64 FLRA No. 79

PROFESSIONAL AIRWAYS
SYSTEMS SPECIALISTS
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

0-NG-2907

DECISION AND ORDER
ON NEGOTIABILITY ISSUE

February 4, 2010

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

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 concerns the negotiability of one proposal. The Agency's statement of position (SOP) was filed untimely as discussed below, and the Union did not file a response.

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

II. Preliminary Issues

The Authority issued a Show Cause Order (Order) directing the Agency to show cause why its SOP should not be dismissed as untimely filed. The Authority noted that the record of the post-petition conference (Record) issued in this case stated that the Agency did not request an extension of time and that, therefore, the SOP was required to have been filed with the Authority by September 14, 2006. [2] *See* Record at 2. The Order further stated that the Agency agreed with the information contained in the Record and that, although the SOP is dated September 13, it was filed (postmarked) on September 15. In addition, the Order noted that, although the Agency submitted a copy of the SOP to the Authority by facsimile transmission on September 14, a facsimile transmission is not an authorized method of service for SOPs. Order at 1-2.

The Agency filed a timely response to the Order. In its response, the Agency asserts that its SOP was filed timely because it was placed in a "U.S. Mail box on the evening of September 13[]" and the Agency "had every expectation that [the SOP] would be collected and postmarked on September 13." Agency Response to Order at 1. The Agency also asserts that, even if the mail was not collected and postmarked on September 13, "it should have been collected and postmarked on September 14." *Id.* No other documentation was provided.

The Agency does not dispute that, to be timely, the SOP was required to be filed by close of business on September 14. The Agency also does not provide any evidence that it filed such document on the due date. While the Agency submitted a facsimile transmission, a statement of position does not fall within the limited class of documents that may be served in this manner. *See, e.g., Marine Engineers' Beneficial Ass'n, Dist. No. 1 - PCD*, 60 FLRA 828, 828-29 (2005) (*Marine Engineers*) (Chairman Cabaniss dissenting on other grounds, Member Pope separate opinion) (Authority found agency's statement of position filed by facsimile transmission untimely). Under the Authority's Regulations, if a document is filed by mail, the date of filing of the document is the date it is "deposited in the U.S. mail." 5 C.F.R. § 2429.27(d). The date of mailing is determined in one of two ways: (1) by the "postmark" on the mailing; or (2) in the absence of a postmark, by the date of receipt minus five days. 5 C.F.R. § 2429.21(b). As the Agency's SOP was postmarked on September 15, it was filed on that date. Accordingly, we find that the SOP is untimely and will not consider it.

1. Member Beck's dissenting opinion is set forth at the end of this decision.

2. All dates in this section are in 2006.

Although the Agency's SOP is untimely and the Union did not file a response, we find that the record contains sufficient information to resolve the dispute. The record consists of information contained in the petition for review and the record of the post-petition conference. [3] Also, during such conference, the Union stated, and the Agency did not dispute, that the proposal in this case relates to the proposals in *Professional Airways Systems Specialists*, 64 FLRA No. 77 (Jan. 29, 2010) (*PASS*). Record at 1. Based on the position of the parties contained in the petition for review and the record of the post-petition conference, including the undisputed fact that the issue involved here is related to *PASS*, [4] we find that the record is sufficient to resolve the dispute.

III. Background

According to the Union, for approximately twenty years, the Agency certified dependent children of Agency employees working at Agency facilities in Puerto Rico as eligible for enrollment in the Department of Defense Domestic Elementary and Secondary Schools (DDESS) system in Puerto Rico. Subsequently, in June 2004, the Agency informed unit employees that it would no longer certify certain dependents of its employees as eligible to enroll in the DDESS system in Puerto Rico.

The Union filed an unfair labor practice charge, which was resolved in a settlement agreement obligating the Agency, among other things, to allow all children enrolled in the DDESS system to complete the 2004-05 school year and to bargain over the Agency's decision to no longer certify the children of certain Agency employees for enrollment in that system. Petition at 1-2. The proposal in dispute resulted from bargaining pursuant to the settlement agreement. *Id.*

IV. Proposal

> Section 17. Entitlement
>
> The entitlement for dependent education applies to all FAA dependent children of bargaining unit employees attaining school age. The options and rights set forth shall not be limited whether they previously attended a DoD [Department of Defense] school, and/or other educational institutions, but rather on the eligibility to attend school.

