70 FLRA No. 139

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

0-NG-3320

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

July 11, 2018

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Before the Authority: Colleen Duffy Kiko Chairman, and Ernest DuBester and James T. Abbott, Members

I. Statement of the Case

The Union filed this negotiability appeal (petition) under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).[1] The case concerns the negotiability of two proposals, which would limit the rating levels the Agency uses to evaluate employees' performance. The Agency filed a statement of position, to which the Union filed a response. The Agency did not file a reply to the Union's response.

The main question before us is whether the proposals impermissibly affect the Agency's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute or whether the proposals fall within an exception to those rights. For the reasons discussed in Section IV., below, we find that the first proposal affects those rights and does not fall within an exception under § 7106(b) of the Statute.[2] We also deny the Union's severance request. Finally, we dismiss the Union's petition as to the second proposal because the proposal is "inextricably intertwined" [3] with the nonnegotiable part of the first proposal.[4]

II. Background

The Union represents the Agency's customs and border patrol officers. The Agency currently has a pass/fail employee performance evaluation system consisting of "[s]uccessful" and "[u]nacceptable" rating levels.[5] A dispute arose between the parties during term negotiations when the Union submitted two proposals to the Agency seeking, in effect, to retain the Agency's pass/fail rating levels that the Agency uses to evaluate employees' performance. During these negotiations, the Union sent the Agency an email requesting an allegation of nonnegotiability for the two proposals. The Agency failed to respond to the Union's request, and on May 3, 2016, the Union filed this negotiability petition. On July 19, 2016, the Agency filed a statement of position, to which the Union responded on August 16, 2016.

III. Preliminary Matter: The Union's petition is timely.

The Agency claims that the Union's petition should be dismissed because it was prematurely filed.[6] The Agency asserts that it did not declare that the Union's proposals are nonnegotiable and that the parties are still "engaged in term negotiations."[7] Therefore, the Agency requests that the Authority issue an order to show cause why the petition should not be dismissed as prematurely filed.[8] In the alternative, the Agency asserts that "[s]hould the Authority reject the Agency's position on this matter, the Agency reserves the right to submit an additional [s]tatement of [p]osition in the future."[9]

[1] 5 U.S.C. § 7105(a)(2)(E).
[2] *Id.* § 7106(b).
[3] *NAGE, Local R1-100*, 61 FLRA 480, 484 (2006) (*Local R-100*) (citing *IFPTE, Local 49*, 52 FLRA 813, 821 (1996) (*Local 49*)).
[4] Member Abbott notes that during his confirmation hearing before the U.S. Senate Committee on Homeland Security and Governmental Affairs to become a Member of the Authority on November 7, 2017, he pledged that one of his foremost objectives was to bring "clarity" to decisions which are issued by the Authority and to ensure that these decisions would be written in such a manner that they could be understood by the federal labor-management relations community. In keeping with that pledge, he concurs in the outcome of this decision but not with its overly lengthy, archaic, and legalistic analysis. The Authority's decisions do not help to avoid and resolve future disputes when they are difficult to understand.
[5] Pet. at 1.
[6] Statement Form at 3.
[7] *Id.*
[8] *Id.*; Statement Br. at 3.
[9] Statement Br. at 3.

We find that the Union's petition is timely. Under § 2424.21(b) of the Authority's Regulations, "[i]f the agency has not served a written allegation on the exclusive representative within ten . . . days after the agency's principal bargaining representative has received a written request for such allegation, . . . then the petition may be filed at any time."[10]

On April 10, 2016, the Union sent the Agency an email requesting an allegation of nonnegotiability concerning the proposals.[11] The Agency did not respond to the Union's request. Therefore, under § 2424.21(b) of the Authority's Regulations, the Union had no specific time limit within which it was required to file its petition, and we find that its petition, which was filed on May 3, 2016,[12] is timely.

