

72 FLRA No. 140

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2119
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
JOINT MANUFACTURING
AND TECHNOLOGY CENTER
ROCK ISLAND, ILLINOIS
(Agency)

0-NG-3498

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

March 21, 2022

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

I Statement of the Case

In this case, we consider the negotiability of several provisions disapproved by the Agency head under § 7114(c) of the Federal Service Labor-Management Relations Statute (the Statute).¹ We find that Provision 2, which restates an existing statutory right, is consistent with law, but Provisions 3 and 12 are contrary to management's right to assign work under § 7106(a)(2)(B) of the Statute.² The remaining provisions fail to meet the conditions for review of negotiability appeals; thus, we will not consider those provisions in this proceeding. Accordingly, we dismiss the petition, in part, and order the Agency to rescind its disapproval of Provision 2.

II Background

After the parties executed a collective-bargaining agreement, the Agency head disapproved nineteen provisions under § 7114(c) of the Statute.³ Subsequently, the Union filed a petition for review of

thirteen disapproved provisions.⁴ The Agency filed a statement of position (statement), and the Union filed a response to the Agency's statement (response). The Agency did not file a reply to the Union's response.

During an Authority-conducted post-petition conference (conference) with the parties, the Union confirmed that it had withdrawn Provision 13.⁵

III Preliminary Matter: We dismiss the petition as to Provisions 1 and 4 through 11, without prejudice.

While the petition was pending before the Authority, Executive Order 14,003⁶ revoked Executive Orders 13,836,⁷ 13,837,⁸ and 13,839.⁹ In response to an Authority order, the Agency withdrew its allegation of nonnegotiability as to Provisions 1 and 4 through 11 because Executive Orders 13,836, 13,837, and 13,839 constituted the basis for disapproving those provisions.¹⁰ Additionally, the Agency withdrew its argument that Provision 2 is contrary to Executive Order 13,837.¹¹ But, the Agency maintains that Provisions 2, 3, and 12 are nonnegotiable on other grounds.¹²

⁴ In its petition, the Union requests a hearing under § 2424.31(c) of the Authority's Regulations because "the three Executive Orders [raised by the Agency] are unlawful and in violation of the [C]onstitution." Pet. at 21. Section 2424.31 of the Authority's Regulations states that a hearing may be appropriate "[w]hen necessary to resolve disputed issues of material fact in a negotiability . . . dispute, or when it would otherwise aid in decision making." Here, the Union does not demonstrate that there are disputed issues of material fact for the Authority to resolve, nor do we find it necessary to address the Union's claim in order to resolve the parties' negotiability dispute. Consequently, we deny the Union's request for a hearing. See, e.g., *Prof'l Airways Sys. Specialists*, 59 FLRA 25, 25 n.2 (2003).

⁵ Pet. at 19-21; Resp. at 15 (withdrawing the provision concerning Article 29); Record of Post-Petition Conference (Record) at 1 n.2 (confirming that "the Union withdrew the provision concerning Article 29").

⁶ Protecting the Federal Workforce, Exec. Order 14,003, 86 Fed. Reg. 7,231 (Jan. 22, 2021).

⁷ Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining, Exec. Order 13,836, 83 Fed. Reg. 25,329 (May 25, 2018).

⁸ Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use, Exec. Order, 13,837, 83 Fed. Reg. 25,335 (May 25, 2018).

⁹ Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles, Exec. Order 13,839, 83 Fed. Reg. 25,343 (May 25, 2018).

¹⁰ Agency's Mot. for Partial Withdrawal at 1.

¹¹ *Id.*

¹² *Id.* at 1-2 (arguing that Provision 2 "continues to violate the [Department of Defense] Appropriations Act" and Provisions 3 and 12 are nonnegotiable "for reasons unrelated to the Executive Orders").

¹ 5 U.S.C. § 7114(c).

² *Id.* § 7106(a)(2)(B).

³ *Id.* § 7114(c).

Under § 7117 of the Statute and § 2424.2 of the Authority's Regulations, the Authority will consider a petition for review only where there is a negotiability dispute.¹³ The Authority's Regulations define a "[n]egotiability dispute" as a "disagreement between a [union] and an agency concerning the legality of a proposal or provision."¹⁴

Because the Agency has withdrawn its allegation of nonnegotiability with respect to Provisions 1 and 4 through 11, there is no longer a disagreement between the parties as to the legality of those provisions.¹⁵ Accordingly, we dismiss the Union's petition as to Provisions 1 and 4 through 11, without prejudice.¹⁶ As the Agency continues to assert that Provisions 2, 3, and 12 are contrary to law for reasons unrelated to Executive Orders 13,836, 13,837, and 13,839, we consider the petition as to those provisions.¹⁷

IV. Provision 2 (Article 4, Section 1(a))

A. Wording

Except as otherwise provided by 5 USC Chapter 71, such right includes the right: To act for the Union in the capacity of a representative and the right, in that capacity, to present the views of the Union to the Employer and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and;¹⁸

¹³ 5 U.S.C. § 7117; 5 C.F.R. § 2424.2; see *AFGE*, 71 FLRA 1196, 1196 (2020) (then-Member DuBester concurring) ("[T]he Authority will consider a petition for review of a negotiability dispute only when it has been established that the parties are in dispute as to whether a proposal is inconsistent with law, rule, or regulation.").

