

**71 FLRA No. 216**

INTERNATIONAL FEDERATION  
OF PROFESSIONAL AND  
TECHNICAL ENGINEERS  
LOCAL 4, CHAPTER 1  
(Union)

and

UNITED STATES  
DEPARTMENT OF THE ARMY  
U.S. ARMY ENGINEER RESEARCH AND  
DEVELOPMENT CENTER  
COLD REGIONS  
RESEARCH ENGINEERING LABORATORY  
HANOVER, NEW HAMPSHIRE  
(Agency)

0-NG-3450

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DECISION AND ORDER  
ON NEGOTIABILITY ISSUE

November 20, 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**

In this case, we consider the negotiability of a proposal that would require the Agency to consider a broad range of performance-based elements when determining which employees will be separated in a reduction in force (RIF). The Agency argues that the Union's proposal is non-negotiable under 10 U.S.C. § 1597(e) because the Agency has sole and exclusive discretion to establish procedures for using performance as the primary factor in determining which employees will be separated in a RIF, and that the Union's proposal is otherwise both contrary to law and regulation.

For the reasons discussed below, we find that the Agency failed to establish that it has sole and exclusive discretion over the matter. Additionally, we find that the Agency failed to establish that the proposal conflicts with law or regulation. As a result, we find that the proposal is within the duty to bargain and we grant the Union's petition.

**II. Background**

The National Defense Authorization Act for Fiscal Year 2016 (the Act), effective December 25, 2015, added a new provision to Section 1597 of Title 10 of the United States Code (§ 1597(e)) that stated:

The Secretary of Defense shall establish procedures to provide that, in implementing any [RIF] for civilian positions in the Department of Defense in the competitive service or the excepted service, the determination of which employees shall be separated from employment in the Department shall be made primarily on the basis of performance, as determined under any applicable performance management system.<sup>1</sup>

A RIF refers to the process that a federal agency can initiate, upon certain circumstances, to eliminate positions within the agency. On January 17, 2017, the Deputy Secretary of Defense issued a memorandum with guidance on new RIF policies and procedures. Included in the new policy was a provision addressing how ratings of record (performance ratings) would be established for RIF purposes, in order to make retention decisions. The provision stated, in relevant part, that: "An employee's rating of record is the average of the ratings of record drawn from the two most recent performance appraisals received by the employee within the four-year period preceding the 'cutoff date' established for the RIF."<sup>2</sup>

The parties began negotiating over the new RIF policy in April 2017 and engaged in negotiations for over two years. During negotiations, the Union submitted a proposal that would require the Agency to consider a broader range of long-term performance elements in addition to the two most recent annual performance appraisals in order to determine the rating of record.

On May 8, 2019, the Agency served an allegation of non-negotiability on the Union, contending that the proposal was non-negotiable. The Union then timely filed a negotiability petition for review (petition) with the Authority and the Agency subsequently filed a

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<sup>1</sup> Pub. L. No. 114-92, § 1101(f) (2015); 10 U.S.C. § 1597(e). Section 1101 of the Act originally amended § 1597 of Title 10 of the United States Code by adding a new subsection "(f)," but it was later re-designated as subsection "(e)."

<sup>2</sup> Pet., Attach. 5, 2017 DOD RIF Policy at 4.

statement of position (statement). Thereafter, an Authority representative conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority's Regulations,<sup>3</sup> and the Union then filed a response to the Agency's statement (response).

### III. The Proposal

#### A. Wording<sup>4</sup>

##### Proposal to Recognize Long-Term Performance

1. The Rating of Record, which is used throughout the RIF policy for retaining employees primarily based on performance, shall be modified to recognize long-term performance. Specifically, the following numerical adjustments shall be made to each employee's Rating of Record. The adjustments are cumulative:

- a. Add 2.0 if employee successfully passes probationary period.
- b. Add 0.2 for each annual performance evaluation of fully successful (or equivalent, e.g., "meets expectations") or higher prior to the Rating-of-Record period.
- c. Add 1.0 for each annual performance evaluation of exceeds expectations (or the equivalent category of highest-possible evaluation) prior to the Rating-of-Record period.
- d. Add 2.0 for each performance-based promotion, including promotions based on peer-review panels (Research Grade Evaluation Guide, Equipment Development Grade Evaluation Guide) and accretion of duties.
- e. Add 1.0 for each competitively awarded annual Award.

