

72 FLRA No. 51

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 170
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE CONTRACT MANAGEMENT AGENCY
(Agency)

0-NG-3475

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

May 11, 2021

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

I. Statement of the Case

In this case, we once again remind these parties, particularly the Agency, that unsupported arguments may be deemed waived.¹

This negotiability case involves three proposals related to the Agency's Anti-Harassment Manual (manual), and 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).² The Agency alleges that the proposals are nonnegotiable because they conflict with management's rights to determine internal security practices, assign work, and determine personnel under § 7106(a) of the Statute.³ Because the Agency fails to support those

allegations, we are constrained to find the proposals within the duty to bargain.

II. Background

The Agency issued the manual to establish an anti-harassment program for its civilian personnel. The Union submitted nine counterproposals to the manual. The Agency responded and alleged that most of the counterproposals were nonnegotiable. In December 2019, the Union filed a petition for review (petition) with the Authority over three of its counterproposals.⁴

In April 2020, the Agency filed its statement of position (statement). An Authority representative conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority's Regulations.⁵ After the conference, the Union filed a response. The Agency did not file a reply.

III. The Proposals**A. Wording****1. Proposal 4**

To ensure that investigations are conducted promptly, fairly, impartially, and produce objective and appropriate factual records to allow fact-finders to draw conclusions as to whether harassment occurred, all investigations shall be performed by the

¹ The Agency, in two prior negotiability decisions, failed to provide any arguments or explanation of how the Union's proposals in those cases were nonnegotiable. Consequently, in those cases, the Authority determined that the Agency waived its arguments. *AFGE, Council 170*, 71 FLRA 1259, 1261 (2020) (then-Member DuBester concurring) (*AFGE II*); *AFGE, Council 170*, 71 FLRA 1220, 1221 (2020) (then-Member DuBester concurring) (*AFGE I*).

² 5 U.S.C. § 7105(a)(2)(E).

³ *Id.* § 7106(a).

⁴ On February 7, 2020, the Authority issued an Order to Show Cause (Order) directing the Agency to explain why the Agency's failure to respond to the Union's petition was not a concession that the proposals are negotiable. In the Agency's response to the Order, the Agency claimed the Union's service of the petition was defective. The Authority directed the Union to correct the procedural deficiency, and the Union properly served the petition on the Agency. In its response to the Order, the Agency also argued for the dismissal of the Union's petition because the Union had failed to serve the petition on the Agency "within fifteen days of . . . [the A]gency head's disapproval." Agency's Response to Order to Show Cause at 2. However, because the Union's petition concerns proposals, there has been no Agency-head review. 5 C.F.R. § 2424.21(a) ("A petition for review must be filed within fifteen . . . days after the date of service of either: (1) [a]n agency's written allegation that the exclusive representative's proposal is not within the duty to bargain, or (2) [a]n agency head's disapproval of a provision."); *see id.* § 2424.2(e). Additionally, the time limits for filing a petition with the Authority do not apply to the service requirement, which is pursuant to a separate regulation. *See* 5 C.F.R. § 2424.22(d); *see also AFGE II*, 71 FLRA at 1259 n.8; *AFGE I*, 71 FLRA at 1220 n.7.

⁵ 5 C.F.R. § 2424.23.

Investigations and Resolutions Directorate (IRD).⁶

2. Proposal 5

The Agency shall ensure that the unredacted investigative record be provided to the complainant and their representative promptly upon completion of the investigation.⁷

3. Proposal 8

The Agency shall afford AFGE Council 170 the opportunity to review and comment on the specialized training which will be given to those internal Agency personnel who will conduct primary investigations.⁸

B. Meaning of Proposals

The parties agreed that the plain wording of Proposal 4 reflects its meaning and operation.⁹

For Proposal 5, the parties agreed the proposal would require the Agency to provide an unredacted copy of the investigative record to the complainant and his or her representative within a reasonable period after the Agency completes the harassment investigation.¹⁰ The parties further agreed that: the term “representative” could be a Union representative, an attorney, or any other person; the term “investigative record” included any physical or electronic investigative records generated during the investigation; and the term “promptly” would be based on the reasonableness of the investigation’s facts.¹¹

Regarding Proposal 8, the parties agreed that the proposal is intended to permit the Union to – in an advisory role only – review and comment on any Agency-created training programs or any changes to existing training programs.¹² The parties agreed that the Agency would have complete and unfettered discretion over the training programs.¹³

C. Analysis and Conclusion: The Agency failed to support its argument that the proposals are nonnegotiable.

With regard to all three proposals, the Agency states that it “reserves the right to determine the internal security practices, assign work[,] and determine . . . personnel . . . as defined in § 7106(a).”¹⁴

An agency “has the burden of raising and supporting arguments that the proposal[s] . . . [are] outside the duty to bargain or contrary to law.”¹⁵ Further, an agency is “required in [its] statement of position to . . . set forth its understanding of the proposal[s.] . . . and supply all arguments and authorities in support of its position.”¹⁶ Section 2424.32(c)(1) of the Authority’s Regulations provides that a “[f]ailure to raise and support an argument will . . . be deemed a waiver of such argument.”¹⁷

In its statement, the Agency generally asserts that the three proposals interfere with management’s rights. But the Agency provides no arguments, explanation, or case law supporting its position that the proposals are contrary to law.¹⁸ The Authority has found that agencies fail to meet their regulatory burden when they merely cite a law or regulation without explaining how a particular proposal conflicts with that law or regulation.¹⁹ Because the Agency failed to support or explain its argument that the proposals interfere with the identified management rights, we once again find that the Agency has waived its arguments.²⁰ Consequently, we are constrained to find that the proposals are within the duty to bargain.²¹

IV. Order

The Agency must, upon request or as otherwise agreed to by the parties, bargain over the proposals.²²

¹⁴ Statement at 2.

¹⁵ 5 C.F.R. § 2424.32(b).

¹⁶ *Id.* § 2424.24(a).

¹⁷ *Id.* § 2424.32(c)(1).

¹⁸ Statement at 1-2; *see* Statement Form at 5-6.

¹⁹ *See AFGE II*, 71 FLRA at 1261 n.32; *AFGE I*, 71 FLRA at 1221; *AFGE*, *Loc. 3430*, 71 FLRA 881, 886 (2020) (*Loc. 3430*) (Member Abbott concurring); *AFGE*, *Loc. 940*, 71 FLRA 415, 415 (2019).

²⁰ *See AFGE II*, 71 FLRA at 1261; *AFGE I*, 71 FLRA at 1221; 5 C.F.R. § 2424.32(c)(1).

²¹ *See AFGE II*, 71 FLRA at 1261, *AFGE I*, 71 FLRA at 1221; *Loc. 3430*, 71 FLRA at 885-86.

²² In finding that the proposals are within the duty to bargain, the Authority makes no judgment as to their merits. *IFPTE*, *Loc. 4*, *Chapter 1*, 71 FLRA 1135, 1140 n.37 (2020) (then-Member DuBester concurring). In other words, the Authority will not decide whether the parties should agree to the proposals. *Id.*

⁶ Pet., Attach. 1, Proposal at Issue at 5-6.

⁷ *Id.* at 6.

⁸ *Id.*

⁹ PPC Record at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

Chairman DuBester, concurring:

I agree with the Order directing the Agency to bargain over the Union's proposals.