C.F.R. § 2424.23.

⁸ Statement at 5-6.

⁹ Record of Post-Petition Conference (Record) at 2 (emphasis added).

B. Meaning

The parties agree that only the provision's second sentence is in dispute.¹⁰

Generally, if the parties do not dispute the meaning of a provision, and that meaning is consistent with the provision's wording, then the Authority bases its negotiability determination on the provision's undisputed meaning.¹¹ And to the extent the parties disagree over a provision's meaning, the Authority looks first to the provision's wording and the union's statement of intent. As relevant here, if the union's explanation of the provision's meaning comports with its wording, then the Authority adopts that explanation for the purpose of construing what the provision means and, based on that meaning, deciding whether the provision is negotiable.¹²

The parties agree that the provision's disputed language "would require the Agency to identify a spokesperson – and to give that person the title 'Chief Negotiator' – in order to make the bargaining process more orderly and ensure that the Union is able to contact the appropriate person in the Agency."¹³ Although the parties disagree over the Chief Negotiator's specific responsibilities, including whether the Chief Negotiator is merely "a point[.]of[.]contact,"¹⁴ or is responsible for also processing official-time requests and "functions incident to collective bargaining,"¹⁵ both parties agree that under the proposal the "Chief Negotiator" would serve as the Agency's "spokesperson."¹⁶

Neither party explicitly defines the terms "Chief Negotiator" or "spokesperson." However, the term, "Chief," is commonly defined as a person with the "highest rank" in an organization,¹⁷ and the term, "spokesperson," as a person "who makes statements on behalf of another individual or a group."¹⁸ These common definitions comport with the provision's plain

language and the meaning proffered by the Union.¹⁹ Therefore, we conclude that the provision would require the Agency to identify a "Chief Negotiator,"²⁰ who would serve as the negotiating team's highest ranking member and make statements on behalf of the Agency.

C. Analysis and Conclusion: The provision impermissibly affects management's right to assign work under § 7106(a)(2)(B).

The Agency argues that the provision impermissibly affects its right to assign work under § 7106(a)(2)(B).²¹ An agency's right to assign work encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.²² This right also encompasses the right to refrain from assigning work.²³

It could also be said that the proposal runs counter to the basic tenet of labor law that parties have a nearly unfettered prerogative to determine the organization of, and delegation of duties within, their respective negotiating teams.²⁴

¹⁹ See Resp. at 3-4 (describing parties' bargaining history where parties' primary representatives carry title of "Chief Negotiator" and act as party spokesperson); see also Resp., Attach. 1 at 3 (parties' representatives signing ground-rules MOU as "Chief Negotiator").

²⁰ Record at 2.

²¹ 5 U.S.C. § 7106(a)(2)(B).

²² *NTEU*, 66 FLRA 584, 585 (2012) (citing *AFGE, Local 3392*, 52 FLRA 141, 143 (1996)).

²³ *U.S. DOJ, Fed. BOP, U.S. Penitentiary Atlanta, Ga.*, 57 FLRA 406, 409 (2001) (citing *U.S. EPA, Wash., D.C.*, 38 FLRA 1328, 1330 (1991)).

²⁴ *Cf. NLRB v. Ind. & Mich. Elec. Co.*, 599 F.2d 185, 190 (7th Cir. 1979) (recognizing principle affording broad protection for parties' free choice of their bargaining representatives); *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963) (same); *NFFE, Local 1437*, 18 FLRA 96, 97 (1985) (*NFFE*) (finding proposal nonnegotiable that would require Agency to appoint "Chief Negotiator" and alternate during negotiations); *Dep't of the Air Force, Space Div., L.A., Cal.*, 6 FLRA 439, 449 (1981) (management not required to negotiate bargaining-team organization); *NFFE, Local 1451*, 3 FLRA 87, 88-90 (1980) (finding proposal nonnegotiable that would dictate number of parties' representatives at negotiations); *Eastland Food Prod. Inc.*, 2017 WL 839916 (NLRB Div. of Judges Mar.1, 2017), *aff'd* 2017 WL 1462123 (NLRB Apr. 18, 2017) (finding that party seeking to exclude selected representative from bargaining has heavy burden of proving individual poses "clear and present danger" to the collective-bargaining process); *Vibra-Screw, Inc.*, 301 NLRB 371, 377 (1991) (permitting discharged employees on party's bargaining committee).

