

71 FLRA No. 167

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3430
(Union)

and

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
CENTERS FOR DISEASE
CONTROL AND PREVENTION
NATIONAL INSTITUTE
FOR OCCUPATIONAL SAFETY AND HEALTH
MORGANTOWN, WEST VIRGINIA
(Agency)

0-NG-3456

DECISION

July 13, 2020

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

I. Statement of the Case

This case concerns the negotiability of sixteen provisions disapproved by the Agency head under § 7114(c) of the Federal Service Labor-Management Relations Statute (the Statute).¹ Because the Agency failed to support its argument that the provisions are contrary to law, we grant the Union's petition.

II. Background

After the parties executed a collective-bargaining agreement, the Agency head disapproved sixteen provisions contained in the agreement under § 7114(c) of the Statute.² The disapproval letter stated that "the [Agency] through its delegated agency head review officer hereby disapproved the following Articles," with a list of the provisions but without any explanation for the disapproval.³ The Union then timely filed a petition for review of the sixteen disapproved

provisions. The Authority conducted a post-petition conference; the Agency filed a statement of position (statement); and the Union filed a response to the Agency's statement.

In its statement the Agency asserted that the provisions were disapproved because they "are contrary to law, rule, or regulation" and requested that the FLRA dismiss the Union's petition so that the parties could continue to bargain over the disapproved provisions.⁴

III. The Provisions**A. Provision 1**

Article 2, Section 2, Subsection 7.J.

The Union will be authorized at least the same number of Union representatives on official time as the Employer has representatives at the negotiation table, however not less than three (3) representatives. The designated Union negotiators will be on duty time for all time spent during the actual negotiations, including attendance at impasse proceedings, and for other related duties during negotiations. Reasonable official time will be granted for preparation time and time spent developing and drafting proposals.⁵

B. Provision 2

Article 3, Section 3

Any rule or regulation published after the effective date of this agreement, over which the Employer is obligated to bargain, will not be enforced for bargaining unit employees if it conflicts with the specific terms of this agreement.⁶

C. Provision 3

Article 4, Section 6

Employees shall have the right to direct and/or fully pursue their private lives, personal welfare, and personal beliefs

¹ 5 U.S.C. § 7114(c).

² *Id.*

³ Pet., Attach. 1, Agency-Head Disapproval Letter (Disapproval) at 1.

⁴ Statement at 2.

⁵ Pet. at 4; Pet., Attach. 2, [Agency] Rejected Sections Language (Provisions) at 1.

⁶ Pet. at 5; Provisions at 1.

without interference, coercion, or discrimination by the Employer, except as restricted by laws, regulations, or job responsibilities.⁷

D. Provision 4

Article 6, Section 4

The Parties agree that beyond the reasonable official time required under 5 U.S.C. 7131(a) and (c), up to 450 hours per calendar year shall be granted under 5 U.S.C. 7131(d). Upon Union request, management may grant additional hours during any calendar year they determine to be mutually beneficial as well as reasonable, necessary and in the public interest. Unused hours are not rolled over to future years.⁸

E. Provision 5

Article 6, Section 6

Each Union representative shall timely submit to his/her supervisor a biweekly written report of the amount of official time that he/she has spent on Union activities covered by this Article through the Employer's reporting system, and shall provide an amended report if official time is used after submission of their time and attendance through the Employer's system.

Union representatives will use the following representational categories in completing their time and attendance report:

Term Negotiations—official time used by Union representatives to prepare for and negotiate a basic collective bargaining agreement or its successor.

Mid-Term Negotiations—official time used to bargain over issues raised during the life of a term agreement.

Dispute Resolution—official time used to process grievances up to and including arbitrations, and to process

appeals of bargaining unit employees to the various administrative agencies such as the MSPB, FLRA and EEOC and, as necessary, to the courts.

General Labor-Management Relations—official time used for: meetings between labor and Management officials to discuss general conditions of employment, Labor-Management Relations Committee (LMRC) meetings, labor relations training for Union representatives, Union participation in formal meetings and investigative interviews, answering employee inquiries, and other activities related to administering the Collective Bargaining Agreement.⁹

F. Provision 6

Article 8

SECTION 1.