Further, we deny the Agency's request, in effect, to file an additional statement of position. Section 2424.24(a) of the Authority's Regulations provides that an agency's statement of position must, "among other things, . . . supply *all arguments* and authorities in support of its position."[13] As the Authority's Regulations require the Agency to set forth all of its arguments in its statement of position, we deny the Agency's request to file an additional statement of positon.

IV. Proposals 1 and 2[14]

A. Wording

Proposal 1

> There will be no performance appraisal rating levels above the [s]uccessful rating level for purposes of the annual appraisal process. Nothing in this proposal prevents the [Agency] from establishing performance levels between the [s]uccessful and [u]nacceptable rating levels. In the event that the Agency decides to establish such a performance level(s) it will notify and provide [the Union] the opportunity to bargain at the national level in accordance with law and the procedures contained in Article 26: Bargaining.[15]

Proposal 2

> The performance rating levels set forth above do not bar or otherwise inhibit [the Agency's] right to define and set the number of critical elements, core competencies, or the number of performance goals that will be included in each performance plan. Similarly, the performance rating levels set forth above do not bar or otherwise inhibit [the Agency's] right to determine the performance standards that must be met for each performance goal and core competency in order for an employee to be appraised at the two performance levels set forth above. Finally, the limitation on the number of performance levels may not be interpreted to bar [the Agency] from assigning work or directing its employees.[16]

B. Meaning[17]

Generally, if the parties do not dispute the meaning of a proposal, and that meaning is consistent with the proposal's wording, then the Authority bases its negotiability determination on the proposal's undisputed meaning.[18] However, when the undisputed meaning of a proposal is inconsistent with the proposal's wording, the Authority construes the meaning based on the record as a whole.[19]

The parties agree about Proposal 1's fundamental purpose. In the parties' view, Proposal 1 would require the Agency to retain the Agency's existing pass/fail employee performance evaluation system consisting of two rating levels: "successful" and "unacceptable."[20] The parties acknowledge, however, that the proposal also permits the Agency to add additional rating levels between "successful" and "unacceptable."[21]

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[10] 5 C.F.R. § 2424.11(a).
[11] Pet., Ex. 1, Union's Request for Allegation of Nonnegotiability at 1.
[12] Pet. at 1.
[13] 5 C.F.R. § 2424.24(a); *see also id.* § 2424.24(c) (setting forth required contents of agency statements of position).
[14] As these proposals are related, and the parties present similar legal arguments for both proposals, we address them together. *See AFGE, Local 723*, 66 FLRA 639, 639 n.2 (2012).
[15] Pet. at 1.
[16] *Id.* at 3.
[17] The meaning we adopt for the various proposals would apply in other proceedings, unless modified by the parties through subsequent agreement. *See AFGE, Local 1164*, 60 FLRA 785, 786 n.3 (2005).
[18] *NTEU*, 65 FLRA 509, 510 (2011).
[19] *AFGE, Local 1345*, 64 FLRA 949, 949 n.1 (2010).
[20] Record of Post-Pet. Conference (Record) at 1.
[21] *Id.* at 1-2.

Based on the record as a whole, we agree that substantively, Proposal 1 – specifically its first sentence – would require the Agency to retain its pass/fail rating system. That the proposal allows the Agency to establish an indefinite number of degrees of "failure" between the "successful" and "unacceptable"[22] rating levels does not change this. The proposal is still focused, essentially, on a performance evaluation system with only two basic outcomes – "pass" and "fail," and bars the Agency from establishing any performance levels above "pass."[23]

As to Proposal 2, although that proposal deals with some matters not mentioned in Proposal 1, the parties agree that "Proposal 2 has no independent meaning apart from Proposal 1."[24] The parties also agree that "Proposal 2 means that the Agency would retain the right to define critical elements, competencies, goals, and performance standards for each goal and competency, for employees to be rated under [Proposal 1's] appraisal rating levels."[25] We adopt this understanding of Proposal 2's meaning.