<sup>3</sup> 5 C.F.R. § 2424.23.

<sup>4</sup> The language of the original proposal included a "Principles" section explaining the rationale behind the proposal. Pet., Attach 2. However, the record of the PPC states that at the conference, "the Union requested, and the Agency did not oppose, the request to sever the 'Principles' section of the original proposal into a separate proposal. The Agency did not dispute the negotiability of the newly created 'Principles' proposal, and the Union agreed to withdraw that proposal from its petition. Thus, the negotiability dispute before the Authority concerns the remaining proposal, which is titled 'Proposal to Recognize Long-Term Performance.'" PPC Record (Record) at 1-2. The Union recognized as such in its response to the Agency's statement of position. Resp. at 2 n.1 ("During the [PPC] of 23 July 2019, the Union agreed to sever the Principles portion of its proposal from its Proposal to Recognize Long-Term Performance"). Thus, we only review the language of the proposal titled "Proposal to Recognize Long-Term Performance."

#### B. Meaning

At the PPC, the Union explained that any points an employee earns under subparts (a) through (e) of the proposal would be totaled together and added to the employee's Rating-of-Record score under the RIF policy, which is currently the average score of the employee's two most recent annual performance ratings.<sup>5</sup> The Union stated that the numerical adjustments under subparts (a) through (e) are independent of the annual performance ratings and are not intended to change those ratings.<sup>6</sup> The Union explained that the proposal is intended to incorporate employees' long-term performance into the rating of record to ensure that the highest performing employees are retained during a RIF.<sup>7</sup> The Agency agreed with the Union's explanation of the meaning and operation of the proposal.<sup>8</sup>

#### C. Analysis and Conclusions

1. The Act does not give the Agency sole and exclusive discretion.

The Agency argues that the Union's proposal is non-negotiable because the plain language of § 1597(e) and the legislative history of the Act demonstrate that the Agency has sole and exclusive discretion to establish the procedures for using performance as the primary factor in determining which employees will be separated in a RIF.<sup>9</sup> When analyzing an agency's claim that a matter is not negotiable because it possesses sole and exclusive discretion to act concerning that matter, the Authority looks at the plain wording and legislative history of the statute in question.<sup>10</sup> While unfettered discretion is typically indicated by such phrases as "notwithstanding any law" or "without regard to the provisions of other laws," such a signal is not required and the entire wording of the legislation must be considered.<sup>11</sup> In the absence of any indication that Congress intended the agency's discretion to be sole and

<sup>5</sup> Record at 2.

<sup>6</sup> *Id.* at 2-3.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 3.

<sup>9</sup> Statement at 4-5.

<sup>10</sup> *NTEU*, 71 FLRA 703, 705 (2020) (*NTEU*) (Member DuBester dissenting in part) (citing *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1402 (D.C. Cir. 1988); *NAGE, Local R5-136*, 56 FLRA 346, 348 (2000); *Ass'n of Civilian Technicians, Mile High Chapter*, 53 FLRA 1408, 1412 (1998)).

