71 FLRA No. 158

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

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

0-NG-3387

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DECISION AND ORDER
ON REMAND

June 16, 2020

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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

This case is before the Authority on remand from the U.S. Court of Appeals for the District of Columbia Circuit (the Court).[1] In *NTEU v. FLRA*,[2] the Court reversed the Authority's finding that Proposal 1[3] was nonnegotiable because it is contrary to 41 C.F.R. § 300-3.1 of the Federal Travel Regulation (FTR).[4] Accordingly, the Court remanded the case to the Authority for proceedings consistent with its opinion. Based on the foregoing, we find that Proposal 1 is within the duty to bargain because it is not contrary to law and the Agency does not have sole and exclusive discretion to define a "duty station" for purposes of calculating employees' travel compensation. Additionally, Proposal 1 is not contrary to management's right to determine its organization because it does not affect the Agency's right to allocate employees to certain duty stations or agency subdivisions.

II. Background

The background is set forth more fully in *NTEU* (*NTEU I*),[5] and is briefly summarized here. The Union filed a negotiability petition with the Authority after the parties agreed to sever two proposals from the parties' agreement, including Proposal 1.

Both parties agreed that Proposal 1 would require the Agency to calculate travel compensation by using "road miles instead of the straight-line (or 'as the crow flies') standard."[6] Under the "as the crow flies" standard, a bargaining-unit employee's official duty station is a circle with a fifty mile radius around the employees' regular workplace. Consequently, the Union argued that Proposal 1 would more accurately measure the distance traveled by bargaining-unit employees for travel compensation purposes because the "road miles" metric accounts for geographic or other obstructions.[7]

The Authority found that Proposal 1 was outside the duty to bargain because it was contrary to § 300-3.1 of the FTR.[8] The Authority noted that § 300-3.1 of the FTR requires an official duty station to be "a mileage radius around a particular point, a geographic boundary, or any other definite domain, provided no part of the area is more than 50 miles from where the employee regularly performs his or her duties . . . ."[9] The Authority held that the "road miles" metric does not create a definite area and may "extend more than fifty miles from where the employee regularly performs his or her duties or vary with every employee and every trip."[10] Consequently, the Authority found that the "road miles" metric is contrary to the definition of an official duty station in the FTR because it is not a mileage radius around a particular point, a geographic boundary, or a definite domain.[11]

The Union filed a petition for review of the Authority's decision with the Court. On review, the Court vacated the Authority's decision, finding that the

[1] *NTEU v. FLRA*, 942 F.3d 1154 (D.C. Cir. 2019).
[2] *Id.* at 1157-58.
[3] The Union submitted Proposal 1 to the Agency with the following wording:

> C. 1. For applicable travel compensation purposes, (e.g., mileage, lodging, per diem, overtime), the official duty station extends 50 road miles from the employee's official duty station in every direction. The 50 road mile rule for determining travel compensation should not be applied to local travel procedures and mileage reimbursements contained in Section 5.

Pet. at 4.
[4] *NTEU*, 70 FLRA 724, 725-26 (2018) (*NTEU I*) (Member DuBester concurring, in part, and dissenting in part); *see also* 41 C.F.R. § 300-3.1.
[5] 70 FLRA at 724.
[6] Post-Petition Conference Record at 2 (quoting Pet. at 5).
[7] Pet. at 5-6.
[8] *NTEU I*, 70 FLRA at 725-26.
[9] *Id.* at 725 (citing 41 C.F.R. § 300-3.1).
[10] *Id.* at 725-26.
[11] *Id.*

Authority erred when it concluded that the "road miles" metric does not create an official duty station with a definite domain.[12] In particular, the Court determined that Proposal 1 does not create a radius that may extend fifty miles beyond an employee's official duty station because "it is impossible for an area defined by every point an employee could travel within fifty road miles to ever extend beyond a fifty-mile-radius circle."[13]

The Court also held that Proposal 1 does not create an official duty station that will vary with every trip.[14] In order for employees to be eligible for any travel compensation, the Court noted that both the parties' agreement and the FTR require employees to take the most travelled and expeditious route possible.[15] Furthermore, the Court found that the Agency's Travel Handbook presumptively requires any travel routes to be pre-approved by the Agency.[16] Therefore, the Court granted the Union's petition for review and remanded the decision to the Authority for proceedings consistent with the Court's opinion.

