

71 FLRA No. 79UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT0-PS-36

DECISION ON REQUEST FOR GENERAL
STATEMENT OF POLICY OR GUIDANCENovember 25, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members**I. Statement of the Case**

On June 4, 2019, the U.S. Office of Personnel Management (OPM) requested the Authority to issue a policy statement on the following topic:

Does an agency have an obligation to bargain at the demand of the exclusive representative on a mandatory subject of bargaining that is not covered by an existing agreement during the term of the collective bargaining agreement (CBA)?¹

II. Background

In its request, OPM recounted the history and development of the Authority's caselaw on mid-term bargaining, including appeals and determinations made by U.S. Courts of Appeals for the District of Columbia Circuit and the Fourth Circuit. OPM concluded by noting that since the decision of the U.S. Supreme Court in *NFFE, Local 1309 v. U.S. Department of the Interior*, 526 U.S. 86 (1999), the Authority has consistently held that agencies are required to bargain over union proposals covering matters not contained in or covered by the CBA.²

Referring to recently issued executive guidance and, broadly, to caselaw published by this Authority, OPM prevailed upon us to issue policy guidance at this juncture to get ahead of the "eventual, piecemeal guidance on this issue . . . derived through the [unfair labor practice], negotiability appeal, and grievance processes."³

¹ OPM Request at 1.

² See *Dep't of the Interior, Wash., D.C.*, 56 FLRA 45 (2000); see also *NTEU*, 64 FLRA 156 (2009).

³ OPM Request at 4.

III. Discussion

The Authority has carefully considered this request and has determined that the request does not satisfy the standards governing the issuance of general statements of policy and guidance set forth in section 2427.5 of the Authority's Regulations.⁴ The guidance sought by OPM is sufficiently provided by existing Authority precedent; the question presented can be more appropriately resolved by other means; and there is no reason to conclude that the issuance of an Authority statement would prevent the proliferation of cases involving the same or similar question.

We note that the Statute's mandate that its obligations be interpreted "in a manner consistent with the requirement of an effective and efficient Government" dates from the Statute's enactment in 1979.⁵ While the recent issuance of Executive Order 13836 has returned this mandate to the federal labor community's attention, there has not been an accompanying mandate for a wholesale revision of Authority precedent.⁶ Likewise, the request adequately summarized the existing Authority precedent which remains centered on the seminal decisions *U.S. Department of the Interior, Washington, D.C.*, 56 FLRA 45 (2000), and *NTEU*, 64 FLRA 156 (2009).⁷ We find this request to be dependent upon the circumstances of the parties and the agreement language at issue, so much so, that this issue of law and policy may be developed more fully in the context of an actual dispute between actual parties. Accordingly, any policy statement or guidance issued by the Authority would be unlikely to prevent the proliferation of future cases.

IV. Decision

The request by OPM for a general statement of policy or guidance is denied.

⁴ 5 C.F.R. § 2427.5.

⁵ 5 U.S.C. § 7101(b).

⁶ Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining, 83 Fed. Reg. 25,329 (June 1, 2018).

⁷ Member Abbott notes that the U.S. Circuit Court of the District of Columbia Circuit has issued a decision that discussed extensively the issue of duty to bargain and "covered by." See *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 875 F.3d 667, 673-74 (2017), rev'g *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla.* 69 FLRA 447 (2016). This decision may prove to be illuminating for the federal labor relations community. In addition, the court has also issued *AFGE, AFL-CIO v. Trump*, 929 F.3d 748, 757-58 (2019), wherein the court discussed at length the value of federal labor issues proceeding according to the statutory "scheme" to seek resolution before the Members of the Authority.