C. Analysis and Conclusions

1. Proposal 1 impermissibly affects the Agency's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.

The Agency argues that Proposal 1 is nonnegotiable because it impermissibly affects the Agency's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.[26] We agree.

a. Proposal 1 affects the Agency's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.

Proposals restricting an agency's determination of the rating levels in a performance evaluation system affect an agency's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.[27] Determining a performance evaluation system's rating levels "directly affects the degree of precision with which management can establish and communicate job requirements (performance standards), the range of judgments which management can make regarding performance in the context of performance appraisals, and the range of rewards and sanctions which management can apply to such performance."[28] Consequently, "[t]he number of [rating] levels for both individual job elements and overall performance are essential aspects of the rights to assign work and direct employees."[29]

Proposal 1 restricts the Agency's determination of the rating levels in the Agency's performance-evaluation system to levels compatible with a pass/fail rating system. Specifically, the proposal bars the Agency from establishing any rating levels above "[s]uccessful."[30] Thus, the proposal requires a performance evaluation system that is – substantively – limited to pass or fail rating levels. As such, the proposal affects management's rights to direct employees and assign work.

The Union acknowledges the Authority's case law on this issue, but argues that the Authority should overrule its precedent and find that Proposal 1 does not affect management's rights to direct employees and assign work.[31] In support, the Union cites the opinion of the United States Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *NTEU v. FLRA* (*NTEU*),[32] a case involving a proposal setting the level of incentive pay employees should receive as part of a trial incentive-pay program.[33] The Authority's decision held that the proposal affected management's rights to direct employees and assign work.[34] The court disagreed with the Authority and vacated the Authority's decision.[35]

We find the Union's argument unpersuasive. *NTEU* was restricted to incentive-pay matters,[36] and did

[22] *Id.*
[23] *Id.*
[24] *Id.* at 2.
[25] *Id.*; Resp. at 1.
[26] Statement Form at 3-4.
[27] *AFGE, Council 238*, 62 FLRA 350, 351-52 (2008) (*Council 238*); *AFGE, Local 12*, 60 FLRA 533, 536 (2004) (*Local 12*); *AFSCME, AFL-CIO, Council 26*, 13 FLRA 578, 580 (1984) (*AFSCME*).
[28] *AFSCME*, 13 FLRA at 580-81.
[29] *Id.* at 580.
[30] Pet. at 1.
[31] Resp. at 9.
[32] 793 F.2d 371 (D.C. Cir. 1986).
[33] *Id.*
[34] *Id.* at 373.
[35] *Id.* at 375-76.
[36] *Id.* at 371.

not address the Authority's case law concerning the negotiability of proposals determining rating levels. Moreover, *NTEU* is distinguishable in other respects. In *NTEU*, the court found that the right to set the level of incentive pay was not "implicit" in management's rights to direct employees and assign work.[37] Rather, the court found, setting the level of incentive pay – like the rights to direct employees and assign work – was simply a means "for getting the agency's work done," but was not part of either of those reserved management rights.[38]

The Authority's case law concerning rating-level determinations is different. As the Authority has made clear, determining the number of rating levels is one of the ways in which an agency directs employees and assigns work.[39] It is thus an "essential aspect" of those rights.[40] It is not simply an alternative means "for getting the agency's work done,"[41] as in *NTEU*. Accordingly, we decline the Union's request that we overrule our precedent holding that proposals determining rating levels affect management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute.

b. Proposal 1 is not an appropriate arrangement.

i. Proposal 1 is an arrangement.

The Union asserts that even if Proposal 1 affects management's rights to direct employees and assign work, the proposal is an appropriate arrangement under § 7106(b)(3) and is therefore negotiable.[42] The Agency does not dispute that Proposal 1 is an arrangement.[43] Therefore, we find that this proposal is an arrangement under § 7106(b)(3).[44]

ii. Proposal 1 is not an appropriate arrangement.

