

73 FLRA No. 48

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1748
NATIONAL COUNCIL
OF FIELD LABOR LOCALS
(Union)

and

UNITED STATES
DEPARTMENT OF LABOR
KANSAS CITY, MISSOURI
(Agency)

0-NG-3606

—————
DECISION AND ORDER
ON NEGOTIABILITY ISSUES

September 15, 2022

—————

Before the Authority: Ernest DuBester, Chairman, and
Colleen Duffy Kiko and Susan Tsui Grundmann,
Members

I. Statement of the Case

The Union filed a petition for review (petition) concerning two proposals. The proposals require the Agency to assign workers' compensation claims to employees based on geographical considerations. Because the Agency has demonstrated that the proposals are outside the duty to bargain, we dismiss the petition.

II. Background

The Union requested mid-term bargaining and offered two proposals concerning the processing of workers' compensation claims filed by the Agency's own

employees. The Agency provided the Union with a written allegation of nonnegotiability. Subsequently, the Union filed its petition with the Authority.

An Authority representative conducted a post-petition conference (conference) and issued a written record of that conference pursuant to § 2424.23 of the Authority's Regulations.¹ The Agency filed a statement of position (statement), to which the Union filed a response (response), and the Agency filed a reply (reply) to the Union's response.

III. Preliminary Matters

A. The proposals raise negotiability disputes.

In its statement, the Agency asserts that the Union's petition raises "a bargaining[-]obligation dispute, which cannot be addressed in the negotiability appeal procedure."² Where a proposal raises both a negotiability dispute and a bargaining-obligation dispute, the Authority may resolve both disputes in a negotiability case.³ However, a petition "that concerns *only* a bargaining[-]obligation dispute may not be resolved [in a negotiability proceeding]."⁴

Here, the Agency argues, among other things, that the proposals conflict with management rights under § 7106 of the Federal Service Labor-Management Relations Statute (the Statute).⁵ Those arguments raise negotiability disputes.⁶ Thus, the Union's petition is properly before us.

¹ 5 C.F.R. § 2424.23.

² Statement Br. at 2-4 (arguing that the parties' disagreement revolves around whether an executive order requires the Agency to bargain over permissive subjects and characterizing this disagreement as a bargaining-obligation dispute).

³ See, e.g., *NFFE, IAMAW, Fed. Dist. 1, Fed. Loc. 1998*, 69 FLRA 586, 589 (2016) (Member Pizzella concurring in part and dissenting in part on other grounds) (citing 5 C.F.R. § 2424.30(b)(2); *AFGE, Loc. 1164*, 65 FLRA 924, 927 (2011)).

⁴ 5 C.F.R. § 2424.2(d) (emphasis added); see also *NFFE, Fed. Dist. 1, Loc. 1998, IAMAW*, 66 FLRA 124, 127 (2011) (Member Beck dissenting in part on other grounds).

⁵ 5 U.S.C. § 7106; see, e.g., Statement Br. at 5 (alleging that "the proposals are outside the duty to bargain because they impermissibly affect management's right to assign work and determine organization"), 6 ("[T]he proposal is outside the duty to bargain under [§] 7106(a)(1) of the Statute because it impermissibly affects the Agency's right to determine its organization.").

⁶ See 5 C.F.R. § 2424.2(c)(1) (listing, as one example of a negotiability dispute, a disagreement over whether a proposal "[a]ffects a management right under 5 U.S.C. [§] 7106(a)").

B. We consider the § 7106(b)(1) arguments in the Agency's reply.

In their initial filings, both parties contend that the proposals are negotiable only at the Agency's election under § 7106(b)(1) of the Statute.⁷ However, in its reply, the Agency offers new arguments about why the proposals *do not* concern subjects covered by § 7106(b)(1).⁸

Section 2424.26 of the Authority's Regulations states that the limited purpose of the reply is for an agency to explain why it "disagrees with any facts or arguments made for the first time in the . . . response."⁹ Thus, we must consider whether the Authority's Regulations permit consideration of the Agency's § 7106(b)(1) arguments that were raised for the first time in the reply.