¹⁴ 5 C.F.R. § 2424.2(c).

¹⁵ See *AFGE*, *Loc. 1151*, 19 FLRA 540, 540 (1985) (finding that the parties no longer had a negotiability dispute once the agency withdrew its allegation of nonnegotiability).

¹⁶ See *AFGE*, *Council 214*, 53 FLRA 131, 132 (1997) (dismissing the petition, in part, because there was no dispute as to whether several proposals were inconsistent with law, rule, or regulation); *Fed. Prof'l Nurses Ass'n*, *Loc. 2707*, 34 FLRA 71, 71-72 (1989) (dismissing petition, without prejudice, where agency withdrew its written allegation of nonnegotiability before the Authority).

¹⁷ See *AFGE*, *Loc. 1917*, 55 FLRA 228, 229 (1999) (holding that the Authority had jurisdiction to consider the negotiability of a proposal because the agency "alleged that the duty to bargain did not extend to the proposal" and "continue[d] to assert that it has no duty to bargain").

¹⁸ Pet. at 5; Record at 2.

B. Meaning

At the conference, the Union explained that the provision "merely reiterates" § 7102(1) of the Statute and reminds employees of their statutory rights.¹⁹ The Agency agreed with the Union's explanation of the meaning and operation of the provision.²⁰

C. Analysis and Conclusion: Provision 2 is consistent with law.

In its statement, the Agency asserts that Provision 2 is contrary to the Department of Defense Appropriations Act of 2020 (the Act).²¹ Specifically, the Agency argues that the provision violates the Act's prohibition on employees using official time to lobby Congress on any pending legislative or appropriations matters.²²

The Authority has previously held that provisions which "merely reiterate existing statutory provisions" are negotiable.²³ In addition, it is well established that provisions requiring management to "take action in accordance with law[]" are within the duty to bargain.²⁴

Based on the parties' mutual understanding of the provision's meaning and operation, Provision 2 incorporates a § 7102 statutory right into the collective-bargaining agreement in order to increase employees' awareness of that right.²⁵ Although the Agency contends that Provision 2 would entitle employees to official time in violation of the Act, we find no support in the record for concluding that the provision affects official time. Thus, contrary to the Agency's argument, the provision would not permit employees to use official time for a purpose that would violate the Act. Rather, the provision—by essentially quoting § 7102(1)—requires management to do nothing more than recognize

¹⁹ Record at 2.

²⁰ *Id.* ("The Agency agreed with the Union's stated meaning and operation of the provision.").

²¹ Statement at 3; Department of Defense Appropriations Act, Pub. L. No. 116-93, § 8013, 133 Stat. 2317, 2338 (2020) ("None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress.").

²² Statement at 3.

²³ *NTEU*, *Chapter 213 & 228*, 32 FLRA 578, 581 (1988); see also *AFGE*, *Locs. 3807 & 3824*, 55 FLRA 1, 5 (1998) (*Locs. 3807 & 3824*) ("Proposals that incorporate existing statutory standards into agreements are within the duty to bargain" (citation omitted)).

²⁴ *NAGE*, *Loc. R1-109*, 64 FLRA 132, 134 (2009) (Member Beck dissenting) (citing *Locs. 3807 & 3824*, 55 FLRA at 5).

²⁵ Record at 2.

an existing statutory standard with which it is already obligated to comply.²⁶

Accordingly, we find that the provision is negotiable, and we direct the Agency to rescind its disapproval of Provision 2.²⁷

V. Provisions 3 and 12

A. Wording

1. Provision 3 (Article 4, Section 6)

It is the policy of the Employer that all employees shall be treated fairly and equitably in all respects. Employees who feel they have not been treated fairly and equitably have a right to present their grievance to appropriate management officials for prompt

consideration and an objective decision.²⁸

2. Provision 12 (Article 36, Section 1(c))

The Employer agrees to provide training fairly and equitably to all employees.²⁹

B. Meaning

The parties agreed that the intent of Provision 3 is to make employees aware of their “right to be treated fairly and equitably” and their opportunity to seek recourse through the grievance procedure if they believe they have not been treated in such a manner.³⁰ Under Provision 12, employees would “know that everyone gets trained equally and that no employee gets more training than others.”³¹

