

63 FLRA No. 112

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 1156
(Union)

and

UNITED STATES DEPARTMENT OF DEFENSE
DEFENSE INFORMATION SYSTEMS AGENCY
MECHANICSBURG, PENNSYLVANIA
(Agency)
0-NG-2933

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

May 19, 2009

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Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2424 of the Authority's Regulations, and concerns the negotiability of one proposal.¹ The Agency filed a statement of position, to which the Union filed a response and the Agency filed a reply.

For the reasons that follow, we find that the proposal is within the duty to bargain.

II. Proposal

The following Union proposal would modify Section B.1.2 of Chapter 432 of Defense Information Systems Agency (DISA) Regulations:²

If an employee has been on a performance improvement plan, and demonstrate acceptable performance, and then the employee's performance relapses within the year following the commencement of the performance improvement plan, after a change in supervisor, duties, or significant

change in technology, the employee will be given another opportunity to improve.

Record of Post-Petition Conference at 2.

III. Meaning of the Proposal

The parties agree that the proposal applies only in the circumstance where the Agency has implemented a performance improvement plan (PIP) for an employee and the employee has satisfied the requirements of the PIP. If, during the 12-month period following commencement of the PIP -- that was satisfied by the employee -- the employee's performance again becomes unacceptable *and* there has been a change in the employee's supervisor, the employee's duties, or a significant change in technology, then the proposal would require the Agency to implement a new PIP before taking action based on unacceptable performance. The Agency agrees to the portion of the proposal requiring a new PIP if the employee's performance again becomes unacceptable and there have been significant changes in assigned duties or technology. Statement of Position at 3. Thus, the dispute centers on the portion of the proposal requiring a new PIP when an employee's supervisor has changed.

IV. Positions of the Parties**A. Union**

The Union explains that the intent of the proposal is to prevent the Agency from taking action based on unacceptable performance -- without issuance of a new PIP -- only in situations where: (1) an employee has satisfactorily met the requirements of a (prior) PIP; and (2) the employee's performance subsequently becomes unacceptable (within 12 months after implementation of the prior PIP) after a change in supervisors. Response at 2-3. The Union claims that unacceptable performance in this situation may involve a new supervisor's interpretation of performance standards and elements that differ from the prior supervisor's interpretation. *Id.* at 2.

2. Section B.1.2 provides, as relevant here, that:

If an employee has performed acceptably continuously for one year from the beginning of an opportunity to demonstrate acceptable performance . . . and the employee's performance again becomes unacceptable a new opportunity to demonstrate acceptable performance must be provided. However, *if the performance becomes unacceptable prior to the one year period, . . . an additional opportunity period . . . need not be provided[.]*

Petition for Review, Attachment 2 (emphasis added).

1. Four proposals were contained in the petition for review. However, as three subsequently were resolved by the parties, only one proposal remains for consideration here.

According to the Union, the proposal constitutes a procedure. Also according to the Union, the proposal constitutes an appropriate arrangement, within the meaning of § 7106(b)(3) of the Statute. *Id.* at 3. In this regard, the Union contends that any employee who satisfied the requirements of a (prior) PIP and subsequently was subject to an action based on unacceptable performance without a subsequent PIP would be adversely affected. *Id.* The Union argues that the proposal would afford such employees “the chance to understand the performance criteria from the viewpoint of the new supervisor,” and would have only “minimal impact” on management rights. *Id.*

B. Agency

The Agency contends that the proposal is nonnegotiable because it precludes the Agency from exercising its rights under § 7106(a)(2)(A) of the Statute “to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees”. *See* Reply at 1. According to the Agency, a proposal that precludes an agency from exercising a management right inherently cannot constitute an appropriate arrangement. *See* Statement of Position at 5; Reply at 3-4.

The Agency contends that the proposal is nonnegotiable because it precludes the Agency from exercising its rights under § 7106(a)(2)(A) of the Statute “to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees”. *See* Reply at 1. According to the Agency, a proposal that precludes an agency from exercising a management right inherently cannot constitute an appropriate arrangement. *See* Statement of Position at 5; Reply at 3-4.

The Agency also contends that the proposal is contrary to 5 C.F.R. § 432.105(a), a Government-wide regulation, which provides, in pertinent part:

(1) Once an employee has been afforded a reasonable opportunity to demonstrate acceptable performance . . . an agency may propose a reduction-in-grade or removal action if the employee’s performance . . . is unacceptable in 1 or more of the critical elements for which the employee was afforded an opportunity to demonstrate acceptable performance.

. . . .

(3) A proposed action may be based on instances of unacceptable performance which occur within a

1 year period ending on the date of the notice of proposed action.

Statement of Position at 4.

V. Analysis and Conclusions

A. The proposal is not inconsistent with § 7106(a)(2)(A) of the Statute.

Under § 7106(a)(2)(A) of the Statute, the Agency retains the right to “hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees[.]” The Authority has interpreted § 7106(a)(2)(A) as encompassing an agency’s right to take action based on unacceptable performance. *Patent Office Prof’l Ass’n*, 29 FLRA 1389, 1404-06 (1987), *petition for review denied*, 873 F.2d 1485 (D.C. Cir. 1989).

