

72 FLRA No. 78

DEPARTMENT OF DEFENSE
DOMESTIC DEPENDENT ELEMENTARY AND
SECONDARY SCHOOLS
FORT BUCHANAN, PUERTO RICO
(Respondent)

and

ANTILLES CONSOLIDATED
EDUCATION ASSOCIATION
(Charging Party)

BN-CA-17-0170
(71 FLRA 127 (2019))
(71 FLRA 359 (2019))

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DECISION AND ORDER
ON REMAND

July 1, 2021

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

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

As relevant here, in the original decision in this case,² the Authority found that: (1) the Federal Service Impasses Panel (the Panel) lacked the authority to impose on the parties a contract provision concerning the workday of bargaining-unit employees (the workday provision) because that provision was not substantively identical to any previous contract wording that the Authority had found negotiable; and (2) the workday provision was, in fact, nonnegotiable because it interfered with management's right to assign work. Further, the original decision remanded the matters addressed in the workday provision, as well as other matters, to the parties for further bargaining as part of

their renegotiations for a successor collective-bargaining agreement (successor agreement).

The Union filed a petition for review of the Authority's original decision, and the court denied that petition in all respects but one. Specifically, the court set aside the Authority's finding that the workday provision was nonnegotiable, and the court remanded the case to the Authority for further proceedings consistent with its opinion.

For the reasons set forth below, we vacate the portions of our original decision that dealt exclusively with finding that the workday provision was nonnegotiable, but we conclude that we need not render another negotiability determination at this time. If the Union wishes to negotiate the same contract wording that was at issue in our original decision, and if the Agency alleges that such wording is outside the duty to bargain, then the Union may file a negotiability appeal in accordance with § 7117(c) of the Federal Service Labor-Management Relations Statute³ (the Statute) and the Authority's Regulations.⁴

II. Background and Previous Decisions

The Authority thoroughly examined the background of this dispute in the original decision,⁵ and we only briefly summarize pertinent details here.

The parties' renegotiations for a successor agreement stalled on several topics, including work hours and compensation, so the parties sought the assistance of the Panel. After a multi-stage process, the Panel imposed a successor agreement on the parties. The Agency subsequently refused to implement the Panel-ordered successor agreement, and the FLRA's General Counsel filed a complaint alleging that the Agency's actions were unfair labor practices (ULPs) that violated the Statute. An FLRA administrative law judge recommended finding that the Agency committed the alleged ULPs, and the Agency filed exceptions to the judge's recommendations.

The Authority found that the Agency committed the alleged ULPs by failing to implement the *lawful* provisions of the Panel-ordered successor agreement. However, the Authority determined that some of the successor-agreement provisions were beyond the Panel's authority to impose, or were otherwise unlawful.

The workday provision was one piece of the successor agreement that the Authority found deficient, for two distinct reasons. Initially, the Authority

¹ *Antilles Consol. Educ. Ass'n v. FLRA*, 977 F.3d 10 (D.C. Cir. 2020).

² *DOD, Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, P.R.*, 71 FLRA 127 (2019) (*Fort Buchanan I*) (then-Member DuBester dissenting).

³ 5 U.S.C. § 7117(c).

⁴ 5 C.F.R. pt. 2424 (Authority's Regulations concerning negotiability appeals).

⁵ *Fort Buchanan I*, 71 FLRA at 127-31.

determined that the Panel lacked the authority to order the adoption of the workday provision because that provision was not substantively identical to any previous contract wording that the Authority had found negotiable.⁶ This initial determination, standing alone, was a sufficient basis for the Authority to conclude that the workday provision was not an enforceable part of the successor agreement.

Nevertheless, “in order to expedite the resolution of th[e] case,” the Authority also addressed the negotiability of the workday provision.⁷ On that point, the Authority found that the Union had failed to contest the Agency’s characterization of how the workday provision operated. According to the Agency, the workday provision gave employees the discretion to perform one paid hour of preparation and professional tasks at a time of their choosing each workday. The Authority adopted the Agency’s characterization as uncontested and, on that basis, found that the workday provision was nonnegotiable because it interfered with management’s right to assign work under § 7106(a)(2)(B) of the Statute.⁸ The Authority also noted that the Union had not argued that any exception to management’s rights applied to the workday provision.