C. Analysis and Conclusion: Provisions 3 and 12 are contrary to law.

The Agency argues that Provisions 3 and 12 affect its right to assign work under § 7106(a)(2)(B) of the Statute.³² The right to assign work includes the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned.³³

In order for an agency to demonstrate that a proposal or provision is contrary to a § 7106(a) right, the

²⁶ See *AFGE, Loc. 3407*, 39 FLRA 557, 570 (1991) (finding a proposal negotiable because it required “nothing which the [a]gency [was] not already obligated to do under the Statute”); see also *United Power Trades Org.*, 44 FLRA 1145, 1160 (1992) (finding a proposal negotiable where it incorporated an existing statutory standard contained in 5 U.S.C. § 4302(b)).

²⁷ Member Kiko notes that, in addition to any other applicable authority that governs lobbying, the Authority has held that § 7102(1) of the Statute authorizes the use of official time for “direct lobbying” only. See *Nat’l Right to Work Legal Def. Found., Inc.*, 71 FLRA 923, 925 (2020) (then-Member DuBester dissenting) (clarifying that § 7102(1) expressly authorizes official time to “directly present the view of [a] labor organization to heads of agencies . . . Congress, or other appropriate authorities,” but does not authorize official time “for urging the public to communicate with government officials” (internal quotation marks omitted)). Therefore, in applying a contract provision that merely restates § 7102(1) of the Statute, an agency would not be obligated to grant official time for “indirect” or “grass roots” lobbying. See *id.* (holding that indirect, or grass roots, lobbying “is prohibited by the [Anti-Lobbying] Act and is not expressly authorized by the Statute”).

²⁸ Record at 2-3. In its response, the Union provided wording of Provision 3 that the Union had inadvertently omitted from the petition but was subject to Agency-head review. Resp. at 8; Record at 2 (noting that the “Union provided the missing language in its Response”). At the conference, the Agency confirmed that the provision, as written in the response, is the correct, complete wording of the provision. Record at 3. Therefore, we consider the provision as modified. See *AFGE, AFL-CIO, Loc. 2361*, 57 FLRA 766, 766 n.3 (2002) (Chairman Cabaniss concurring) (citing *Ass’n of Civilian Technicians, Inc., Heartland Chapter*, 56 FLRA 236, 236 n.1 (2000)) (considering proposal wording as modified at conference without objection); cf. *POPA*, 48 FLRA 546, 547 (1993) (holding that the Authority will consider a modified provision only when it has “been the subject of an agency allegation of nonnegotiability”).

²⁹ Pet. at 18-19; Record at 8.

³⁰ Record at 3 (“The Agency agreed with the Union’s stated meaning and operation of the provision.”).

³¹ *Id.* at 8.

³² 5 U.S.C. § 7106(a)(2)(B); Statement at 4, 12-13.

³³ *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Big Spring, Tex.*, 70 FLRA 442, 443 (2018) (then-Member DuBester concurring) (citing *U.S. EPA*, 65 FLRA 113, 115 (2010)).

agency must allege and demonstrate that the proposal or provision affects a management right.³⁴ If the agency does so, then the Authority will examine any union argument that the proposal or provision falls within an exception set forth in § 7106(b) of the Statute.³⁵ The Authority has previously held that terms such as “fair and equitable,” “equitable,” and “equitably,” when used in proposals or provisions that govern the exercise of a management right, affect the exercise of that right.³⁶

By requiring management to take all actions “fairly and equitably” – including, but not limited to, determining which employees will perform various tasks and when they will perform them – Provision 3 would affect management’s right to assign work.³⁷ Similarly, Provision 12 would affect management’s right to assign work by precluding management from training an employee without providing an equal amount of training to other employees.³⁸ In its response, the Union argues that the terms “fairly and equitably” do not affect management’s right to assign work “because the [Agency] has the [s]tatutory duty to treat all employees in this regard without the words.”³⁹ However, the Union’s claim is without merit because, as explained above, the Authority has specifically held that these terms affect the exercise of a management right when used in provisions governing the exercise of that right.⁴⁰ Accordingly, we find that Provisions 3 and 12 affect management’s right to assign work.