Establishing and maintaining a strong working relationship between the Employer and the Union through positive, productive dialogue is essential. The Parties agree to a joint committee known as the Labor Management Relations Committee (LMRC) to promote effective communication and cooperation between the Employer and the Union, which will lead to a better productive working relationship. The Parties reaffirm their commitment to continued development and operation of a strong and ongoing quest to provide the highest quality working environment and service to stakeholders. The Parties agree to support this committee to identify problems and craft solutions to better serve the agency's customers and to advance the HHS/CDC/NIOSH mission.

The scope of the LMRC will include multi-divisional/office issues raised by either party regarding matters involving personnel policies, practices, and general working conditions. Upon

⁷ Pet. at 6; Provisions at 1.

⁸ Pet. at 8; Provisions at 1.

⁹ Pet. at 9; Provisions at 2.

mutual agreement, the scope of issues addressed by the LMRC may be expanded on a case-by-case basis, which may include the establishment of standing or ad hoc subcommittees.

SECTION 2.

Membership of the LMRC shall include the President of AFGE Local 3430, the Employer CBO, management representatives from each Division/Office appointed by the Director, NIOSH or designee, and up to an equal number of Union representatives appointed by AFGE Local 3430. The Employer will provide a recorder for the LMRC.

SECTION 3.

Employees are encouraged to communicate ideas, concerns, issues, etc., to the LMRC.

SECTION 4.

The LMRC will meet quarterly or as needed. Decisions and recommendations will be reached through a unanimous decision of the committee.¹⁰

G. Provision 7

Article 10, Section 1

Parties agree that new employee orientation is important and beneficial for new employees. When new employee orientation is conducted by the Employer, the Union will be provided up to thirty (30) minutes to present information concerning representation and the Agreement. Official time will be granted for up to two Union Officials for the purpose of new employee orientation.¹¹

H. Provision 8

Article 13, Section 1

The Parties commit to the development and maintenance of a strong incentive awards program and processes for employee recognition. It is recognized that the use of both monetary and non-monetary awards has a significant effect on employee morale, motivation, and performance. This effort is intended to provide recognition based on employee achievements that contribute to NIOSH's mission. Awards and recognition are used to reward superior accomplishments and encourage exceptional performance.

Employee empowerment and teamwork are critical components in achieving the NIOSH mission. The Employee Recognition and Awards Program will not only recognize individual employee accomplishments, but promote the recognition of accomplishments of employees as members of teams. This Program is designed to promote a positive work environment, emphasizing teamwork, partnership, and cooperation.

The Parties recognize that there is a need to move toward a more positive employee recognition and awards program that encourages and applauds the successful efforts of individuals, teams, and groups. The LMRC will continue to examine opportunities for improving the Employee Recognition and Awards Program.

The parties recognize that the Agency budget must be considered in the granting of monetary awards. The number and frequency of awards an individual employee may receive is limited only by statute. Award amounts for suggestions, inventions, special acts or services, and patents are based on established HHS guidelines which describe the tangible or intangible benefits to the Agency.¹²

¹⁰ Pet. at 10; Provisions at 2-3.

¹¹ Pet. at 12; Provisions at 3.

¹² Pet. at 13; Provisions at 3.

I. Provision 9

Article 18, Section 10

Except as hereinafter provided, the employer may require the employee to furnish a medical certificate to substantiate requests for sick leave that exceed three consecutive work days. The Employer may consider an employee's written self-certification as to the reason for his or her absence as administratively acceptable evidence, regardless of the duration of the absence. The supervisor may require the employee to furnish a medical certificate for each absence which the employee claims was due to illness, injury or other incapacitation for duty, on the following basis in accordance with the following procedures:

A) There is a pattern of unscheduled sick and/or annual leave or there is other reasonable evidence that the employee has abused leave privileges.

B) The supervisor has counseled the employee with respect to the use of sick leave, a record of such counseling is on file, and the employee has been given written notice that he/she must furnish a medical certificate for each absence which he/she claims was due to illness, injury, or other incapacitation for duty.