Here, the Authority conducted the conference after the Agency filed its statement. Based on the information elicited at the conference, the parties identified new disagreements about the meaning and operation of the proposals and the legal consequences.¹⁰ The Agency's first opportunity to address the parties' discussion of the proposals at the conference was in its reply. Moreover, the reply makes clear that the Agency's arguments are based on new information obtained at the conference and arguments raised for the first time in the Union's response.¹¹ Therefore, we consider the § 7106(b)(1) arguments set forth in the reply.¹²

⁷ Pet. at 4, 6 (arguing that proposals are negotiable at Agency's election because they concern matters "which the Authority has held to be covered by 5 [U.S.C. §] 7106(b)(1)"); Statement Br. at 4 ("The Agency argues that the proposals are nonnegotiable because they are permissive subjects of bargaining that are negotiable only at the election of the Agency.").

⁸ Reply Br. at 2-4.

⁹ 5 C.F.R. § 2424.26; *see AFGE, Loc. 2139, Nat'l Council of Field Lab. Locs.*, 61 FLRA 654, 656 (2006) (holding that § 2424.26(a) of the Authority's Regulations barred an argument raised, for the first time, in the agency's reply because that argument was not responsive to an argument raised for the first time in union's response).

¹⁰ Record of Post-Pet. Conference (Record) at 3 (Agency asserting that the term "Kansas City, Missouri commuting area" has no effect and conflicts with the Agency's organizational structure because employees are not associated with a specific geographic region), 4 (Agency arguing, based on Union's explanation of proposal's operation, that Proposal 2 "would require it to create separate claims units outside of the national model").

¹¹ *Compare* Reply Br. at 1-2 (noting that even though the parties agreed that "Office 7 [employees] are located throughout the [U.S.]," at the conference, "[t]he Union clarified that . . . it sought

IV. Proposal 1

A. Wording

All claims for injured employees of the US Department of Labor will be assigned to OWCP-DFELHWC employees located in the Kansas City, Missouri commuting area, with the exception of claims for OWCP-DFELHWC employees reporting to Office 7, which will be assigned elsewhere.¹³

B. Meaning

The parties agree to define "all claims" as all workers' compensation claims, and "OWCP-DFELHWC" as the Office of Workers' Compensation Program-Division of Federal Employees', Longshore and Harbor Workers' Compensation.¹⁴ The parties also agree that "Office 7" refers to the Agency's field office in Kansas City, Missouri.¹⁵ However, the parties disagree on the meaning of the term "Kansas City, Missouri commuting area." According to the Union, that term refers to the area to which employees could be recalled if they worked remotely.¹⁶ The Agency contends that the term "has no effect" because OWCP offices are national and, therefore, "not subject to recall to a specific location."¹⁷ Because the Union's explanation of the term comports with the proposal's plain wording, we adopt that explanation.¹⁸

The Union states that the proposal requires the Agency to assign the task of processing workers'

to change Office 7 so that employees . . . can solely work within the Kansas City, Missouri commuting area"), *and id.* at 4 (affirming the Agency's position at the conference that Proposal 1 would create a new organizational subdivision because OWCP-DFELHWC is a "nationally[-]based organization" that "only hire[s] remote claims examiners"), *with* Resp. Br. at 5 (acknowledging the Agency's statement at the conference "that OWCP is now a nationwide organizational structure" but arguing that the proposals "make no requirement for the Office 7 reporting structure or where management officials are located"), *and id.* (alleging that the Agency made a "demonstrably false" claim at the conference that "all future employees are entirely remote and will not be subject to recall").

¹² *See AFGE, Loc. 1904*, 56 FLRA 787, 788 (2000) (considering agency's arguments in reply where record reflected that reply addressed matters raised for the first time in union's response).

¹³ Pet. at 4; Record at 2.

¹⁴ Record at 2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 3.

