

71 FLRA No. 51

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

0-NG-3408

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

August 9, 2019

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

Decision by Member Abbott for the Authority

I. Statement of the Case

In this case, we find nonnegotiable a proposal - that would allow employees on a flexible schedule to earn credit hours for hours worked on a federal holiday during the same duty hours for which the employee is already being paid holiday pay - because it conflicts with 5 U.S.C. § 6121(4) and applicable Office of Personnel Management (OPM) guidance.

This matter is before the Authority on a negotiability appeal filed under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (Statute).¹ It concerns the negotiability of one Union proposal that identified federal holidays as non-workdays for the purpose of allowing employees to earn up to ten credit hours. We find that the proposal is nonnegotiable.

II. Background

The proposal at issue here has been included in the parties' agreement since 2012 and was disputed

during their last contract negotiation in 2015.² The Agency declared the proposal non-negotiable during reopener negotiations in 2018 when the article was reopened for bargaining.³

The Union filed its negotiability petition on July 3, 2018. The Agency filed its statement of position July 26, 2018. The Union filed its response on August 10, 2018. A post-petition conference was held with the parties on August 16, 2018. The Agency filed its reply to the Union's response on August 27, 2018.

III. Proposal 1**A. Wording**

Other than employees on Maxiflex schedules, employees will be allowed to earn a maximum of three (3) credit hours per regularly scheduled workday and up to ten (10) credit hours on regular non-workdays (e.g., Saturday and Sunday for a Monday to Friday workweek). *Federal holidays are considered non-workdays for the purpose of earning credit hours.* Subject to prior approval by the Employer and established flexible time bands, credit hours may be earned at the beginning of the shift, the end of the shift, or split between the beginning and the end of the shift.⁴

B. Meaning

At the conference, the parties agreed that, as described in the petition, the proposal would allow employees on flexible schedules to earn credit hours, on

² This provision was also at issue in *NTEU, Chapter 24*, 50 FLRA 330 (1995) (*Chapter 24*). In *Chapter 24*, the Agency terminated the provision without notifying the Union, contending that it was contrary to 5 U.S.C. § 5546. An arbitrator agreed and ruled that the provision violated § 5546. The Authority stated that “[t]he legislative history of the Work Schedules Act shows that Congress intended alternative work schedules to be fully negotiable, subject only to the provisions of the 1982 Act itself.” *Id.* at 332. Therefore, the Authority found that § 5546 was not a law superseding the Work Schedules Act, and distinguished the National Guard Technicians Act, at issue in *Illinois National Guard v. FLRA*, 854 F.2d 1396, 1405 (D.C. Cir. 1988). *Id.* at 333. The Authority found that § 5546 did not provide a basis on which to deny enforcement of the parties' contractual provision. The Authority modified the award and remanded the case to the parties without reaching the disputed merits of the provision itself. *Id.*

³ Pet., Attach. 1, Agency's Declaration of Nonnegotiability at 2 n.1; *see also* Agency's Statement of Position (SOP) at 1; Union's Resp. to Agency's SOP (Resp.) at 1.

⁴ Pet. at 4-5 (emphasis added). Only the italicized sentence is in dispute. The Union did not request to sever any portion of the proposal.

¹ 5 U.S.C. § 7105(a)(2)(E).

federal holidays, during the same hours as the employee's normal tour of duty.⁵ Employees on flexible schedules could "work up to ten (10) credit hours on [f]ederal holidays."⁶ The parties agreed that the proposal would operate as set forth in the Union's petition.⁷ As an example, the Union explained that "if the employee's normal tour of duty is from 8:00 a.m. to 4:30 p.m., the proposal would permit the employee to elect to work credit hours during that same timeframe" on a federal holiday.⁸ The parties agree that the issue in this petition is whether employees are precluded from voluntarily working credit hours on a federal holiday *during the same hours* used to meet the employees' basic work requirement.⁹

C. Analysis and Conclusion: The proposal is non-negotiable.

The Agency argues¹⁰ that the proposal is non-negotiable because it violates the Federal Employees Flexible and Compressed Work Schedules Act (the Act)¹¹ and OPM's interpretative guidance.¹² The Agency contends that because the eight holiday hours are used to account for the employee's basic work requirement, hours voluntarily worked during that *same time period*, the same tour of duty,¹³ cannot logically constitute credit hours, in light of the definitions in 5 U.S.C. §§ 6121 and 6124.

⁵ Record of Post-Pet. Conference (Record) at 2; Pet. at 5.

⁶ Pet. at 5.

⁷ Record at 2.

⁸ Pet. at 5.

⁹ Resp. at 3; *see also* SOP at 3-4.

¹⁰ SOP at 4-6.

¹¹ 5 U.S.C. §§ 6120-6133.