To determine whether an arrangement is appropriate, the Authority weighs the benefits afforded to employees under the arrangement against the proposal's burden on the exercise of management's rights.[45] The Union asserts that "th[e] proposal would relieve Agency managers from having to make granular distinctions they are incapable of making."[46] This would benefit employees by "retain[ing] objective appraisal ratings and [by] avoid[ing] the adverse impacts of invalid subjective ratings on . . . performance appraisals, awards, promotions, details, [temporary duty assignments] and [reductions in forces]."[47] That is, "by retaining the two-level pass/fail appraisal system," performance appraisals would remain objective and would be "credible, believable, and accepted" by employees.[48]

The Agency argues that by precluding the Agency from "determin[ing] the number of tiers within a performance evaluation system," "this proposal would have a negative effect on employee morale and would prevent the Agency from recognizing employees based on performance or creating a more structured format for reviewing employees and how they are or are not meeting expectations."[49]

We find that Proposal 1 is not an appropriate arrangement because it excessively interferes with the Agency's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. Considering first the benefits afforded to employees, the Union's claim that the proposal's pass/fail rating system would ensure that employees would receive "objective"[50] ratings, rather than "invalid subjective ratings,"[51] is unsubstantiated. We make this finding cognizant of the Union's citation and extensive discussion of studies critical of the performance appraisal process.[52] But as the Union cites and discusses them, the studies upon which the Union relies are critical of the performance appraisal process generally, and do not differentiate between pass/fail and multi-tiered performance appraisal systems.

In contrast, the proposal's burden on the Agency's exercise of its management rights is clear. As discussed previously, the Authority has found that making a performance-appraisal system's rating level determinations enables an agency to control "the degree of precision with which management can establish and communicate job requirements (performance standards),

[37] *Id.* at 374.
[38] *Id.*
[39] *Council 238*, 62 FLRA at 351-52; *Local 12*, 60 FLRA at 536; *AFSCME*, 13 FLRA at 580.
[40] *AFSCME*, 13 FLRA at 580.
[41] *NTEU*, 793 F.2d at 374.
[42] *E.g.*, *NAIL, Local 5*, 67 FLRA 85, 89 (2012) (*NAIL*) (A proposal that affects management's rights under § 7106(a) of the Statute is negotiable if it constitutes an appropriate arrangement within the meaning of § 7106(b)(3).); *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (same).
[43] *See* Statement Form at 3-4 (arguing merely that proposal "interferes" with management's rights to direct employees and assign work).
[44] *NAIL*, 67 FLRA at 87 (finding that, because agency did not dispute that proposal was arrangement, proposal constituted arrangement); *NATCA, Local ZHU*, 65 FLRA 738, 740, 742 (2011) (same).
[45] *NAIL*, 67 FLRA at 87.
[46] Record at 2.
[47] Resp. at 22.
[48] *Id.* at 19.
[49] Statement Br. at 2; Record at 2.
[50] Resp. at 22.
[51] *Id.*
[52] *See id.* at 19 n.13.

the range of judgments which management can make regarding performance in the context of performance appraisals, and the range of rewards and sanctions which management can apply to such performance."[53] Based on the record in this case, we find that this burden on the Agency's exercise of its management rights outweighs the demonstrated benefits afforded to employees by the proposal's arrangement. Accordingly, based on the record, we find that Proposal 1 excessively interferes with management's rights.

Because we find that Proposal 1 is not an appropriate arrangement under § 7106(b)(3), it impermissibly affects the pertinent management rights, and is therefore outside the Agency's duty to bargain.