<sup>11</sup> *NTEU*, 71 FLRA at 705 (citing *U.S. Dep't of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957, 961-63 (D.C. Cir. 2016)).

exclusive, the exercise of discretion through collective bargaining is consistent with law.<sup>12</sup>

Here, we find nothing in the plain language of the Act prohibiting the Agency from negotiating with the Union over its procedures for using performance as the primary factor in determining which employees will be separated in a RIF. Section 1597(e) merely states that “[t]he Secretary of Defense shall establish” these procedures.<sup>13</sup> This simply requires the Secretary of Defense to establish the procedures; however, there is no word or phrase evoking unfettered discretion over those procedures that would support a conclusion that the Agency has sole and exclusive discretion.<sup>14</sup>

In addition, we disagree with the Agency that the legislative history of the Act indicates that Congress intended to provide the Agency with sole and exclusive discretion. The Agency points out that the subsection immediately following the subsection at issue here states that “[i]t is the sense of Congress that the Secretary of Defense should proceed with the collaborative work with employee representatives on the ‘New Beginnings’ performance management and workforce incentive system authorized under section 1113 of the National Defense Authorization Act for Fiscal year 2010.”<sup>15</sup> The Agency argues that if Congress had intended for the Agency to engage in collective bargaining regarding the establishment of the RIF procedures for using performance as the primary basis for retention, “it would have said so,” and that the difference in language of these two subsections shows that “Congress was conscious of the distinction between giving the Secretary exclusive authority” and requiring him to collaborate with employee representatives.<sup>16</sup> We do not agree that Congress, in directing the Agency to collaborate with employee representatives on a matter the Agency pointed out is “unrelated”<sup>17</sup> to the RIF policy at issue here, intended by the absence of such a direction in a separate provision to give the Secretary sole and exclusive discretion over establishing the RIF procedures. Furthermore, we do not find any language in the legislative history specifically regarding the provision here indicating that Congress intended the Agency to have exclusive authority over the RIF procedures.<sup>18</sup> Thus, we find nothing in the legislative history of the Act indicating that Congress intended to give the Agency sole and exclusive discretion.<sup>19</sup> Consequently, we find that the Agency has failed to demonstrate that the proposal is

<sup>12</sup> *Id.* (citing *POPA*, 53 FLRA 625, 648 (1997); *IAMAW, Franklin Lodge No. 2135*, 50 FLRA 677, 692 (1995); *NAGE*, 43 FLRA 1008, 1009-10 (1992)).

<sup>13</sup> 10 U.S.C. § 1597(e).

<sup>14</sup> See *NTEU*, 71 FLRA at 705. Compare *id.* (finding that the Agency did *not* have sole and exclusive discretion where the legislation stated, in part, that “the head of each executive agency shall – establish a policy under which eligible employees of the agency may be authorized to telework”) (emphasis added), with *AFGE, Local 3295*, 47 FLRA 884, 894-96 (1993) (finding that the Agency had sole and exclusive discretion where the legislation stated: “The Director shall fix the compensation and number of, and appoint and direct, all employees of the [agency] notwithstanding section 301(f)(1) of Title 31. Such compensation shall be paid *without regard to the provisions of other laws applicable* to officers or employees of the United States.”) (emphasis added), and *U.S. DHS, Border & Transp. Sec. Directorate, Transp. Sec. Admin.*, 59 FLRA 423, 423-24, 428 (2003) (finding sole and exclusive discretion where the legislation stated: “*Notwithstanding any other provision of law*, the [head of the Agency] may employ, appoint, discipline, terminate, and fix the compensation, terms, and conditions of employment of Federal service . . . as [he or she] determines to be necessary to carry out . . . section 44901 of [T]itle 49, [U.S.C.]”) (emphasis added).

<sup>15</sup> Statement at 5 (quoting Pub. L. No. 114-92, § 1101(b) (2015)).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2 (the Agency stated that “‘New Beginnings’ contains a performance management program . . . which was jointly developed with the labor unions . . . [and] is unrelated to the [RIF] policy at the heart of the instant dispute”).

<sup>18</sup> See *NTEU*, 71 FLRA at 706 (finding that the legislative history at issue did not indicate that Congress intended to provide the agency with sole and exclusive discretion after contrasting it with a case where a House Report emphasized that that a particular matter was within the “*exclusive authority*” of the Agency) (citing *NTEU*, 59 FLRA 815, 817-18 (2004) (Member Pope dissenting) (emphasis added)).