¹² SOP at 2, 7-8 (citing SOP, Attach. 1, OPM's *Handbook on Alternative Work Schedules* (Handbook); SOP, Attach. 2, OPM Fact Sheet: *Credit Hours Under a Flexible Work Schedule* (OPM Fact Sheet) (<https://www.opm.gov/policy-data-oversight/pay-leave/work-schedules/fact-sheets/credit-hours-under-a-flexible-work-schedule/> (last visited August 9, 2019)); SOP, Attach. 3, OPM Transmittal, CPM 2015-12, *Excusing Federal Employees From Duty for the Last Half of the Scheduled Workday on Thursday, December 24, 2015* (CPM 2015-12); SOP, Attach. 4, OPM Transmittal, CPM 2014-15, *Excusing Federal Employees from Duty on Friday, December 26, 2014* (CPM 2014-15); SOP, Attach. 5, OPM Transmittal, CPM 2012-15, *Excusing Federal Employees on Monday, December 24, 2012* (CPM 2012-15)). The Agency also argues that a provision is not deemed negotiable merely because it had previously passed agency-head review. *Id.* at 10-11 (citing *AFGE, Local 1827*, 58 FLRA 344, 353 (2003); *SEIU, Local 556, AFL-CIO*, 26 FLRA 380, 385 (1987)). However, because the Union did not dispute this point, we will not address it further.

¹³ *See Id.* at 3, 6-7 (Agency does not dispute that employees on flexible work schedules may be permitted to earn credit hours on federal holidays for hours worked *in excess of* their basic work requirement).

Any analysis must begin with the text of the Act.¹⁴ Section 6121(4) defines "credit hours" to mean: "any hours, within a flexible schedule established under section 6122 of this title, which are in excess of an employee's basic work requirement and which the employee elects to work so as to vary the length of a workweek or a workday."¹⁵ The term "basic work requirement" is also defined in § 6121(3) of the Act as: "the number of hours, excluding overtime hours, which an employee is required to work or is required to account for by leave or otherwise."¹⁶

Finally, the entitlement of employees on flexible work schedules to eight hours of pay for holidays is provided for in § 6124, which states in relevant part: "if any employee on a flexible schedule under section 6122 of this title is relieved or prevented from working on a day designated as a holiday by Federal statute or Executive order, such employee is entitled to pay with respect to that day for [eight] hours."¹⁷

The text of the Act does not clearly address the very narrow issue before us, namely, whether credit hours may be earned by eligible employees on a federal holiday during the very tour of duty, the same hours, for which those employees are (already) being paid their eight hours of holiday pay.¹⁸ However, within § 6121's definition of "credit hours," the phrase "in excess" that modifies "the employee's basic work requirement" is key—it indicates that it must be additional time.¹⁹ The Union cites the Act's legislative history for support of its interpretation that by definition, employees may "earn credit hours on a holiday during *any* hours within their flexible time band, including the hours that the employee would have normally worked but for the

¹⁴ *U.S. Dep't of Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957, 960 (D.C. Cir. 2016) (noting the court owes no deference at all to the FLRA when it interprets a statute other than its organic statute); *see also U.S. Dep't of Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base, N.C.*, 70 FLRA 286, 291 (2017) (Concurring Opinion of Member DuBester).

¹⁵ 5 U.S.C. § 6121(4).

¹⁶ *Id.* § 6121(3).

¹⁷ *Id.* § 6124.

¹⁸ Equally unavailing is § 6126(a) of the Act, which provides that "[s]ubject to any limitation prescribed by [OPM] or the agency, a full-time employee on a flexible schedule can accumulate . . . credit hours." 5 U.S.C. § 6126(a).

¹⁹ *See Excess*, Webster's New World Dictionary 473 (3d College Ed. 1988) ("the amount or degree by which one thing exceeds another; remainder; surplus").

holiday.”²⁰ To the contrary, we find the cited historical comment equally ambiguous because it largely repeats the enacted definition of credit hours. Moreover, the Agency has already conceded that an employee may earn credit hours on a holiday – the issue before us is *when*.²¹

Title 5, § 6133 of the U.S. Code grants OPM authority to prescribe regulations and provide educational guidance on the Act.²² The parties did not identify any government-wide regulations implementing the Act that shed needed light here; accordingly, we turn to the available guidance as issued by OPM.²³ While OPM has not issued guidance that carries the force of law, we nonetheless find the assorted letters of instruction that accompanied the Presidents’ executive orders, read with the *Handbook on Alternative Work Schedules* and the available “Factsheet” to be persuasive because cumulatively they are a reasonable interpretation of the Act.²⁴

Of record are three OPM Transmittals, dated in 2012, 2014, and 2015, that are letters from the OPM Director to the Heads of Executive Departments and Agencies.²⁵ Each Transmittal was a memorandum that instructed federal executive agencies on the implementation of an accompanying executive order that allowed eligible federal employees to be excused from duty, without charge to leave, for certain dates that immediately accompanied an already established federal holiday. In the Transmittals, the OPM Director informed these agencies how to treat the identified dates as, in effect, additional holidays. The Transmittal for the 2015 half-day holiday, in addition to the 2014 and 2012

memoranda, provide that employees may earn credit hours for work performed “in excess” of the basic work requirement, and not in lieu of any premium pay.²⁶

