72 FLRA No. 73

FRATERNAL ORDER OF POLICE
DC LODGE 1
NDW LABOR COMMITTEE
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY
(Agency)

0-NG-3473

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

June 24, 2021

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

I. Statement of the Case

The Union filed a petition seeking review of one proposal concerning the chain of command for the Agency's bargaining-unit civilian police officers. Because we find that the proposal affects management's rights to determine its organization under § 7106(a)(1) and assign work under § 7106(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute),[1] and the Union has not demonstrated that the proposal is negotiable under § 7106(b)(2) or (3) of the Statute,[2] the proposal is outside the duty to bargain. Accordingly, we dismiss the petition.

II. Background

During negotiations over a new collective-bargaining agreement, the parties disputed the negotiability of one proposal. The Union requested a written allegation of non-negotiability, which the Agency provided on December 5, 2019. The Union then timely filed its petition.

The Authority conducted a post-petition conference (conference) and issued a written record of that conference (record). The Agency then filed a statement of position (statement). The Union filed a response to the Agency's statement (response) and the Agency filed a reply to the Union's response (reply).

III. Proposal 1

A. Wording

> Article 1, Section 01.03. For purposes of this agreement, the Employer is defined as any element of CNRNDW[3] within the chain of command, who exercises direct or indirect supervision over members of the bargaining unit. The chain of command for the civilian police force Series 0083 is Lieutenant Series 0083, Captain Series 0083, Major Series 0083 and ends at the Chief of Police Series 0083 for all precincts.[4]

B. Severance

In its response, the Union requests severance of the first sentence because the dispute only concerns the second sentence which sets forth the chain of command for civilian police officers.[5] Under § 2424.25(d) of the Authority's Regulations, a union must support its severance request with "an explanation of how the severed portion of the proposal . . . may stand alone, and how such severed portion would operate."[6] If the severance request meets the Authority's regulatory requirements, then the Authority severs the proposal and rules on the negotiability of its separate components.[7] Generally, the Authority will grant a severance request if the request provides an explanation of how each severed portion may stand alone and operate independently.[8]

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[1] 5 U.S.C. § 7106(a).
[2] *Id.* § 7106(b)(2), (3).

[3] The Union explained that "CNRNDW" means the "Commander, Naval District Washington." Record at 2. The Agency stated that the acronym stands for "Commandant [V]ice Commander, Navy Region Naval District Washington." Statement Br. at 6 & n.1. Because the parties agree that this sentence is not in dispute, we find it unnecessary to address the parties' differing explanations.
[4] Pet. at 4. The record states that "0083" refers to the U.S. Office of Personnel Management police officer job series. Record at 2.
[5] Resp. Form at 4-5; *see also* Record at 2 (parties "agreed that the first sentence of the proposal was negotiable").
[6] 5 C.F.R. § 2424.25(d); *NATCA*, 64 FLRA 161, 162 (2009) (citing *Tidewater Va. Fed. Emps. Metal Trades Council*, 58 FLRA 561, 562 (2003)).
[7] *NATCA*, 64 FLRA at 162 (citing *AFGE, Loc. 3354*, 54 FLRA 807, 811 (1998)).
[8] *Id.* (citing *NATCA*, 61 FLRA 341, 343 (2005)).

Here, the Agency agrees that the second sentence "remains at the heart of the dispute," and does not contest the Union's request for severance "with the understanding that sentence one only broadly defines the meaning of [e]mployer" and has no impact on the Agency's discretion in determining the chain of command for civilian police officers.[9] And the Union's explanation demonstrates that the second sentence may stand alone to establish the police officers' chain of command. Accordingly, we grant the Union's request to sever the first sentence, and we consider only the second sentence of the proposal. Thus, all references to the proposal below refer to the second sentence.

C. Meaning

The parties agree that the proposal limits the chain of command for civilian police officers to civilian employees serving in the listed police officer positions.[10]

D. Analysis and Conclusions: The proposal is outside the duty to bargain.

1. The proposal affects management's rights to determine its organization under § 7106(a)(1) and assign work under § 7106(a)(2)(B) of the Statute.