<sup>19</sup> See generally *NTEU*, 71 FLRA 808, 811 (2020) (Member DuBester concurring) (finding a proposal within the duty to bargain in part because the legislative history of the law and regulations at issue did not demonstrate any intent to give agencies sole and exclusive authority over defining an official duty station for travel compensation); *NTEU*, 71 FLRA at 706 (finding that the legislative history of the law at issue did not indicate that Congress intended to provide the agency with sole and exclusive discretion).

outside the duty to bargain because it has sole and exclusive discretion.<sup>20</sup>

2. The proposal does not conflict with § 1597(e).

The Agency argues that the proposal conflicts with § 1597(e)<sup>21</sup> because it is “inconsistent with the law’s requirement that performance be the primary determination for which employees will be separated in a RIF.”<sup>22</sup> Specifically, the Agency argues that although the Union’s proposal is “couched” in performance terms, it gives greater significance to longevity than performance in determining employee retention.<sup>23</sup>

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<sup>20</sup> The Agency also argues that it issued a February 2017 Reference Guide interpreting § 1597(e) as granting the Secretary sole and exclusive discretion and that its interpretation is due deference. Statement at 5. In the guidance, the Agency states that “it interprets 10 U.S.C. § 1597(f) as granting the Secretary sole discretion to develop the procedures for establishing performance as the primary basis for determining retention in RIF throughout the [Department of Defense (DOD)] and its [c]omponents.” *Id.*; see also *id.* Attach. 6, Reference Guide at 3. The U.S. Court of Appeals for the D.C. Circuit has emphasized that the Authority owes deference to another agency’s interpretation of a statute that that agency administers. *Laborers Int’l Union of N. Am.*, 70 FLRA 392, 394 (2018) (Member DuBester dissenting) (citing *U.S. Dep’t of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base v. FLRA*, 648 F.3d 841 (D.C. Cir. 2011); *U.S. Dep’t of the Air Force, Luke Air Force Base v. FLRA*, 844 F.3d 957, 961 (D.C. Cir. 2016) (*Luke AFB*) (holding that the Secretary of Defense had sole and exclusive discretion over access to commissaries and exchanges because the regulation governing such access gave the Department of Defense the *exclusive* right to operate them, meaning that Congress gave the military *unfettered discretion* to determine who may patronize them)). However, unlike *Luke AFB* cited above, there is nothing in the plain language of the statute or legislative history here indicating Congress intended the Agency to have *unfettered discretion* over establishing RIF procedures regarding performance that would support the Agency’s interpretation, and the Agency may not simply give itself sole and exclusive discretion. Furthermore, we note that unlike *Luke AFB*, this case does not touch on a matter of internal military governance where we must be careful not to second-guess the Secretary’s judgment on how best to achieve military purposes. See *Luke AFB*, 844 F.3d at 961. Consequently, because the Agency’s interpretation of § 1597(e) lacks support in the statutory wording, and because there is nothing else to support the Agency’s interpretation, we do not find it persuasive and reject the Agency’s argument.

<sup>21</sup> Under § 7117(a) of the Statute, proposals are non-negotiable if they are inconsistent with any Federal law. 5 U.S.C. § 7117(a).

<sup>22</sup> Statement. at 7 (emphasis omitted).