At the conclusion of the original decision, as relevant here, the Authority ordered the Agency to resume bargaining with the Union over certain workday and compensation matters.⁹

Thereafter, the Union filed its petition for review with the court. While that petition was pending, the Agency filed – with the Authority – a motion for reconsideration of the original decision. The Authority denied the Agency’s reconsideration motion.¹⁰

The court ultimately denied the Union’s petition for review on all points but one. The court set aside the Authority’s finding that the workday provision was nonnegotiable due to the Union having conceded the Agency’s characterization of the provision’s operation.¹¹

⁶ *Id.* at 133 (citing *Commander, Carswell Air Force Base, Tex.*, 31 FLRA 620, 623-25 (1988) (holding the Panel and interest arbitrators may *apply* existing negotiability law to resolve duty-to-bargain questions, but only where disputed contract wording is “substantively identical” to wording the Authority previously addressed)).

⁷ *Id.*

⁸ *Id.* (citing 5 U.S.C. § 7106(a)(2)(B)).

⁹ The Authority also directed resumed bargaining over other matters that were addressed in successor-agreement provisions that were held deficient.

¹⁰ *DOD, Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, P.R.*, 71 FLRA 359 (2019) (then-Member DuBester concurring), *denying recons. of Fort Buchanan I*, 71 FLRA 127.

¹¹ *Antilles*, 977 F.3d at 17.

Citing the Union’s arguments before the Panel about a different provision of the successor agreement,¹² the court held that the Union had “vigorously contested” the Agency’s characterization of the workday provision.¹³ On that limited basis, the court remanded the case to the Authority for further proceedings consistent with the court’s opinion.¹⁴

III. Analysis and Conclusion: We vacate our previous negotiability determination but need not render another one at this time.

We adopt, as the law of the case, the court’s holding that the Union “vigorously contested” the Agency’s characterization of the operation of the workday provision.¹⁵ Accordingly, we vacate the portions of our original decision that dealt exclusively with finding that the workday provision was nonnegotiable.¹⁶

When we previously rendered a negotiability determination on the workday provision, we did so in

¹² *Id.* Whereas the workday provision appeared in Article 19, Section 1 of the successor agreement, the court relied on the Union’s arguments concerning Article 19, Section 3(d). *Compare id.* (quoting *In re DOD*, 16 FSIP 52, 2017 WL 393617, at *3), with *In re DOD*, 16 FSIP 52, 2017 WL 393617, at *3 (noting that the Union’s argument, which the court cited, concerned “Article 19, §[]3(d)”). Further, Article 19, Section 1 addressed the eight hours of a bargaining-unit employee’s standard workday, but Article 19, Section 3(d) addressed “additional hours” that the Agency could assign *beyond* the standard eight hours per workday. *Fort Buchanan I*, 71 FLRA at 143 (administrative law judge’s decision quoting Article 19, Section 3(d) of the successor agreement).

¹³ *Antilles*, 977 F.3d at 17.

¹⁴ *Id.* at 19.

¹⁵ *Id.* at 17; *see, e.g., U.S. DOJ, BOP, Allenwood Fed. Prison Camp, Montgomery, Pa.*, 49 FLRA 597, 602 (1994) (on remand from court in ULP case, Authority adopted court’s decision as law of the case); *Dep’t of the Air Force, Griffiss Air Force Base, Rome, N.Y.*, 15 FLRA 1032, 1033 (1984) (same).

¹⁶ Specifically, in part III.B. of *Fort Buchanan I*, we vacate the last sentence of the second paragraph; the first sentence of the fifth paragraph; the third, fourth, and fifth sentences of the sixth paragraph; and footnotes 61, 74, and 75. 71 FLRA at 132-33.

order to “expedite the resolution” of this case.¹⁷ We had hoped that if we directly addressed the negotiability question as part of these ULP proceedings, then the parties would swiftly return to the bargaining table to conclude renegotiations on their successor agreement. However, the parties’ subsequent actions – including the reconsideration motion and the appeal of nearly every part of our original decision – long ago thwarted any chance of an expeditious resolution. Because our rationale for rendering a negotiability determination as part of this ULP case lacks any continuing force, we decline to render another negotiability determination at this time.¹⁸

If the Union still wishes to negotiate the same contract wording that was at issue in our original decision, and if the Agency alleges during renegotiations that such wording is outside the duty to bargain, then the Union may avail itself of the negotiability-appeals process – which, unlike the ULP process, is specifically designed for resolving negotiability disputes.

