63 FLRA No. 164

AMERICAN FEDERATION OF TEACHERS
INDIAN EDUCATORS FEDERATION
LOCAL 4524
(Union)

and

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C.
(Agency)

0-NG-2927

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DECISION AND ORDER ON NEGOTIABILITY ISSUES

July 31, 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). The appeal involves the negotiability of three sentences in a four-sentence proposal concerning employment contract renewal of employees working in schools on Indian reservations. The Agency filed an untimely statement of position (SOP), to which the Union filed a response.

For the reasons discussed below, we find that the three disputed sentences are within the Agency's duty to bargain.

II. Background

The Agency operates schools on Indian reservations in several states, and employees who work at these schools are employed pursuant to the Indian Education Act, 25 U.S.C. § 2000, *et seq.*, which exempts them from several provisions of Title 5 of the United States Code, notably those "relating to the appointment, promotion, hours of work, and removal of civil service employees[.]" 25 U.S.C. § 2012(a). In 2001, as part of the No Child Left Behind Act (NCLBA), certain provisions of the Indian Education Act were amended, including one that was changed to require notice of contract non-renewal 30 days, rather than 60 days, before the end of the school year. *See* 25 U.S.C. § 2012(e)(1)(C); Response at 10.

The unit employees affected by the disputed proposal work under annual contracts. During term negotiations, the Union submitted the four-sentence proposal related to employment contract renewal. The Agency disputed the negotiability of three of the sentences and the Union filed the instant petition for review.

III. Preliminary Matter -- The Agency's SOP is untimely

The Agency's SOP was due on January 22, 2007. On February 6, 2007, the Agency filed a motion to waive time limits and requested an extension of time to file its SOP, asserting that waiver was warranted because Agency counsel was not notified by the Agency of the Union's petition until after the time to file an SOP had expired. The Agency filed an SOP on February 20, 2007 and the Union filed a timely response.

Requests for waivers of time limits may be granted only in "extraordinary circumstances." 5 C.F.R. § 2429.23. The Agency's failure timely to notify its counsel of the Union petition does not constitute an extraordinary circumstance. In this regard, it is well-established that parties are "responsible for being knowledgeable" of statutory and regulatory filing requirements. *AFGE, Local 2065*, 50 FLRA 538, 539-40 (1995). Accordingly, we do not consider the SOP. However, in accordance with Authority precedent, we consider the Union's reply to the SOP, because it complied with all filing requirements. *See Marine Eng'rs' Beneficial Assoc., Dist. No. 1 -- PCD*, 60 FLRA 828, 829 (2005). As they are properly part of the record, we consider the Agency's allegation of nonnegotiability (Allegation) attached to the Union's petition, and the record of the post-petition conference (Conf. Report). *Id.*

IV. Severance

The Union requests severance of the three sentences of the proposal, and the Agency does not object to the Union's request. Conf. Report at 1. Under § 2424.22(c) of the Authority's Regulations, a request for severance must be supported by an explanation of how each severed portion may stand alone and would operate. If severance is granted, then the Authority rules on the negotiability of the proposal's severed portions. *See, e.g., AFGE, Local 3354,* 54 FLRA 807, 811 (1998).

The Union argues that each sentence of the proposal has separate meaning and operates independently. Petition at 5-6. In addition, the parties address and argue each sentence independently. Further, the Agency does not challenge the negotiability of the second sentence. [1] *See, e.g.*, Petition at 4; Allegation at 2. As such, we sever the proposal and address the disputed sentences separately.

V. First Sentence of the Proposal

Employees will be notified in writing by Management of their contract renewal/non-renewal not less than 60 days prior to the end of the school year.

Petition at 3.

A. Positions of the Parties

The Agency argues that the first sentence is contrary to the "clear, specific, restrictive, and no[n]discretionary" language of § 1132(e)(1)(C) of the NCLBA, codified at 25 U.S.C. § 2012(e)(1)(C), which provides for notice of contract renewal or non-renewal 30 days prior to the end of the school year. Allegation at 1. The Agency also contends that the proposal excessively interferes with management's rights to hire, assign, and determine personnel under § 7106(a)(2) of the Statute "by requiring that a decision be made 30 days sooner than required by statute." *Id.* at 1-2.

The Union argues that the NCLBA contains only a minimum notice period and "does not prohibit the agency from giving employees more notice[.]" Response at 3. In this connection, the Union notes that, since the passage of the NCLBA in 2001, the Agency has not amended its own regulations, which still guarantee employees 60 days' notice. *Id.* (citing 25 C.F.R. § 38.8(a)). [2] The Union also argues that the proposal does not excessively interfere with management's rights.

B. Meaning of the first sentence

The parties agree that the first sentence would require the Agency to notify employees 60 days prior to the end of the school year as to whether their employment contract will be renewed. Conf. Report at 2. The term "employees" includes both professional employees, such as teachers, and non-professional employees, such as teacher aides. *Id.* The term "end of the school year" is statutorily defined in the Indian Education Act, as amended by the NCLBA. *Id.* As the parties' understanding of this sentence comports with the wording, we adopt it. *See, e.g., NEA, OEA, Laurel Bay Teachers Ass'n,* 51 FLRA 733, 737-38 (1996) (*Laurel Bay*).