The Transmittals refer to the OPM *Handbook on Alternative Work Schedules* for further guidance.²⁷ The *Handbook* discusses how the 80 hours of the “basic work requirement” must be worked or otherwise accounted for.²⁸ It provides that employees are to be credited with eight hours toward their basic work requirement when they are excused from work during a federal holiday. As we observed in an analogous case, *NTEU, Chapter 41*, credit hours are defined as “outside” of the basic work requirement.²⁹ Therefore, *NTEU, Chapter 41*, supports the Agency’s argument here that credit hours cannot be earned simultaneously with holiday pay, for the regular tour of duty that is used to make up the 80-hour basic work requirement, because credit hours are supposed to be outside of the basic work requirement. Both the Transmittals and the *Handbook* refer to the Fact Sheet for additional guidance.

Accordingly, the OPM Fact Sheet: *Credit Hours Under a Flexible Work Schedule* addresses the *when* for earning credit hours. After observing credit hours may only be earned within the flexible time band as already established by an agency or parties’ agreement, the Fact Sheet states: “Hours that will count toward the basic work requirement may not be considered credit hours.”³⁰ The Fact Sheet also addresses whether employees may earn or use credit hours on holidays. The Fact Sheet provides that employees may not earn additional credit hours “during holiday hours” and that employees may earn credit hours for work “in excess” of their basic work requirement on a holiday.³¹ Therefore, located in the Fact Sheet is the guidance that credit hours may not be earned simultaneously, or within the same tour of duty, as holiday hours that fulfill the basic work requirement.

The cumulative weight of the OPM guidance of record is persuasive that, under the Act, eligible, flexible schedule employees may not use the same hours that count toward their basic work requirement to earn credit hours. While alternative work schedules are generally negotiable, they are subject to limitation.³² Here, the Union’s proposal conflicts with OPM’s guidance as the

²⁰ Resp. at 4 (emphasis added); *see also id.* at 5 (“By definition, ‘credit hours’ may be worked during *any* hours within the flexible schedule. . . . Three requirements must be met before time worked qualifies as credit hours: (1) the hours worked must fall within the flexible schedule, i.e., within the designated hours during which an employee must be present for work or the designated hours during which an employee is permitted to elect a time of arrival and time of departure from work . . . ; (2) the hours worked must be in excess of the employee’s basic work requirement; and (3) the employee must elect to work those hours.” (citing S. REP. No. 365, 97th Cong., 2d Sess. at 8 (1982))).

²¹ Resp. at 3-4.

²² 5 U.S.C. § 6133(a), (b)(1); *see also NTEU, Chapter 41*, 57 FLRA 640, 644 (2001) (*NTEU*).

²³ We note that the parties agree that “*Chevron*” deference is not appropriate for the guidance materials included in the record, as attached to the Agency’s SOP. *See* Reply at 3. Nonetheless, the Authority must look to OPM for its interpretation of the Act as Congress as clearly entrusted that responsibility to that agency. *See generally U.S. DHS, U.S. ICE*, 70 FLRA 628, 630 (2018), *aff’d sub. nom. AFGC Nat’l Council 118-ICE v. FLRA*, 926 F.3d 814 (D.C. Cir. 2019).

²⁴ *NTEU*, 57 FLRA at 644.

²⁵ *See* CPM 2015-12; CPM 2014-15; CPM 2012-15.

²⁶ CPM 2015-12 at question 15; CPM 2014-15 at question 16; CPM 2012-15 at question 16.

²⁷ *See* Handbook at 8-9.

²⁸ *Id.* at 6.

²⁹ *See NTEU*, 57 FLRA at 645.

³⁰ OPM Fact Sheet at 2.

³¹ *Id.* at 6.

³² *NTEU, Atlanta, Ga.*, 32 FLRA 879, 881-84 (1988) (questions concerning whether a proposed alternate work schedule conflicts with the Act are subject to negotiability appeals before the Authority).

proposal would allow employees to earn credit hours during *the same holiday hours* that count toward their basic work requirement. But the proposal cannot be reconciled with the Act's definition of credit hours – that time cannot be both simultaneous to, and “*in excess*” of, the basic work requirement.³³ Accordingly, we find that the Union's proposal is non-negotiable and dismiss the Union's petition.

IV. Order

We dismiss the Union's petition.

Member DuBester, concurring:

I concur in the Order dismissing the Union's petition.

³³ 5 U.S.C. § 6121(4) (emphasis added); *NTEU*, 57 FLRA at 644 (OPM's regulations indicate that the concept of a “basic work requirement” should be considered the same as the concept of “regularly scheduled work” for hours of duty purposes).