¹⁸ *See, e.g., Am. Fed'n of Tchrs., Indian Educators Fed'n, Loc. 4524*, 63 FLRA 585, 587 (2009).

compensation claims originating within the Agency to staff located in the Kansas City, Missouri commuting area.¹⁹ Additionally, the Union explains that the Agency would have to assign the workers' compensation claims from Office 7 to a different office.²⁰ The Union elaborates that the proposal's intent is to "ensure integrity and consistency of the claims process,"²¹ although the exception for claims from Office 7 is intended to prevent conflicts of interest between claimants and claims processors who report to the same office.²² The Agency agrees with the Union's explanation of the proposal's operation.²³

C. Analysis and Conclusion: Proposal 1 is outside the duty to bargain.

The Agency asserts that Proposal 1 affects its management right to assign work under § 7106(a)(2)(B) of the Statute.²⁴ The Union does not dispute that the proposal affects management's right to assign work but contends that the proposal is negotiable at the Agency's election under § 7106(b)(1) of the Statute.²⁵ In the reply, the Agency disputes the Union's contention that the proposal concerns a § 7106(b)(1) matter.²⁶

Where a union does not dispute that a proposal affects management's rights under § 7106(a) of the Statute, but claims that the proposal is bargainable under § 7106(b)(1) of the Statute, the Authority first examines the contention that the proposal is bargainable under § 7106(b)(1).²⁷ If the matter concerns a subject set forth in § 7106(b)(1), then the Authority does not address § 7106(a) further because subsection (b)(1) is an exception to subsection (a).²⁸

As relevant here, § 7106(b)(1) provides that agencies may elect to negotiate over proposals relating to the "numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty."²⁹ The Authority has held that this phrase

applies to the establishment of agency staffing patterns, or the allocation of staff, for the purpose of an agency's organization and the accomplishment of its work.³⁰ A proposal concerns "numbers" under § 7106(b)(1) if it increases, decreases, or maintains the number of employees or positions assigned to an organizational subdivision, work project, or tour of duty.³¹ A proposal concerns "types" if it involves "distinguishable classes, kinds, groups, or categories of employees or positions that are relevant to the establishment of staffing patterns."³² Finally, a proposal concerns "grades" where it involves the employees' or positions' grade levels.³³

The Union asserts that Proposal 1 is negotiable at the election of the Agency under § 7106(b)(1) because it determines which "organizational unit performs a particular job or task."³⁴ Relying on the Authority's decision in *AFGE, Local 3302 (Local 3302)*,³⁵ the Union argues that its proposal concerns the numbers, types, or grades of employees assigned to a work project because it "assign[s] the particular job or task of working claims for injured [Agency] employees to the OWCP-DFELHWC workers in Kansas City."³⁶

Proposal 1 addresses *where* certain work would be performed but does not address *how many* employees or positions would perform it. In other words, it would not increase, decrease, or maintain the number of employees or positions performing that work. Thus, *Local 3302* – where a proposal would have effectively increased the number of employees performing a certain task³⁷ – is inapposite.

Further, although the proposal specifies that employees in a particular (organizational) office and at specified locations would perform certain work, it does not address the "distinguishable classes, kinds, groups[,] or categories of employees or positions" who would perform that work within that office and at those locations.³⁸ Moreover, the proposal does not address the

¹⁹ Record at 3.

²⁰ *Id.*

²¹ Pet. at 4.

²² Record at 3.

²³ *Id.*

²⁴ Statement Br. at 3, 5 (citing 5 U.S.C. § 7106(a)(2)(B)).

²⁵ Pet. at 4 (citing 5 U.S.C. § 7106(b)(1)); Resp. Br. at 2-3.

²⁶ Reply Br. at 2; see Part III.B. above (finding that Authority may consider § 7106(b)(1) arguments in the reply).

²⁷ *Fed. Educ. Ass'n, Stateside Region*, 58 FLRA 465, 467 (2003) (citing *NAGE, Loc. R5-184*, 51 FLRA 386, 393 (1995)).