IV. Order

The order from our original decision remains unchanged.¹⁹

¹⁷ *Id.* at 133. As mentioned previously, the Authority’s finding that the workday provision was not *substantively identical* to any previous contract wording that the Authority had found negotiable meant that the Panel lacked the power to order the parties to include the workday provision in the successor agreement, regardless of whether the provision was, in fact, negotiable. *Id.*; see also *Antilles*, 977 F.3d at 16 (finding that “the FLRA permissibly concluded that the . . . Panel lacked authority . . . [to] order the parties to adopt” the workday provision). Because that finding alone rendered the workday provision in the Panel-ordered successor agreement unenforceable, the Authority did not need to decide the negotiability of the workday provision in order to conclude that the Agency did not commit a ULP by refusing to implement that specific provision.

¹⁸ Contrary to the dissent’s assertion, we do not hold that the court has “preclude[d] us from determining whether or not the workday provision is negotiable,” Dissent at 7, and nothing in our analysis suggests such a holding.

¹⁹ *Fort Buchanan I*, 71 FLRA at 135-36.

Chairman DuBester, concurring:

I agree with the decision to vacate the finding in *DOD, Domestic Dependent Elementary & Secondary Schools, Fort Buchanan, Puerto Rico*¹ that the workday provision was nonnegotiable. I also agree that the Authority should not render a negotiability decision at this time.

¹ 71 FLRA 127, 132-33 (2019) (then-Member DuBester dissenting); *see also* Majority at n.16.

Member Abbott, dissenting:

I cannot join the majority in its decision to remand this matter back to the parties when a determination on the negotiability of the disputed provision would bring an end to this dispute that dates back to 2015.

Friedrich Nietzsche once wrote: “the text has disappeared under the interpretation.”¹ In similar fashion, the majority effectively concludes that the U.S. Court of Appeals for the District of Columbia Circuit (the Court) remand precludes us from determining whether or not the workday provision is negotiable. On this point, the Court recognized the “seemingly fine distinction” between recent Authority decisions that conclude agencies may not be compelled to bargain “over *when* employees will work” and significantly older Authority decisions that held agencies may be required to bargain “over *where* employees will work.”² As relevant here, the Court vacated the negotiability determination we made in the underlying dispute³ for two reasons. First, the Court found that we “did not *explain* how the language of [the second part of the provision] support[ed]” our conclusion that it allowed employees “to decide *when* to perform their paid hour of preparation and professional tasks.”⁴ Second, the Court found that we erred in concluding that the Union had conceded that the provision impacted when work would be performed.⁵ Accordingly, the Court “set aside [our] negotiability ruling.”⁶

But it is quite clear that the Court expects us to make a new negotiability determination on remand. The Court found that arguments on both sides of the question – whether the provision “allows teachers to decide *when* to perform their eighth hour of work” or “*where* . . . that work is performed” – “appear to be plausible arguments.”⁷ Specifically, the Court noted that it would “not . . . choose between these competing interpretations”⁸ and, although it rejected our earlier interpretation [for the two reasons noted above], clarified that “nothing we say here prejudices the *options* available to the FLRA *if it were to conclude* on remand that the disputed workday provisions are *negotiable*.”⁹ In effect,

the Court expects us to determine which argument is the more reasonable and whether the provision is or is not negotiable. There is no indication whatsoever that the Court anticipated that we would, send this matter back to the parties unresolved, rather than determining once and for all whether or not the provision is negotiable.

Once again, the majority avoids making a decision that would put an end to this seven-year dispute (two years because the majority failed to act on the Court’s remand).¹⁰

¹ Friedrich Nietzsche, *Beyond Good and Evil*.

² *Antilles Consol. Educ. Ass’n v. FLRA*, 977 F.3d 10,17 (D.C. Cir. 2020).

³ *DOD, Domestic Dependent Elementary & Secondary Schs., Fort Buchanan, P.R.*, 71 FLRA 127 (2019).

⁴ *Antilles*, 977 F.3d at 17 (emphasis added).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* (emphasis added).

⁸ *Id.*

⁹ *Id.* at 18 (emphasis added).

¹⁰ *AFGE, Council 53, Nat’l VA Council*, 71 FLRA 1124, 1126 (2020) (Dissenting Opinion of Member Abbott) (“The majority’s decision is quite successful if its purpose is to take a dispute off the Authority’s docket and proverbially kick the can down the road.”).