Having found that Provisions 3 and 12 affect management’s right to assign work, we next consider whether the Union has argued that the provisions fall

within an exception contained in § 7106(b) of the Statute.⁴¹ Based on our review of the record, the Union does not allege that the provisions concern permissive subjects of bargaining under § 7106(b)(1), are negotiable procedures under § 7106(b)(2), or constitute appropriate arrangements under § 7106(b)(3). Accordingly, because Provisions 3 and 12 affect management’s right to assign work, and the Union has not argued that either provision falls within an exception to management’s rights under § 7106(b), Provisions 3 and 12 are contrary to management’s right to assign work under § 7106(a)(2)(B) of the Statute.⁴²

VI. Order

We direct the Agency to rescind its disapproval of Provision 2. We dismiss, with prejudice, the petition for review as to Provisions 3 and 12. We dismiss the petition with respect to Provisions 1 and 4 through 11, without prejudice to the Union’s right to refile.

³⁴ *NTEU*, 70 FLRA 100, 101 (2016) (citing *AFGE*, *Loc. 2058*, 68 FLRA 676, 677 (2015) (*Loc. 2058*)).

³⁵ *Id.* (citing *Loc. 2058*, 68 FLRA at 677; *AFGE*, *Council of Prison Locs. 33*, *Loc. 506*, 66 FLRA 929, 931-32 (2012)).

³⁶ *AFGE*, *Loc. 3258*, 48 FLRA 232, 235 (1993) (Member Armendariz concurring) (*Loc. 3258*) (citations omitted).

³⁷ See *NTEU*, 46 FLRA 696, 727-28 (1992) (provision requiring management to approve leave-without-pay requests in a “fair and objective manner” directly interfered with management’s right to assign work and, therefore, affected the right to assign work); *NTEU*, 53 FLRA 539, 597 (1997) (provision requiring the agency to assign and administer career development details “in a fair and equitable manner” affected management’s right to assign work); see also *NTEU*, 61 FLRA 871, 873 (2006) (holding that a proposal requiring management to implement any rules, regulations, or policies “fairly and consistently” affected the exercise of management’s rights).

³⁸ See *NTEU*, 46 FLRA at 707-09 (provision requiring management to select employees for training on a fair and equitable basis established a substantive restriction on management’s right to assign work and, therefore, affected that right).

³⁹ Resp. at 8, 16.

⁴⁰ See *Loc. 3258*, 48 FLRA at 235.

⁴¹ See *Loc. 2058*, 68 FLRA at 677.

⁴² See *id.* at 683 (provisions found contrary to management’s right to assign work where Authority determined provisions did not concern permissive matters under § 7106(b)(1), and the union did not argue that the provisions constituted procedures or appropriate arrangements under § 7106(b)(2)-(3) of the Statute); *Laborers Int’l Union of N. Am.*, *Loc. 28*, 58 FLRA 605, 607 (2003) (holding that a provision was contrary to law because it affected a § 7106(a) management right, and the union did not argue that it was negotiable under § 7106(b) of the Statute).

Member Abbott, concurring:

When parties restate statutory rights in a collective-bargaining agreement, it is left for arbitrators, administrative law judges, and ultimately the Authority to determine whether that restatement creates a separate avenue by which to seek relief. Specifically, is a claim that an agency violated a contractual provision (a restated statutory right) an issue that precludes the union from filing a separate ULP claim? Section 7116(d) of the Federal Service Labor-Management Relations Statute prohibits forum shopping and the litigation of the same issue or matter in multiple forums.¹ We attempted to resolve this question in *U.S. Department of the Navy, Navy Region Mid-Atlantic, Norfolk, Va. (Navy Mid-Atlantic)*, by expanding the standard through which the Authority applies § 7116(d).² But that alone has not and will not prevent attempts to circumvent § 7116(d) by fragmenting the same or similar issues and matters into separate grievances that allege contractual violations of restated statutory rights and charges that allege a violation of the same statutory rights.³ Section 7116(d) and our decision in *Navy Mid-Atlantic* sought to avoid this fragmentation.

Therefore, in my view, no purpose is served when parties insert language that merely restates or reiterates statutory rights in a collective bargaining agreement.

¹ 5 U.S.C. § 7116(d) (“[I]ssues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.”).

² 70 FLRA 512 (2018) (then-Member DuBester dissenting) (holding that to determine whether the issues involved in a unfair-labor-practice (ULP) charge and a grievance are the same, the Authority looks at whether: (1) the ULP charge arose from the same set of factual circumstances as the grievance; and (2) the *theories* advanced in support of the ULP charge and the grievance were *substantially similar*).

³ See *U.S. Dep’t of VA*, 71 FLRA 785, 786-87 (2020) (then-Member DuBester dissenting) (finding a grievance was barred by an earlier-filed ULP charge even though the grievance was based on contractual violations and the ULP charge was based on statutory violations); *AFGE, Loc. 420, Council of Prison Locs., C-33*, 70 FLRA 742, 743 (2018) (then-Member DuBester concurring) (finding a grievance was barred by an earlier-filed ULP charge even though the grievance was based on contractual and statutory violations and the ULP charge was based on only statutory violations).