²⁸ *Profl Airways Sys. Specialists*, 56 FLRA 798, 802 (2000).

²⁹ 5 U.S.C. § 7106(b)(1). Section 7106(b)(1) also provides that agencies may elect to bargain over the "technology, methods, and means of performing work." *Id.* The Union does not argue that Proposal 1 involves those matters.

³⁰ *AFGE, Loc. 723*, 66 FLRA 639, 645 (2012) (*Loc. 723*) (citing *AFGE, Loc. 1546*, 58 FLRA 368, 369-70 (2003)).

³¹ *U.S. Dep't of Transp., FAA*, 60 FLRA 159, 162 (2004).

³² *Loc. 723*, 66 FLRA at 645.

³³ *Cf. AFGE, Loc. 3529*, 55 FLRA 830, 832-33 (1999) (holding that proposals addressing which employees would perform certain work, but not those employees' grade levels, did not concern "grades" under § 7106(b)(1)).

³⁴ Pet. at 4 (internal quotation marks omitted).

³⁵ 37 FLRA 350 (1990) (*Loc. 3302*).

³⁶ Resp. Br. at 2.

³⁷ *Loc. 3302*, 37 FLRA at 355-56.

³⁸ *Cf., e.g., NAGE, Loc. R5-184*, 55 FLRA 549, 552 (1999) (licensed practical nurses were a "type" of employee); *U.S. Dep't of Com., Pat. & Trademark Off.*, 53 FLRA 858, 870 (1997) (decision to hire examiners under term appointments involved the "type" of employees); *NAGE, Loc. R5-184*, 52 FLRA 1024, 1031-32 (1997) (Member Armendariz dissenting in part on other grounds) (dental hygienists were a "type" of employee).

grade levels of the employees or positions who would perform those tasks. Consequently, the Union fails to establish that Proposal 1 concerns the “numbers, types, [or] grades of employees or positions” within the meaning of § 7106(b)(1),³⁹ and we find that Proposal 1 is not a permissive subject of bargaining under that section.⁴⁰

The Union does not argue that Proposal 1 is a negotiable procedure under § 7106(b)(2)⁴¹ or an appropriate arrangement under § 7106(b)(3) of the Statute.⁴² Accordingly, because Proposal 1 affects management’s right to assign work under § 7106(a)(2)(B), and the Union has not established that the proposal falls within an exception to management’s rights under § 7106(b), Proposal 1 is outside the duty to bargain.⁴³

V. Proposal 2

A. Wording

To accomplish this assignment, the OWCP-DFELHWC Office 7 will maintain a minimum staffing level of 2 claims units and necessary support staff including a Staff Nurse, Vocational Rehabilitation Specialist, Fiscal Operations Specialist, and a support employee/Claims Assistant within the Kansas City, Missouri commuting area.⁴⁴

B. Meaning

The Union states that the phrase “this assignment” refers to the assignment of workers’

compensation claims in the manner that Proposal 1 identifies.⁴⁵ The Union describes the “minimum staffing level” as two claims units, with seven to eight employees per unit, and one each of the listed support-staff positions.⁴⁶ The Union explains that Proposal 2 requires the Agency to maintain this staffing level in the Kansas City, Missouri commuting area, with “commuting area” defined as the area to which employees could be recalled if they worked remotely.⁴⁷ The Union explains further that the claims units and support staff identified in Proposal 2 would be responsible for processing all workers’ compensation claims of Agency employees, except for claims arising in the Kansas City, Missouri area.⁴⁸ The Agency agrees with the Union’s explanation of the proposal’s meaning and operation.⁴⁹

C. Analysis and Conclusion: Proposal 2 is inextricably intertwined with Proposal 1 and is, consequently, outside the duty to bargain.