III. Analysis and Conclusions

A. Proposal 1 is not contrary to law.

Applying the Court's reasoning in *NTEU v. FLRA* as the law of the case, we find that Proposal 1's "road mile" metric creates a "definite domain" and, therefore, complies with the definition of an official station as required by § 300-3.1 of the FTR.[17] However, the Agency asserts that Proposal 1 is contrary to 5 C.F.R. §§ 550.112(j), 551.422(d),[18] and 550.1403[19] (the regulations) because they refer to a "mileage radius" when defining an official duty station for purposes of calculating overtime and compensatory time.[20] Consequently, the Agency argues that Proposal 1 is contrary to the regulations because the "road miles" metric is not a "mileage radius."[21]

However, the regulations also state that "an employee's official duty station for determining overtime pay . . . *may not* be smaller than the definition of 'official station and post of duty' under" § 300-3.1 of the FTR.[22] While agencies *may* use a "mileage radius" when defining an official duty station under the regulations, agencies *may* also use the FTR's "definite domain" standard when defining an official duty station under the regulations. As a result, it is not contrary to the regulations and § 300-3.1 of the FTR to use the "road mile" metric when defining an official duty station for calculating travel reimbursements, mileage, per diem, overtime, and compensatory time.[23]

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[12] *NTEU v. FLRA*, 942 F.3d at 1157-58.
[13] *Id.* at 1157.
[14] *Id.*
[15] *Id.* at 1157-58.
[16] *Id.* at 1158.
[17] *See id.* at 1157-58 (finding that the "both of the FLRA's reasons for finding the proposal nonnegotiable were flatly wrong"); *supra* Part II.
[18] 5 C.F.R. §§ 550.112(j) and 551.422(d) provide that: "[a]n agency may prescribe a mileage radius of not greater than 50 miles to determine whether an employee's travel is within or outside the limits of the employee's official duty station for determining entitlement to overtime pay for travel . . . [but] an agency's definition of an employee's official duty station for determining overtime pay for travel may not be smaller than the definition of 'official station and post of duty' under the [FTR] issued by the General Services Administration (41 CFR 300-3.1)."
[19] In calculating compensatory time, 5 C.F.R. § 550.1403 states that "[o]fficial duty station means the geographic area surrounding an employee's regular work site that is the *same* as the area designated by the employing agency for the purpose of determining whether travel time is compensable for the purpose of determining overtime pay." (emphasis added). Therefore, the regulations dictate that agencies must use the same "area" when defining an official duty station for overtime and compensatory time. *Id.*
[20] Statement at 3-11. The Agency also argues that it "can't negotiate away the authority given to it by regulation" and the Office of Personnel Management. Reply at 3. However, the cases cited by the Agency to support this proposition held that certain proposals were outside the duty to bargain because they were contrary to law. *NTEU v. FLRA*, 418 F.3d 1068, 1073 (9th Cir. 2005) (finding that a proposal "conflicts with government-wide OPM regulations defining hours of work"); *U.S. Dep't of the Air Force v. FLRA*, 952 F.2d 446, 453 (D.C. Cir. 1991) (holding that "[t]he government-wide regulations promulgated by the OPM under the [Fair Labor Standards Act] do not allow compensation for time spent in concluding activities that are not closely related to principal work activities").
[21] Statement at 3-11.
[22] 5 C.F.R. § 551.422(d) (emphasis added); *see* Pay Administration (General), 72 Fed. Reg. 19093, 19094 (Apr. 17, 2007) (stating that "the geographic area an agency designates for the purpose of determining whether an employee is entitled to overtime pay for a period of travel may be different than the geographic area covered by *official station* as defined in" § 300-3.1 of the FTR).
[23] *See NFFE, Local 376*, 67 FLRA 134, 136 (2013) (holding that the union did not establish that the agency had agreed to use a twenty-five-mile radius when defining an official duty station for calculating overtime under 5 C.F.R. § 551.422(d)).