The Agency argues that the proposal affects management's right to determine the Agency's organization under § 7106(a)(1) of the Statute[11] by prohibiting the Agency from including military personnel in the "organizational chain of command of civilian police officers, thereby impacting the relationship of personnel through lines of authority."[12]

The Authority has held that management's right to determine its organization encompasses the right to determine the administrative and functional structure of the agency, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties.[13] For example, where an arbitrator directed an agency to assign as many supervisors to the midnight shift as it did for other shifts, the Authority found that the award affected the right to determine organization because the award "specifie[d] the nature and scope of the supervisory relationships, or lines of authority, on that shift."[14] Similarly, the Authority has found that proposals requiring an agency to assign each employee to only one supervisor affected management's right to determine organization.[15] Consistent with this precedent, by prohibiting the Agency from structuring its organization to have civilian police officers under military personnel in the chain of command, the proposal affects the "relationship of personnel through lines of authority."[16] Accordingly, we find that the proposal affects management's right to determine organization.[17]

The Agency also argues that the proposal affects management's right to assign work under § 7106(a)(2)(B) of the Statute[18] because it requires the Agency to assign specific positions to perform all supervisory functions for civilian police officers[19] and would prevent the Agency "from assigning tasks[] to any individuals it deems appropriate to meet its mission and function."[20]

The Authority has held that proposals precluding management from assigning supervisory duties to particular supervisors, and requiring assignment of those duties to other supervisors, affects management's right to assign work under § 7106(a)(2)(B).[21] And the Authority has long held that proposals precluding military personnel from supervising civilian bargaining-unit employees directly interfere with management's right to

[9] Reply Br. at 6. The Agency disagreed with the definition of "Employer" as stated in the record. *See* Statement Br. at 7. Because we do not consider the first sentence, and resolving the definition of "Employer" is not necessary to determine the negotiability of the second sentence, we do not address the meaning of "Employer."

[10] Pet. at 4; Statement Br. at 6; Record at 2.

[11] 5 U.S.C. § 7106(a)(1).

[12] Statement Br. at 8-9.

[13] *See U.S. Dep't of Transp., FAA*, 63 FLRA 530, 532 (2009) (*FAA II*); *U.S. Dep't of Transp., FAA*, 58 FLRA 175, 178 (2002) (*FAA I*); *AFGE, Loc. 3529*, 56 FLRA 1049, 1051 n.2 (2001) (*Local 3529*); *AFGE, Loc. 1336*, 52 FLRA 794, 802 (1996); *AFGE, Loc. 3509*, 46 FLRA 1590, 1604-15 (1993).

[14] *FAA I*, 58 FLRA at 178. *But see FAA II*, 63 FLRA at 532 (where the arbitrator did *not* "specify the nature and scope of the supervisory relationships, or lines of authority" the award did not affect the right to determine organization).

[15] *Loc. Lodge 830, IAMAW, AFL-CIO*, 20 FLRA 848, 848-49 (1985); *Nat'l Ass'n of Gov't Inspectors & Quality Assurance Pers., Unit #2*, 8 FLRA 144, 147 (1982) (proposal requiring agency to assign bargaining-unit employees "to only one first line or immediate supervisor" would "require the [a]gency to adopt a certain organizational structure and to organize its workforce in a particular way" thereby affecting the right to determine organization).

[16] *FAA I*, 58 FLRA at 178.

[17] Chairman DuBester notes that under the plain wording of the proposal and the Union's explanation of how the proposal would operate, the proposal would require the Agency to establish a specific chain of command for civilian police officers using only the stated positions in the listed job series. Further, the proposal would preclude the Agency from structuring the supervisory personnel in any other way. Under these particular circumstances, he agrees that the proposal affects the Agency's right to determine its organization.

[18] 5 U.S.C. § 7106(a)(2)(B).

[19] Statement Br. at 9.

[20] *Id.* at 10.

[21] *Local 3529*, 56 FLRA at 1050.

assign work.[22] Here, the proposal would preclude the Agency from assigning military supervisors to supervise civilian police officers and would require that those duties be assigned to specific civilian employees. Thus, we find that the proposal also affects management's right to assign work.[23]

2. The Union fails to show that the proposal constitutes an exception to the affected management rights.

In its response, the Union asserts that the proposal constitutes an appropriate arrangement and a negotiable procedure.[24] Under § 2424.25(c)(1) of the Authority's Regulations, a union must set forth its arguments and supporting authorities for any assertion that its proposal constitutes an exception to a management right, including "[w]hether and why the proposal" constitutes a negotiable procedure under § 7106(b)(2), or an appropriate arrangement under § 7106(b)(3).[25]

In determining whether a provision is an appropriate arrangement, the Authority first examines whether the provision is intended as an arrangement for employees adversely affected by the exercise of a management right.[26] To establish that a provision is an arrangement, a union must identify the actual effects, or reasonably foreseeable effects, on employees that flow from the exercise of the management right and how those effects are adverse.[27] Proposals that address speculative or hypothetical concerns do not constitute arrangements.[28]