The Agency argues that Proposal 2 “has no independent meaning apart from [P]roposal 1,” and, thus, Proposal 2 is “inextricably intertwined with the nonnegotiable [P]roposal 1.”⁵⁰ When a proposal is outside the duty to bargain, and another proposal is “inextricably intertwined” with the former proposal, the Authority will dismiss the petition as to both proposals.⁵¹

Proposal 2’s plain wording requires the Agency to allocate staff in the Kansas City, Missouri commuting area “[t]o accomplish this assignment.”⁵² The parties agree that “this assignment” refers to the processing of workers’ compensation claims that Proposal 1 describes.⁵³

³⁹ 5 U.S.C. § 7106(b)(1).

⁴⁰ See *Ass’n of Civilian Technicians, Evergreen Chapter*, 55 FLRA 591, 594 (1999) (Member Wasserman concurring) (proposal did not concern numbers, types, or grades under § 7106(b)(1) where the record contained no arguments or other basis for finding that proposal related to staffing patterns); see also *AFGE, Loc. 2058*, 68 FLRA 676, 683 (2015) (Member Pizzella concurring in part and dissenting in part on other grounds) (party’s general assertion that provisions concerned “numbers” and “types” was insufficient to demonstrate that the provisions concerned permissive subjects of bargaining).

⁴¹ 5 U.S.C. § 7106(b)(2).

⁴² *Id.* § 7106(b)(3).

⁴³ See *Fraternal Ord. of Police Lodge #1F*, 57 FLRA 373, 384-85 (2001) (proposal outside the duty to bargain where union conceded that proposal affected the exercise of management rights under § 7106(a) of the Statute and did not demonstrate that proposal concerned the number of employees or positions assigned to a tour of duty under § 7106(b)(1)); see also *Loc. 723*, 66 FLRA at 643-46 (where proposal affected a § 7106(a) management right and union failed to establish that proposal was negotiable under § 7106(b) of the Statute, the Authority found the proposal outside the duty to bargain).

⁴⁴ Record at 3. At the conference, the Union modified the proposal by removing the phrase “office in Kansas City, Missouri,” and inserting the term “Office 7.” *Id.* In the absence of any objection from the Agency, we consider the proposal as modified. See *AFGE, AFL-CIO, Loc. 2361*, 57 FLRA 766, 766 n.3 (2002) (Chairman Cabaniss concurring) (considering proposal wording as modified at conference where agency did not object to union’s modification (citing *Ass’n of Civilian Technicians, Inc., Heartland Chapter*, 56 FLRA 236, 236 n.1 (2000))).

⁴⁵ Record at 3.

⁴⁶ *Id.*

⁴⁷ *Id.* at 3-4.

⁴⁸ *Id.* at 4.

⁴⁹ *Id.*

⁵⁰ Statement Br. at 6 (internal quotation mark omitted).

⁵¹ *NTEU*, 70 FLRA 701, 705 (2018) (citing *NAGE, Loc. R1-100*, 61 FLRA 480, 484 (2006) (*NAGE*)). On the basis of this precedent, we reject the Union’s argument that it is “irrelevant” whether the proposals are “inextricably intertwined.” Resp. Br. at 4.

⁵² Pet. at 5; Record at 3.

⁵³ Record at 3.

Thus, Proposal 2 assumes that the Agency has assigned work in accordance with Proposal 1, and is therefore inextricably intertwined with Proposal 1.⁵⁴

Because Proposal 2 is inextricably intertwined with Proposal 1, and Proposal 1 is outside the duty to bargain, we find that Proposal 2 is also outside the duty to bargain.⁵⁵

VI. Order

We dismiss the Union's petition.

⁵⁴ See *NAGE*, 61 FLRA at 484 (holding that the negotiability of two proposals was inextricably intertwined where latter proposal incorporated requirement found in former proposal).

⁵⁵ See *IFPTE, Loc. 49*, 52 FLRA 813, 821 (1996) (Member Armendariz concurring) (finding proposals outside the duty to bargain because they elaborated on, and were inextricably

intertwined with, a nonnegotiable proposal); *AFGE, Loc. 3369*, 49 FLRA 793, 798 (1994) (where proposal concerned how the agency would implement three nonnegotiable proposals, it was inextricably intertwined with those proposals and also nonnegotiable).