<sup>23</sup> *Id.*

Under the Union’s proposal, additional points would be added to an employee’s rating of record for: successfully passing the probationary period, fully successful annual performance evaluations, exceeds expectations annual performance evaluations, performance-based promotions, and for competitively awarded annual awards.<sup>24</sup> All of these elements are directly performance-based. The Agency contends that the proposal is inconsistent with § 1597(e) because an employee would be awarded points for simply passing a probationary period “without distinction to any degree of success by the employee” and because the proposal does not consider the recency of an employee’s performance evaluations or competitively awarded annual awards.<sup>25</sup> With regard to the Agency’s first point, any employee who passes a probationary period has reached an Agency standard of successful performance. Therefore, awarding points for passing the probationary period would be directly related to performance. As to the Agency’s second point, the plain language of § 1597(e) does not require the Agency to make its determination of which employees will be separated in a RIF based on the *recency* of their performance. Rather, performance must generally be the primary determination. Here, the Union’s proposal would only require the Agency to look at additional performance elements in addition to the two most recent performance appraisals. Although, as the Agency argues, an employee with a longer length of service may earn more points under the proposal, those points would only be awarded if the employee had performed successfully.<sup>26</sup> Section § 1597(e) requires that determinations regarding who will be separated in a RIF “shall be made *primarily* on the basis of performance.”<sup>27</sup> The Union’s proposal primarily concerns employee performance, and any impact by longevity is incidental to the fact that each element of the proposal is directly performance-based. Consequently, we find that the

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<sup>24</sup> Pet. at 4.

<sup>25</sup> Statement at 7.

<sup>26</sup> We note that although the Agency provided an example attempting to show how “longevity gains greater significance to the determinant of performance,” in which a less-successful thirty-year employee would receive more points than a more-successful five-year employee under the Union’s proposal, it failed to consider the average score of the employees’ two most recent annual performance ratings under its current policy. Statement at 7. As the Union points out, taking this into account, under the Agency’s example, the higher-performing five-year employee would still receive more points. Resp. at 10.

<sup>27</sup> 10 U.S.C. § 1597(e) (emphasis added).

Agency has failed to demonstrate that the proposal is contrary to § 1597(e).<sup>28</sup>

3. The proposal does not conflict with a government-wide regulation.

The Agency argues that the proposal conflicts with 5 C.F.R. § 351.201(c),<sup>29</sup> which provides that “[e]ach agency is responsible for assuring that the provisions in this part are uniformly and consistently applied in any one [RIF].”<sup>30</sup> The Agency contends that the Union’s proposal conflicts with this regulation because “[n]ormally, any change to the procedures used in conducting a RIF impacting bargaining unit employees would necessarily have to be equally and consistently applied to supervisors – positions covered within the RIF competitive area, but specifically excluded from coverage under the Statute and contract negotiations.”<sup>31</sup>

It is well established that the duty to bargain does not extend to matters concerning positions and employees outside the bargaining unit.<sup>32</sup> Here, the Agency’s argument that the proposal is non-negotiable because it would “directly impact supervisors and possibly other non-bargaining unit employees”<sup>33</sup> is wholly unpersuasive because the Agency admits that “[i]n this particular case, the competitive area for [a] RIF currently includes only unit employees; all non-unit employees are . . . in their own competitive area.”<sup>34</sup> Thus, the Agency concedes that only bargaining-unit

employees – not supervisors or non-bargaining unit employees – would be impacted by the Union’s proposal in any one RIF.<sup>35</sup> As a result, and because the Agency fails to put forth any other argument showing how the Union’s proposal would otherwise require it to treat employees in a single competitive area inconsistently in the event of a RIF, the Union’s proposal does not conflict with 5 C.F.R. § 351.201(c).<sup>36</sup>

<sup>28</sup> See generally *Ass’n of Civilian Technicians, Mont. Chapter No. 29*, 56 FLRA 674, 675-78 (2000) (finding a proposal setting out the order in which employee names would be placed on retention registers to be within the duty to bargain and rejecting the agency’s argument that the proposal would establish a seniority-based retention system and conflict with the regulation establishing retention standing based on performance alone); *AFGE*, 11 FLRA 261, 261-62 (1983) (finding a proposal concerning competitive areas to be used in the event of a RIF to be within the duty to bargain); *Ass’n of Civilian Technicians, Pa. State Council*, 3 FLRA 49, 54 (1980) (holding that a proposal regarding RIF procedures and retention standings did not conflict with a regulation and was within the duty to bargain).

<sup>29</sup> Under § 7117(a) of the Statute, proposals are non-negotiable if they are inconsistent with government-wide rules or regulations. 5 U.S.C. § 7117(a).