B. Proposal 1 is not contrary to the Agency's management's rights.

The Agency argues that Proposal 1 is outside the duty to bargain because it impermissibly affects management's right to determine its organization.[24] In particular, the Agency claims that Proposal 1 affects management's right to determine "how an agency will structure itself to accomplish its mission and functions."[25] Management's right to determine its organization encompasses how certain organizational functions shall be established and where the duty stations of the positions providing those functions shall be maintained.[26] The Authority has found that this management right gives agencies the discretion to determine which employees are assigned to a certain subdivision of an agency,[27] or where an employee's duty station shall be located.[28]

Proposal 1 does not affect the Agency's right to allocate employees to certain duty stations or agency subdivisions.[29] Proposal 1 simply proposes the Agency use the "road mile" metric when defining an official duty station under the FTR[30] and the regulations[31] for the purposes of travel compensation.[32] Consequently, the Agency has failed to demonstrate how Proposal 1 affects management's right to determine its organization.[33]

C. The regulations at issue do not give the Agency sole and exclusive discretion.

The Agency argues that it has sole and exclusive discretion when defining a bargaining-unit employee's official duty station under the regulations and the FTR.[34] Specifically, the Agency cites FTR language stating that an official station is "an area defined by the agency,"[35] and regulatory wording defining an official duty station as an area "prescribed" by the agency, to support its assertion that it has sole and exclusive discretion to define an official duty station.[36] The Agency also requests that we reconsider our precedent regarding sole and exclusive discretion due to the wording in the FTR and the regulations.[37] In analyzing claims of "sole and exclusive" discretion, the Authority looks at the plain wording and the legislative history of the statute in question.[38] In the absence of any indication that Congress intended the agency's discretion to be sole and exclusive, the exercise of discretion through collective bargaining is not inconsistent with law.[39]

While the Agency points to certain wording in § 300-3.1 of the FTR and the regulations to support its argument,[40] the wording in the regulations does not demonstrate an intent to give the Agency

[24] Statement at 9.
[25] *Id.* The Authority has found that the exercise of management's right to determine its organization encompasses the right to determine the administrative and functional structure of an agency, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties. *AFGE, Local 3928*, 66 FLRA 175, 179 (2011) (*Local 3928*).
[26] *Local 3928*, 66 FLRA at 179.
[27] *AFGE, Local 1336*, 52 FLRA 794, 802-03 (1996) (Member Armendariz concurring) (holding that an agency's right to determine its organization "includes such matters as the geographical locations in which an agency will provide services or otherwise conduct its operations; how various responsibilities will be distributed among the agency's organizational subdivisions; how an agency's organizational grade-level structure will be designed; and how the agency will be divided into organizational entities such as sections").
[28] *Local 3928*, 66 FLRA at 179.
[29] Pet. at 4.
[30] *Id.*; 41 C.F.R. § 300-3.1.
[31] 5 C.F.R. §§ 550.112(j), 551.422(d).
[32] Pet. at 4.
[33] *See Local 3928*, 66 FLRA at 179 (finding that "nothing in the proposal or the Union's explanation of it would affect the Agency's ability to create teams or organize employees into teams").
[34] Statement at 10.
[35] 41 C.F.R. § 300-3.1.
[36] 5 C.F.R. §§ 550.112(j), 551.422(d).
[37] Reply at 4.
[38] *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1402 (D.C. Cir. 1988) (where the governing statute provided that the agency head was required to grant compensatory time for overtime work, instead of paying overtime pay, and prescribe duty hours for employees "notwithstanding any other provision of law," court found that agency head had sole and exclusive discretion); *see also U.S. Dep't of Energy, W. Area Power Admin.*, 71 FLRA 111, 111-12 (2019) (*DOE*) (Member DuBester dissenting); *NAGE, Local R5-136*, 56 FLRA 346, 348 (2000); *Ass'n of Civilian Technicians, Mile High Chapter*, 53 FLRA 1408, 1412-15 (1998) (*ACT*) (finding that even though the plain language did not indicate sole and exclusive discretion, the legislative history could demonstrate that Congress intended the agency to possess sole and exclusive discretion).
[39] *POPA*, 53 FLRA 625, 648 (1997) (holding that absent an indication in the statutory language or the legislative history that the agency's discretion is sole and exclusive, the exercise of that discretion is subject to bargaining); *IAMAW, Franklin Lodge No. 2135*, 50 FLRA 677, 692 (1995); *NAGE*, 43 FLRA 1008, 1009-10 (1992) (finding that the proposal was negotiable because there was no indication in the language of the statute or the legislative history that the agency had unfettered discretion).
[40] Statement at 10.