2. We deny the Union's severance request.

In addition to arguing that Proposal 1 as a whole is negotiable, the Union, in its petition, and again in its response, requests that the Authority sever the last two sentences of Proposal 1.[54] As set forth above, those sentences read:

> Nothing in this proposal prevents the [Agency] from establishing performance levels between the [s]uccessful and [u]nacceptable rating levels. In the event that the Agency decides to establish such a performance level(s) it will notify and provide [the Union] the opportunity to bargain at the national level in accordance with law and the procedures contained in Article 26: Bargaining. [55]

"Severance means the division of a proposal . . . into separate parts having independent meaning, for the purpose of determining whether any of the separate parts is within the duty to bargain."[56] "In effect, severance results in the creation of separate proposals[,] . . . [and] applies when some parts of [a] proposal . . . are determined to be outside the duty to bargain."[57] Under § 2424.25(d) of the Authority's Regulations, a union "must support its [severance] request with an explanation of how the severed portion(s) of the proposal . . . may stand alone, and how such severed portion(s) would operate."[58]

The Union argues that the last two sentences of Proposal 1 stand alone because they "would operate by permitting [the Agency] to establish performance levels between the [s]uccessful and [u]nacceptable rating levels subject to its contractual and [s]tatutory obligation to negotiate."[59] The Union's explanation is consistent with the wording of that part of the proposal, and we adopt it.

However, even if the last two sentences can "stand alone" as a generic matter, the Union does not explain how this language retains any relevant meaning without the context provided by Proposal 1's first sentence. As we have found, Proposal 1 would require the Agency to retain a pass-fail rating system, and we have found that requirement nonnegotiable. The proposal's last two sentences address the establishment of additional rating levels between "pass" and "fail." This has a particular meaning in the context of the proposal's two-tier rating system. But without that context, the purpose and significance of the proposal's last two sentences is different. Put another way, the proposal's last two sentences cannot operate, as originally intended, independent of the proposal's first sentence. As such, we deny the Union's severance request.

3. We dismiss the petition as to Proposal 2.

When a proposal is outside the duty to bargain, and another proposal is "inextricably intertwined" with the former proposal, we will dismiss a petition as to the latter proposal.[60] Here, Proposal 2 is inextricably intertwined with Proposal 1.

As set forth above, Proposal 2 provides:

> The performance rating levels set forth above do not bar or otherwise inhibit [the Agency's] right to define and set the number of critical elements, core competencies, or the number of performance goals that will be included in each performance plan. Similarly, the performance rating levels set forth above do not bar or otherwise inhibit [the Agency's] right to determine the performance standards that must be met for each performance goal and core competency in order for an employee to be appraised at the two performance

[53] *AFSCME*, 13 FLRA at 580-81.
[54] Record at 2; Resp. at 5.
[55] Pet. at 3.
[56] 5 C.F.R. § 2424.2(h) (emphasis omitted).
[57] *Id.*
[58] *Id.* § 2424.25(d).
[59] Resp. at 5.
[60] *Local R1-100*, 61 FLRA at 484 (citing *Local 49*, 52 FLRA at 821).

> levels set forth above. Finally, the limitation on the number of performance levels may not be interpreted to bar [the Agency] from assigning work or directing its employees.[61]

The parties agree that "Proposal 2 has no independent meaning apart from Proposal 1."[62] We also agree. Specifically, Proposal 2 assumes the existence of a performance-rating system limited to "the two performance levels set forth above" in Proposal 1, and explains the actions that Proposal 1 permits the Agency to take.[63] Without Proposal 1, Proposal 2 refers to nothing, and would, as the parties agree,[64] be meaningless. Moreover, the parties did not present independent arguments concerning the negotiability of Proposal 2. Rather, they relied on the arguments they made concerning the negotiability of Proposal 1. In these circumstances, we dismiss the petition as to Proposal 2 because it is "inextricably intertwined"[65] with Proposal 1, which we have found outside the Agency's duty to bargain.

V. Order

We dismiss the Union's petition as to Proposal 1 and Proposal 2.

[61] Pet. at 3.
[62] Record at 2.
[63] Pet. at 3.
[64] Record at 2.
[65] *Local R-100*, 61 FLRA at 484.