C. Analysis and Conclusions

1. The first sentence does not conflict with 25 U.S.C. § 2012(e)(1)(C).

The Indian Education Act, as amended by the NCLBA, provides that Agency regulations governing "the discharge and conditions of employment of educators" shall require that "each educator . . . shall be notified 30 days prior to the end of an academic year whether the employment contract of the individual will be renewed for the following year." 25 U.S.C. § 2012(e)(1)(C). Contrary to the Agency's claims, the plain language of this regulation does not prohibit more than 30 days' notice. *See AFGE, Locals 3807 & 3824*, 55 FLRA 1, 2 (1998) (finding no conflict where plain language of regulation did not conflict with proposal). The Agency has provided no evidence or argument that the statute should be interpreted "to mean something other than what it plainly states." *See AFGE, Locals 3807 & 3824,* 55 FLRA at 2. Accordingly, we find that the first sentence does not conflict with 25 U.S.C. § 2012(a)(1)(C).

2. The first sentence is a negotiable procedure under § 7106(b)(2) of the Statute.

The Authority has held that proposals requiring notice of an agency's actions involving hiring, assignment, and non-disciplinary termination are negotiable as procedures under § 7106(b)(2) of the Statute. *See, e.g., AFGE. Local 12,* 61 FLRA 209, 220 (2005) (notice of detail opportunity); *AFGE, Council of Marine Corps Locals (C-240)*, 35 FLRA 1023, 1029-30 (1990) (notice for non-disciplinary termination of temporary employees); *Fed. Union of Scientists and Eng'rs, NAGE*, 23 FLRA 360, 363 (1986) (notice of bargaining unit job openings). As the Agency has not established that the first sentence would have any effect on the rights to hire or assign employees other than to require additional (beyond that required by law) notice of renewal or non-renewal, we find that the first sentence is a negotiable procedure under § 7106(b)(2) of the Statute.

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1. The second sentence provides: "The employee will be notified in writing of the projected level and step of the next year's contract no later than the last day of the current school year." Petition at 3.

2. Agency regulations require that non-probationary employees with "satisfactory performance" be notified of contract non-renewal "not less than 60 days before the end of the school term." 25 C.F.R. § 38.8(a).

VI. Third Sentence

If non-renewal is for budget or program conditions, the procedures for reduction-in-force will be used.

Petition at 3.

A. Positions of the Parties

The Agency argues that the third sentence of the proposal excessively interferes with management's right to hire, assign, and determine personnel under § 7106(a)(2) of the Statute. In this regard, the Agency contends that, because the NCLBA's yearly progress requirements could be seen as "program conditions," the third sentence would restrict the Agency from using contract non-renewal to replace staff that are "relevant" to a school's failure to meet the NCLBA requirements. Allegation at 2.

The Union asserts that the third sentence is a negotiable procedure under § 7106(b)(2). Response at 5. The Union states that the proposal would require the use of reduction-in-force (RIF) procedures when an employment contract is not renewed because of budgetary or program conditions. The Union argues that the intent of the proposal is to "close [the] loophole" in the Agency's personnel manual, which allows the Agency to avoid RIF procedures by issuing contract non-renewals. *Id.* The Union also asserts that the third sentence of the proposal is an appropriate arrangement under § 7106(b)(3) because it benefits employees "who are impacted by the [A]gency's decision to reduce staff . . . through contract non-renewal." Response at 5.

B. Meaning of the Proposal

The parties agree that the third sentence would require the Agency to use RIF procedures when decisions not to renew an employment contract are for "budgetary or program[] reasons." Conf. Report at 2. The parties also agree that the RIF procedures are set forth in the parties' agreement and Office of Personnel Management regulations. *Id.* However, the parties disagree about the meaning of the term "program conditions." The Union contends that the term "program conditions" includes factors that are not related to an employee's "conduct, qualifications or performance" for which the Agency "would normally conduct a RIF[,]" such as lack of work, shortage of funds, or reorganization. *Id.*; Response at 5 n.2. The Agency contends that the term also includes other legal requirements, including school restructuring provisions of the NCLBA, "for which the Agency is not required to utilize RIF procedures." Conf. Report at 2. As the Union's explanation comports with the plain wording of the proposal, we adopt the explanation. *See Laurel Bay*, 51 FLRA at 737.