"unfettered discretion."[41] In particular, the regulations and § 300-3.1 do not contain any language stating that they preempt the Federal Service Labor-Management Relations Statute or any other statute.[42] While the Authority does not require any specific wording,[43] the plain language in the regulations and § 300-3.1 do not evidence that the Agency's discretion in defining an official duty station is "sole and exclusive."[44] Moreover, the legislative history for the regulations[45] and § 300-3.1[46] do not demonstrate any intent to give agencies sole and exclusive authority over defining an official station or official duty station for travel compensation.[47] Consequently, we decline to reconsider our precedent regarding sole and exclusive discretion. Furthermore, we also find that the Agency has failed to demonstrate that Proposal 1 is outside the duty to bargain because it has sole and exclusive discretion.

IV. Decision

We grant the Union's petition as to Proposal 1.

Member DuBester, concurring:

I agree with the Decision to grant the Union's Petition regarding Proposal 1.

[41] *U.S. DHS, U.S. ICE*, 67 FLRA 501, 502 (2014) (*DHS*) (Member Pizzella dissenting) (stating that "[m]atters concerning conditions of employment over which an agency has discretion are negotiable if the agency's discretion is not sole and exclusive").

[42] *Id.* at 503 (finding that the statute at issue did not confer the agency with sole and exclusive discretion because the statute did not have "preemptive wording").

[43] *Id.* at 502-03. *But see U.S. Dep't of the Air Force, Luke Air Force Base v. FLRA*, 844 F.3d 957, 961 (D.C. Cir. 2016) (holding that the Secretary of Defense had sole and exclusive discretion over access to commissaries and exchanges because the regulation governing such access stated that any determinations were "subject only to 'the authority, direction, and control of the Secretary of Defense.'" (citations omitted)).

[44] *DOE*, 71 FLRA at 111-12 ("If a law indicates that an agency's discretion over a matter is 'sole and exclusive' . . . 'then the agency is not obligated under the Statute to exercise that discretion through collective bargaining.'" (quoting *NTEU*, 59 FLRA 815, 816 (2004))).

[45] Pay Administration (General), 72 Fed. Reg. 19,093 (Apr. 17, 2007); Employment in the Senior Executive Service, Restoration to Duty from Uniformed Service or Compensable Injury, Pay Administration (General), and Pay Administration Under the Fair Labor Standards Act; Miscellaneous Changes to Pay and Leave Rules, 72 Fed. Reg. 12,032 (Mar. 15, 2007).

[46] Federal Travel Regulation; Removal of Privately Owned Vehicle Rates; Privately Owned Automobile Mileage Reimbursement When Government Owned Automobiles Are Authorized; Miscellaneous Amendments, 75 Fed. Reg. 72,965 (Nov. 29, 2010).

[47] *See ACT*, 53 FLRA at 1412-15.