The Union argues that the proposal is an appropriate arrangement because it "deals with the adverse effects of a management action."[29] According to the Union, "the proposal identifies the distinct criminal and civil liabilit[ies]" to which civilian police officers would be exposed "through the use of untrained[,] unqualified active military personnel."[30] The Union further asserts that the proposal "reaffirms the civilian police force chain of command which would reduce or eliminate the reasonably foreseeable harm" to the civilian police officers.[31]

However, the Union neither establishes that the Agency's use of military supervisory personnel will create an adverse effect on civilian police officers nor provides any evidence that military personnel are untrained or unqualified to supervise civilian employees. And although the Union claims that the Agency "acknowledged" during the conference that its "military personnel *are not qualified* to perform law enforcement duties,"[32] the Agency disputes this claim and the record is devoid of any such acknowledgement.[33]

Moreover, the Union does not demonstrate that foreseeable harm will come to civilian police officers if military personnel supervise them. More specifically, while the Union states that there is a reasonable likelihood that designating military personnel to supervise civilian police officers would subject officers to criminal and civil liabilities, it does not identify those liabilities or explain how that harm will occur.[34]

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[22] *AFGE, AFL-CIO, Loc. 1808*, 30 FLRA 1236, 1251 (1988) (citing *NFFE, Locs. 1707, 1737 & 1708*, 9 FLRA 148, 149 (1982)).
[23] *Id.*
[24] Resp. Form at 3; Resp. Br. at 2.
[25] 5 C.F.R. § 2424.25(c)(1) (ii)(iii).
[26] *AFGE, Loc. 2058*, 68 FLRA 676, 679 (2015) (*Local 2058*) (citing *AFGE, Nat'l Border Patrol Council*, 51 FLRA 1308, 1317 (1996)).
[27] *Id.* (citing *NTEU*, 55 FLRA 1174, 1187 (1999) (*NTEU*)); *Marine Eng'rs' Beneficial Ass'n Dist. No. 1-PCD*, 60 FLRA 828, 831 (2005) (*Marine*) (citing *NTEU*, 55 FLRA at 1187).
[28] *Local 2058*, 68 FLRA at 679-80 (citations omitted); *Marine*, 60 FLRA at 831.
[29] Resp. Br. at 2.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 1.
[33] Reply Br. at 9-10. We note that the Union contends that the military personnel have not met the requirements of Department of Defense (DOD) Instruction 5525.15 in order to supervise civilian law officers, but it does not explain how the instruction has a bearing on whether the proposal is an appropriate arrangement. *See* Resp. Br. at 1. Similarly, the Union cites DOD Directive 5525.5 and the Posse Comitatus Act, 18 U.S.C. § 1385, but does not explain how they are applicable to the negotiability of the proposal. Consequently, we find that the Union's statements fail to support the Union's claim that the proposal constitutes an appropriate arrangement. *See, e.g.*, *Local 2058*, 68 FLRA at 679 (finding union's assertion, standing alone, insufficient to demonstrate that provision is procedure); *AFGE, Loc. 12*, 61 FLRA 209, 218 (2005) (*Local 12*) (finding union failed to demonstrate that proposal was negotiable where union did not provide any argument or Authority precedent to support its assertion).
[34] *E.g.*, *Marine*, 60 FLRA at 831 (finding union's concerns speculative where union did not provide "any evidence that there is any reasonable likelihood that designating a military officer to supervise civilian employees would subject civilian employees to some type of discipline or otherwise adversely affect employees' conditions of employment"); *NFFE, Loc. 2015*, 53 FLRA 967, 974 (1997) (finding union failed to establish that it was reasonably foreseeable that bargaining unit employees would be downgraded as a consequence of agency action where agency denied downgrade may occur and the record did not support union's claim).

Consequently, we conclude that because the proposal addresses speculative concerns,[35] it does not constitute an arrangement within the meaning of § 7106(b)(3) of the Statute.[36] As such, there is no need to address whether the proposal is appropriate.[37]

The Union also claims that the proposal is a procedure, but presents no argument or authority to support this claim.[38] Accordingly, we reject this claim as a bare assertion.[39]

Because the proposal affects management's rights to determine its organization and assign work, and the Union has not established that the proposal is negotiable as an exception to those management rights under § 7106(b)(2) or (3), we find that the proposal is outside the duty to bargain.

IV. Order

We dismiss the petition.