C. Analysis and Conclusions

The Authority has found a variety of proposals involving the implementation of RIFs to be negotiable procedures. In *NAGE, Local R7-23,* the Authority held negotiable a proposal that would require an agency to apply existing RIF procedures "whenever an employee is scheduled for separation or downgrade through no fault of his/her own." 26 FLRA 916, 916 (1987). The Authority found that the proposal was a procedure because it did not affect the Agency's determination of whether to abolish positions and did not dictate the content of the RIF procedures. *Id.* at 918-19. The Authority found the proposal to be negotiable even though it would apply RIF principles to certain employees who had been removed from RIF protection under the agency's regulations. *Id.* at 917, 918 n.2. Under this precedent, we find that the third sentence of the proposal, which would require application of RIF procedures in situations under which current Agency regulations do not require application, is a negotiable procedure. We note that the third sentence does not affect the Agency's right to determine whether to abolish positions and/or which positions to abolish because it applies only after these decisions have been made by the Agency. *See id.* at 919. We also note that the Authority previously denied exceptions to an arbitration award that enforces a provision with identical language to the third sentence of the proposal. *See United States Dep't of the Interior, BIA, Office of Indian Education Programs, Rapid City, S.D.*, 55 FLRA 329, 329 n.2, 330-31 (1999) (*BIA*).

The Agency's only argument that the proposal affects management's rights is that it would limit its ability to use contract non-renewal to replace staff that are "relevant to [a school's] failure to make adequate yearly progress" under the NCLBA. Allegation at 2. However, the Agency does not explain how removal of employees who fall under this category would fall under the budget or "program conditions" to which the proposal applies. *See* Conf. Report at 2. Moreover, even if it does, the Agency points to no prohibition on the use of RIF procedures in these circumstances. [3] Accordingly, we find that the third sentence is within the duty to bargain. [4]

3. We note that Indian education personnel have not been removed from coverage of RIF procedures, set forth in 5 C.F.R. Part 351, established pursuant to 5 U.S.C. §§ 3501 *et seq*.

VII. Fourth Sentence

Non-renewal for cause or inadequate performance is grievable if the employee is not serving a probationary period.

Petition at 3.

A. Positions of the Parties

The Agency asserts that the fourth sentence is contrary to law because it would grant due process rights where none are allowed under law. In this regard, the Agency maintains that its educational personnel are generally employed under yearly contracts and are not entitled to procedural due process unless they "demonstrate that something beyond the contract, e.g., a statute, rule, or policy[,] secures [an] interest in re-employment or creates a legitimate claim to re-employment." Allegation at 2. The Agency also asserts that the fourth sentence excessively interferes with management's rights to hire and retain employees under § 7106(a)(2) of the Statute. *Id.* at 3.

The Union argues that the fourth sentence is not contrary to law because, under the Statute, unionized Federal employees "have the right to grieve and arbitrate an employing agency's decision not to renew their contracts[.]" Response at 7-8. The Union also argues that the Indian Education Act allows for hearings prior to discharge. *Id.* at 10-11; 25 U.S.C. § 1012(e) and (m). In addition, according to the Union, the Agency's regulations establish that educators are employed on a continuing basis, *id.* at 13-14 (citing 25 C.F.R. 38.8(g) and (j)), and the tenure provision in the parties' agreement is "evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown." *Id.* at 17 (quoting *Perry v. Snidermann*, 408 U.S. 593, 601 (1972)). In response to the Agency's management rights argument, the Union argues that the fourth sentence is a negotiable procedure and, alternatively, an appropriate arrangement for employees adversely affected by the exercise of the Agency's rights to hire and fire. *Id.* at 21.

B. Meaning of the Proposal

The parties agree that sentence four would allow non-probationary employees whose contracts are not renewed for cause or inadequate performance to grieve their non-renewal under the parties' negotiated grievance procedure. Conf. Report at 2. As the parties' understanding of this sentence comports with the wording, we adopt it. *See Laurel Bay*, 51 FLRA at 737.

C Analysis and Conclusions

1. The fourth sentence is not contrary to law.

The Agency points to no law or statute that forbids it from negotiating with the Union over grievance procedures addressing the non-renewal of yearly contracts. In this regard, we note that the case cited by the Agency for the proposition that there is no right to a third party review of contract non-renewals does not establish that such a proposal would be contrary to law. As noted above, the Authority previously denied exceptions to an arbitration award that enforces a provision with identical language to the fourth sentence of the proposal. *See BIA*, 55 FLRA at 329 n.2, 330-31. As the Agency has not pointed to any prohibition against negotiated grievance procedures being applied to contract non-renewals, we find that the fourth sentence is not contrary to law.

2. The fourth sentence does not excessively interfere with management's rights under § 7106(a)(2) of the Statute.

The Agency asserts that the fourth sentence excessively interferes with management's right to hire and retain employees under § 7106(a)(2) of the Statute. Allegation at 3. The Agency, however, presents no explanation of how this portion of the proposal would affect its right to hire and retain employees. Therefore, we reject this argument as a bare assertion. *See AFGE, Nat'l Council of Field Labor Locals*, *Local 2139*, 57 FLRA 292, 295 n.7 (2001) (argument that proposal interfered with the Agency's right to determine its mission rejected as a bare assertion).

VIII. Order

The first, third, and fourth sentences are negotiable.

4. In light of the finding that the proposal constitutes a negotiable procedure, it is not necessary to address the Union's alternate argument that the proposal constitutes an appropriate arrangement.