<sup>30</sup> 5 C.F.R. § 351.201(c).

<sup>31</sup> Statement at 6.

<sup>32</sup> *NFFE, Local 1379*, 15 FLRA 796, 797 (1984) (*Local 1379*) (citing *IFPTE, AFL-CIO, NASA Headquarters Prof’l Ass’n*, 8 FLRA 212 (1982)). Under the Statute, the term “employee” expressly excludes supervisory and management personnel. 5 U.S.C. § 7103(a)(2)(B)(iii). Additionally, supervisors and managers may not be included in any bargaining unit found appropriate under the Statute. 5 U.S.C. § 7112(b)(1).

<sup>33</sup> Statement at 7.

<sup>34</sup> *Id.* at 6.

<sup>35</sup> Compare *NFFE, Local 29*, 21 FLRA 298, 301 (1986) (discussing 5 C.F.R. § 351.201(c) and finding a proposal negotiable where the agency did not claim that the competitive area encompassing the bargaining unit at issue also included positions and employees who were not within the bargaining unit) with *Prof’l Airways Sys. Specialists District No. 6, PASS/NMEBA*, 54 FLRA 1130 (1998) (finding that the proposals would directly determine the conditions of employment of managers and, therefore, were outside the duty to bargain) and *Local 1379*, 15 FLRA at 797 (finding that the proposal by its plain language would directly determine conditions of employment of employees not within the bargaining unit and was thus outside the duty to bargain).

<sup>36</sup> See generally *NAIL, Local 7*, 67 FLRA 654, 658 (2014) (Member Pizzella concurring in part, and dissenting in part) (holding that the agency failed to establish that a provision conflicted with a government-wide regulation); *AFGE, Council of Meat Grading Locals, AFL-CIO*, 22 FLRA 388, 392-93 (1986) (rejecting the agency’s assertions that the provisions were inconsistent with government-wide regulations). The Agency also briefly asserts that the Authority should find the Union’s proposal non-negotiable to “ensure consistency across the Department” and because by not doing so, “the Authority will create disparities that make the law and regulation meaningless; each bargaining unit in these circumstances would decide how the law and the [DOD] policy applies to their employees.” Statement at 6. Although the Agency may wish that each bargaining unit had the same agreements and policies, such an allegation fails to explain why the Union’s proposal conflicts with 5 C.F.R. § 351.201(c) or is otherwise contrary to law. Section 2424.32 of the Authority’s Regulations states that agencies have “the burden of . . . supporting arguments that [a] proposal . . . is outside the duty to bargain,” and a failure to support an argument will “be deemed a waiver of such argument.” 5 C.F.R. §§ 2424.32(b), (c)(1). We find that the Agency failed to support this argument.

**IV. Decision**

We grant the Union's petition<sup>37</sup> and order the Agency to bargain, upon request, over the proposal.<sup>38</sup>

**Member DuBester, concurring:**

I agree with the Decision granting the Union's petition and ordering the Agency to bargain, upon request, over the proposal at issue.

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<sup>37</sup> In finding the proposal within the duty to bargain, the Authority makes no judgment as to its merits. *E.g.*, *NAIL, Local 5*, 67 FLRA 85, 92 n.11 (2012). In other words, the Authority will not decide whether the parties should agree to the proposal.

<sup>38</sup> Member Abbott emphasizes that, although the Agency failed to put forth any successful argument as to the proposal's non-negotiability in this case, RIF processes are intended to be uniform and predictable. Such intention is evidenced in the strict and detailed regulatory requirements governing RIFs contained in Title 5 of the Code of Federal Regulations at Part 351, which most federal agencies must follow when conducting a RIF. Although the case here presents a unique situation where the Agency was directed to establish its own procedure, at least in part, RIF processes in general were not designed for clever parties to adapt as they see fit. However, as the Agency failed to raise a number of other arguments that could have been successful, this is the outcome we are left with.