C) The requirement for medical certification will be discontinued, and written notification will be destroyed, when improvement has been reasonably demonstrated, at the discretion of the supervisor.¹³

J. Provision 10

Article 18, Section 11,
Subsection G.1¹⁴

For participation in preventive health screenings, including, but not limited to, screening for prostate, cervical, colorectal, or breast cancers, sickle cell

anemia, blood lead level, blood cholesterol level, immunity system disorders such as HIV, and blood sugar level testing for diabetes.

1) Up to four (4) hours of excused absence each leave year may be approved for employees with less than 80 hours of sick leave. Employees may request annual leave, sick leave, or leave without pay when more than four hours of administrative leave is needed;¹⁵

K. Provision 11

Article 22, Section 3

All employees are eligible, including retired personnel whose last place of U.S. Government employment was NIOSH Morgantown. Membership is voluntary.

The Employer will provide the AWRA with reasonable amounts of space as may be required for business operations. The Employer may authorize the use of duty time by officers and the members of the governing bodies of the AWRA for conducting association business in accordance with the following standards:

H) Use of duty time for conducting association business must not interfere with the proper performance of the employee's regular duties.

I) Use of duty time will be confined to matters that cannot reasonably be taken care of outside official hours.¹⁶

L. Provision 12

Article 23 Section 4

The NIOSH Diversity and Inclusion Committees support and promote a work environment that fosters appreciation and mutual respect for each and every employee. The diversity goals include improving

¹³ Pet. at 15; Provisions at 4.

¹⁴ At the post-petition conference, the parties clarified that subsection G.1 is in dispute. Record of Post-Pet. Conference at 4.

¹⁵ Pet. at 16; Provisions at 4-5.

¹⁶ Pet. at 17; Provisions at 5.

recruitment, mentoring and retention of a diverse population of employees, supervisors and managers. These goals may be realized through promotion of better understanding and acceptance of diverse values and enhancement of personal commitment and accountability.

The Committees will advise and recommend to the Employer actions to improve issues related to working conditions, practices, and policies to support fairness of opportunity in all aspects of employment.

The Committees will work to increase awareness and effectiveness of diversity and EEO programs and supporting activities.

The Union will be provided the opportunity to have representation on the Morgantown Committees.¹⁷

M. Provision 13

Article 27, Section 4

When the Agency anticipates re-contracting of any work or contracting out of work presently being performed by bargaining unit employees, the Union will be notified when the Agency approves that a study be conducted. The notice will include all relevant and pertinent data and information that are not prohibited from disclosure.

The Union will be supplied with all information developed by the Employer as part of the contracting out process, and that is supplied by prospective contractors, which is not prohibited from disclosure. Upon request, [t]he Union will be provided the time and date of bid pre-proposal conference and allowed to participate as an observer in the conference, unless prohibited by law or regulation.¹⁸

N. Provision 14

Article 28, Section 4

In the event of a RIF at NIOSH Morgantown, employees receiving notice have the right to review retention lists pertaining to all positions related to their case. Upon request, all the retention lists and the staffing lists will be given to the President of the Union or designee. If a separation is to occur, or upon request, the Union will be given information to update their copy of the retention list prior to the effective date of separation. Affected Unit employees will have the right to the assistance of the Union when reviewing such lists or records.¹⁹

O. Provision 15

Article 28, Section 5

In the event of a RIF, the Employer agrees to freeze the filling of all vacancies in the occupational series and grades of affected employees until the RIF has been completed.

The Employer will seriously consider waiving qualification requirements in assignments during a RIF when an affected employee has the capability, adaptability, and special skills required by the position.²⁰

P. Provision 16

Article 28, Section 11

In the event of a RIF, it is the intent of the Employer that the work load shall not be disproportionately increased for any group of employees (professionals, technical, or clerical).²¹

IV. Analysis and Conclusions

After an exclusive representative files a petition for review, the agency must file its statement, in which it must, "among other things, . . . supply all arguments and

¹⁷ Pet. at 19; Provisions at 5-6.

¹⁸ Pet. at 20; Provisions at 6.

¹⁹ Pet. at 21; Provisions at 6.

²⁰ Pet. at 22; Provisions at 6.