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[35] *E.g.*, *Local 2058*, 68 FLRA at 680 (finding union's concerns about negative evaluations resulting from agency's use of security cameras speculative where record did not clearly establish that agency's *possible* use of security camera to appraise employees constituted an adverse effect on employees); *Marine*, 60 FLRA at 831.

[36] *Marine*, 60 FLRA at 831; *see also Nat'l Ass'n of Agric. Emps.*, 40 FLRA 1138, 1146 (1991) (citing *AFGE, Loc. 2031*, 39 FLRA 1159, 1161 (1991)) (dismissing petition where record is insufficient to determine whether proposal constitutes arrangement).

[37] *Marine*, 60 FLRA at 831 (citations omitted). The Agency also claims that the proposal concerns matters not directly related to the civilian police officers' conditions of employment. *See* Resp. Br. at 8, 11. Because we find that the proposal affects management's rights to determine its organization and assign work and does not constitute an appropriate arrangement, it is not necessary for us to address these claims. *See NFFE, Loc. 1332*, 47 FLRA 1357, 1363 (1993).

[38] *See* Resp. Br. at 3.

[39] 5 C.F.R. § 2424.25(c)(1)(ii)-(iii); *e.g.*, *AFGE, Loc. 723*, 66 FLRA 639, 644 (2012); *Local 12*, 61 FLRA at 218.

Member Abbott, concurring:

I agree that the Union's proposal is not negotiable. But I do not agree that severance is appropriate in this petition, or any petition.

How a proposal is drafted and presented is left entirely to the discretion of the party which drafts the proposal. It seems obvious that the time—to determine whether a proposal and its individual sentences or parts form an intended composite or an unintended amalgamation that should be presented as separate proposals—is at the drafting stage before negotiations commence. Then, during negotiations each party has the option, a second chance so to speak, to parse any individual proposal into separate sentences or parts if either party deems that necessary. In a very real sense, it is the responsibility of the proposing party to ensure that a proposal in dispute is clear and that its intent is apparent.

When a petition is filed with us, however, our sole responsibility is to determine if that disputed proposal is or is not negotiable and whether it falls within or outside the duty to bargain.[1] That a party, under the current regulations, may request that we consider the proposal that it drafted, presented, and negotiated as a composite is incredible. That the Authority would consider that request and make separate determinations on individual sentences or parts is a strange anomaly.

In other matters that come before us—exceptions to arbitration awards, representation petitions, unfair labor practices—we steadfastly reject any attempt by a party to change or reframe the issues or arguments that were presented before the matter came to us.[2] Negotiation petitions are different from those other procedures in one respect. Those matters are heard first and ruled upon by an arbitrator, a regional director (by delegation from the Authority), or an administrative law judge *before* the matter is appealed to us. Whereas, a disputed proposal comes directly to us for review.

That distinction, however, does not support the notion that a party should be able to separate a proposal which it drafted, presented, and negotiated as a single proposal into separate parts when it is sent to us for resolution as to its negotiability. If consideration of each sentence or part of the proposal potentially could result in a different negotiability determination, then it should be for the parties to first go through that process before deciding that they are in dispute and that it is necessary for us to resolve that dispute. In short, severance permits, even encourages, sloppy, imprecise proposals and unfocused negotiations that do not demand that the parties consider each proposal comprehensively to see if agreement can be reached on the proposal in whole or in part. In other words, if a petitioning party truly believes that a proposal should be or can be severed into stand-alone components, then those parts should be sent back to the parties to negotiate them as such before the matter is sent to us for resolution. To do otherwise, does not fulfill our responsibility to facilitate the resolution of disputes at the lowest level and as expeditiously as is possible.[3]

It is no secret that the Authority was on the cusp of issuing new negotiability regulations. The review process started two years ago. The proposed rule with request for comments was published in the Federal Register on December 23, 2019. Comments were due on January 22, 2020 but that deadline was extended to February 11, 2020 and all comments received have been considered. Now, over one year later and despite the significant resources dedicated to this effort, new regulations still have not issued.

For the reasons discussed above, it is my hope that new regulations—whenever issued—eliminate severance altogether. Instead, parties ought to be required to consider any proposal as a composite *and* as severable sentences or parts if any can stand alone and to negotiate in good faith from both angles.

[1] 5 U.S.C. § 7117(c)(1).

[2] *See* 5 C.F.R. § 2429.5 ("The Authority will not consider any evidence, factual assertions, arguments (including affirmative defenses), requested remedies, or challenges to an awarded remedy that could have been, but were not, presented in the proceedings before the Regional Director, Hearing Officer, Administrative Law Judge, or arbitrator.").

[3] 5 U.S.C. § 7101(b) ("The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.").