¹⁰ *Id.*

¹¹ See *NAIL, Local 7*, 67 FLRA 654, 655 (2014) (citing *NTEU*, 65 FLRA 509, 510 (2011), *pet. for review dismissed sub. nom. U.S. Dep't of the Treasury, Bureau of the Pub. Debt, Wash., D.C. v. FLRA*, 670 F.3d 1315 (D.C. Cir. 2012)).

¹² *Id.*; *AFGE, Local 1770*, 64 FLRA 953, 958 (2010); *NAGE, Local RI-100*, 61 FLRA 480, 480 (2006) (citing *AFGE, Local 1900*, 51 FLRA 133, 138-39 (1995)).

¹³ Record at 2.

¹⁴ Resp. at 7.

¹⁵ Statement at 8.

¹⁶ Record at 2; Statement at 7, 8-9; Resp. at 4, 11.

¹⁷ *Chief*, *New Oxford American Dictionary* (3d ed. 2010).

¹⁸ *Spokesperson*, *id.*

Accordingly, we find that the provision impermissibly affects management's right to assign work. We agree with the Agency that the provision "involves the creation of a specific position on the Agency's negotiating team,"²⁵ – the "Chief Negotiator," – which effectively dictates the organization of, and delegation of duties within, the Agency's negotiating team.

The Union argues that even if the provision affects the Agency's right to assign work, the provision does not *impermissibly* affect that right because it constitutes a procedure under § 7106(b)(2) of the Statute.²⁶ We do not agree.

Even though parties may negotiate over "procedures [that] management officials of the agency will observe in exercising any authority under" § 7106,²⁷ the Union's arguments do not address the plain language of the provision that requires the Agency to create a "Chief Negotiator" position.

Consequently, we reject the Union's claim that the provision is a negotiable procedure.

Accordingly, the provision is nonnegotiable because it impermissibly affects management's right to assign work under § 7106(a)(2)(b).²⁸

IV. Order

We dismiss the Union's petition.²⁹

Member DuBester, concurring:

I agree that the Union's proposal is not negotiable. Especially noteworthy in my view is the case's consideration of the right to assign work in the context of collective bargaining and the parties' mutual obligation to bargain in good faith. As the Authority's decision suggests, it is a basic labor-law tenet that each party has a nearly unfettered prerogative to determine the organization of, and delegation of duties within, their respective negotiating teams. This facilitates "the performance of the *mutual obligation* of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to . . . bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees."¹

This perspective on the right to assign work helps clarify why the Union's proposal is nonnegotiable. The Union argues that the provision does not affect the right because the provision "does not assign *any duties* to *any specific person*."² But – as discussed in the Authority's decision – the provision mandates the creation of a position on the Agency's negotiating team, and assigns all the duties of a spokesperson and "chief" negotiator to that individual. Therefore, because the Agency has the right to assign, or not assign, work – including to determine its negotiating team's organization and delegation of responsibilities – the provision affects the Agency's right under § 7106(a)(2)(B).³

²⁵ Statement at 8.

²⁶ Resp. at 2, 4, 7, 9-11.

²⁷ 5 U.S.C. § 7106(b)(2).

²⁸ Cf. *NFFE*, 18 FLRA at 97 (finding proposal outside the duty to bargain because the proposal would require an agency to "appoint [a] Chief Negotiator and alternate to represent and commit the [Agency] to agreements made through the collective bargaining process," and thus would have the effect of determining the organization of the agency's negotiating team and the delegation of responsibilities within that team).

²⁹ Based on this conclusion, we do not address the Agency's remaining arguments. See *NAGE, Local R1-187, SEIU*, 64 FLRA 627, 629 n.3 (2010).

¹ 5 U.S.C. § 7103(a)(12) (emphasis added).

² Resp. at 8.

³ See *U.S. DOJ, Fed. BOP, U.S. Penitentiary Atlanta, Ga.*, 57 FLRA 406, 409 (2001).