²¹ Pet. at 23; Provisions at 6.

authorities in support of its position.”²² In addition, an agency “has the burden of raising and supporting arguments that the . . . provision is . . . contrary to law.”²³ The Authority has found that agencies fail to meet their regulatory burden when they merely cite a law or regulation without explaining how a particular proposal or provision conflicts with that law or regulation.²⁴ Additionally, an agency’s “[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument.”²⁵

Here, the Agency’s statement cites no authority and provides no arguments supporting its position that the provisions are contrary to law.²⁶ The Agency’s statement merely claims, without elaboration, that “the provisions are contrary to law, rule, or regulation.”²⁷ Therefore, we conclude that the Agency failed to support its argument and has waived its argument that the provisions are contrary to law.²⁸

V. Decision

We grant the Union’s petition and order the Agency to rescind its disapproval of the sixteen disputed provisions.

Member Abbott, concurring:

It is confounding to me that the Agency would declare numerous proposed articles to be contrary to law upon Agency-head review and then fail to provide any support whatsoever to the Authority for its position in its response to the Union’s petition for review. Machinations of this nature do not “contribute[] to the effective conduct of public business,”¹ or “facilitate[] . . . the amicable settlement[] of disputes.”²

Although it is apparent to me that substantial portions of at least eight of the proposed articles raise serious questions concerning the legal viability of the provisions, as I have noted before, the Authority cannot salvage arguments that are argued poorly, presented insufficiently, or are not supported at all.³

It is reasonable, then, to question exactly what purpose was served by the Agency-head disapproval under these circumstances. Whatever was the purpose, it most certainly delayed consensus on a new agreement, forced the Union to utilize even more official time, and will not further positive relations going forward.

²² 5 C.F.R. § 2424.24(a); *see id.* § 2424.24(c)(2).

²³ *Id.* § 2424.32(b).

²⁴ *AFGE, Local 940*, 71 FLRA 415, 415 (2019) (citing *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 128 & n.7 (2011); *AFGE, Local 1547*, 65 FLRA 911, 913 (2011), *pet. for review denied sub nom. U.S. Dep’t of the Air Force, Luke Air Force Base v. FLRA*, 680 F.3d 826 (D.C. Cir. 2012); *AFGE, Local 1367*, 64 FLRA 869, 875 (2010)).

²⁵ 5 C.F.R. § 2424.32(c)(1).

²⁶ The Agency asserts in its statement that the parties’ ground-rules agreement requires the parties to return to the bargaining table in the event of Agency-head disapproval of any provisions. Statement at 1. However, the parties’ contractual obligations do not raise an argument that the provisions are contrary to law.

²⁷ *Id.* at 2. The Agency also failed to provide any explanation in its letter disapproving the provisions. Disapproval at 1. Therefore, the Agency has provided no arguments for the Authority to consider in determining whether the provisions are contrary to law. *See NTEU, Chapter 213 & 228*, 32 FLRA 578, 579 n.1 (1988) (relying on arguments set forth in the agency’s disapproval of the agreement where agency failed to file a statement of position).

²⁸ 5 C.F.R. § 2424.32(c)(1); *see NAIL, Local 7*, 67 FLRA 654, 658-59 (2014) (Member Pizzella concurring, in part, and dissenting, in part) (finding agency failed to support argument that provision was contrary to law and directing agency to rescind disapproval of the provision).

¹ 5 U.S.C. § 7101(a)(1)(B).

² *Id.* § 7101(a)(1)(C).

³ *See U.S. Dep’t of HHS, Office of Medicare Hearings & Appeals*, 71 FLRA 677, 680 (2020) (Member Abbott concurring; Chairman Kiko dissenting) (Concurring Opinion of Member Abbott) (agency argument fails because it “did not provide a particular reason for [its actions]”); *U.S. Dep’t of the Air Force, Pope Air Force Base*, 71 FLRA 338, 340, 342 (2019) (Member DuBester concurring) (emphasizing that the agency arguments failed because it “neglected to provide . . . a copy of the billing records which it alleges were inadequate” and failed to identify the “explicit, well-defined . . . policy” that was purportedly violated by the award”); *U.S. Dep’t of VA, Malcolm Randall VA Med. Ctr., Gainesville, Fla.*, 71 FLRA 170, 172 (2019) (Dissenting Opinion of Member Abbott) (noting that it is not the role of the Authority to save parties “from poor choices they make at the bargaining table”).