As discussed above, the proposal would preclude the Agency from taking an action based on unacceptable performance, without issuing a new PIP, in certain circumstances. Accordingly, we conclude that the proposal affects the Agency’s rights under § 7106(a)(2)(A). *See id.* As such, the proposal is outside the Agency’s duty to bargain unless, consistent with the Union’s arguments, it constitutes a procedure or an appropriate arrangement, within the meaning of § 7106(b)(2) or (3).

In determining whether a proposal is an appropriate arrangement, the Authority uses the analysis set forth in *NAGE, Local R14-87*, 21 FLRA 24 (1986) (*KANG*). The Authority first determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. *See United States Dep’t of the Treasury, Office of the Chief Counsel, IRS v. FLRA*, 960 F.2d 1068, 1073 (D.C. Cir. 1992); *AFGE, Local 1900*, 51 FLRA 133, 141 (1995). The claimed arrangement must also be sufficiently “tailored” to compensate employees suffering adverse effects attributable to the exercise of management’s rights. *See NTEU, Chapter 243*, 49 FLRA 176, 184 (1994). To establish that a proposal is an arrangement, a union must identify the effects or reasonably foreseeable effects on employees that flow from the exercise of management’s rights and how those effects are adverse. *See KANG*, 21 FLRA at 31. If a proposal is determined to be an arrangement pertaining to the exercise of management’s rights, then the Authority determines whether it excessively interferes with the relevant management right(s) by weighing the “competing practical needs of employees and managers.” *KANG*, 21 FLRA at 31-32.

The proposal in this case is intended as an arrangement for employees who satisfy the requirements of a PIP but, within the 12-month period following commencement of the PIP, are both identified as performing at an unacceptable level and have a new supervisor. Response at 2. The proposal would require the Agency to give these particular employees an additional PIP before taking action based on unacceptable performance. The adverse effect of being subject to an action based on unacceptable performance, as asserted by the Union, is clear and undisputed by the Agency. *Id.* In addition, as the proposal applies only to particular employees who have satisfactorily completed a PIP, subsequently have had a change in supervisor, and are subsequently identified as performing at an unacceptable level, the proposal is sufficiently tailored to constitute an arrangement within the meaning of § 7106(b)(3) of the Statute. *See NTEU*, 61 FLRA 871, 874 (2006) (proposal sufficient tailored where targeted to avoid adverse impact and would not apply to employees who do not suffer adverse impact).

In determining whether the proposal constitutes an appropriate arrangement, we note that the proposal itself narrowly defines the group of employees who would benefit from it. In addition, the Agency has already agreed to issue a new PIP, prior to initiating an action based on unacceptable performance, in situations where there has been a significant change in an employee's duties or technology. Statement of Position at 3. In these circumstances, and noting particularly that the situation involved here is one where an employee has already performed acceptably under a prior supervisor, we conclude that the burden on the exercise of management's right to remove employees is minimal.

On the other hand, affording employees an additional opportunity to demonstrate acceptable performance (where they previously did so, albeit with a different supervisor) is a significant benefit in that it would either postpone or render unnecessary an action based on unacceptable performance. Put simply, the proposal would afford a narrowly defined group of employees, who have already demonstrate the ability to satisfy the requirement of a PIP, the opportunity to do so once again before being subject to an action based on unacceptable performance. We conclude that, in these circumstances, the benefits to employees outweigh the burdens on management rights and, as a result, the proposal does not excessively interfere with the Agency's rights under § 7106(a)(2)(A).³

B. The proposal is not contrary to 5 C.F.R. § 432.105.

As noted above, the Agency argues that the proposal is contrary to 5 C.F.R. § 432.105, because the regulation provides that once an employee has been given a reasonable opportunity to improve his/her performance, the Agency may propose a reduction-in-grade or a removal action within the 1-year period following commencement of the PIP. The Agency is correct that the regulation *permits* the Agency to take this action. However, the regulation does not *require* an agency to initiate an action based on unacceptable performance without implementing a new PIP in the circumstances encompassed by the proposal in this case. As such, the proposal is not inconsistent with the regulation. *See AFGE, Locals 3807 and 3824*, 55 FLRA 1, 2 (1998) (Authority rejected agency argument that proposal eliminating time limits for using compensatory time was inconsistent with Government-wide regulation stating that agency heads "may fix a limit" for such usage on ground that "as plainly worded, the *regulation permits*, but does not *require*" a time limit) (emphasis added).

Accordingly, we conclude that the proposal is not inconsistent with the regulation.

VI. Order

We find that the proposal is within the Agency's duty to bargain.

3. In view of this determination, we need not consider whether the proposal also constitutes a negotiable procedure under § 7106(b)(2) of the Statute.