V. Positions of the Parties

A. Agency

The Agency asserts that the first sentence of the proposal "obligates the Agency to provide accessibility for dependent children of FAA bargaining unit members to a DDESS regardless of DoD Regulations." Record at 2. Specifically, the Agency contends that the proposal is "contrary to applicable law and DoD regulations concerning participation in any DoD schools and FAA policy, as not 'all' FAA employees are eligible to attend any DoD school." [5] Petition, Attachment 1. The Agency asserts that it "has no jurisdiction over the operation and/or eligibility requirements set forth by DoD regulations for enrollment in DoD schools located in Puerto Rico[.]" *Id.* According to the Agency, "[a]ny determination . . . of an employee's eligibility or qualifications required for participation for this program by the [Agency] is a reserved management right and subject to DoD's approval." *Id.* The Agency further contends that "participation by non-DoD agencies in the DoD school system program is voluntary and at the discretion of DoD. Therefore, the [Agency] cannot bind DoD to any course of action not within its jurisdiction." *Id.*

3. This case is different from the situation presented in *AFGE, Local 727*, 62 FLRA 372 (2008) (separate opinion by then-Member Pope), and *Marine Engineers* because in this case the Union set forth its legal position, *vis a vis* the Agency's allegation of nonnegotiability, in its petition. As a result, there is no need either to seek a reply (to the Agency's untimely SOP) from the Union or to address whether, if such reply had been filed, it would be accepted.

4. As set forth below, we rely on the record in *PASS* only insofar as it contains the wording of DoD instruction (DODI) 1342.26, as asserted by the Agency and not disputed by the Union.

5. The Agency did not specifically identify the DoD regulation. However, consistent with the parties' agreement that this petition is related to the issues in *PASS*, 64 FLRA No. 77, it is clear that the relevant regulation is DODI 1342.26. Accordingly, we take official notice of the wording of that instruction, as set forth by the Agency – and undisputed by the Union – in *PASS*. *See, e.g.*, *IBEW, AFL-CIO*, 26 FLRA 202, 204-05 (1987). In pertinent part, DODI 1342.26, Section 6.2.2.2. permits the enrollment in the DDESS system of dependents of: "Full-time civilian employees of the Federal Government, not residing in permanent quarters on a military installation residing in a territory, possession or commonwealth, who are subject by policy and practice to transfer or reassignment to a location where English is the language of instruction in the schools normally attended by dependent children of Federal personnel." *PASS*, SOP at 3.

B. Union

In the Post-Petition Conference, the Union explained that the proposal "makes it explicit that all dependents of FAA employees (serving outside the continental United States), not just those enrolled in a DDESS or other educational institution, can attend a DDESS." Record at 1. The Union also explained that the proposal "conditions this entitlement" on "the grounds that if a dependent is not eligible to attend a DDESS based upon DoD Regulation, the [Agency] would not be bound under the [parties' agreement] to place those dependents in the DDESS." *Id.* at 1-2. The Union emphasized that a "child's eligibility to attend a DDESS was contingent on meeting the eligibility requirements set forth in DoD Regulations." *Id.*

Further, in its petition, the Union asserts that, contrary to the Agency's assertions, the proposal is in "accord with the DoD's eligibility requirements[.]" Petition at 5. The Union contends that, "[o]nce an employee meets DoD's eligibility requirements and any standards agreed to by the Parties, [the proposal] operates in a manner to guarantee that the right extends prospectively without limitations on new and transferred students." *Id.* That is, according to the Union, the right to attend a school would not be limited to dependents who were already in the school system, but would include dependents who reach the age of eligibility as well as transfer students from other educational institutions.

VI. Analysis and Conclusions

A. Meaning of the Proposal

The proposal is silent with respect to how it is intended to operate. When a proposal is silent as to a particular matter, a union's statement clarifying the matter is considered consistent with the proposal's plain wording so long as the statement otherwise comports with the proposal's wording. *See, e.g., Nat'l Educ. Ass'n, Overseas Educ. Ass'n, Laurel Bay Teachers Ass'n*, 51 FLRA 733, 737 (1996) (*Laurel Bay*). In such circumstance, the Authority adopts the union's statement. *Id.*

As stated above, during the post-petition conference, the Union explained that the proposal "makes it explicit that all dependents of FAA employees (serving outside the continental United States), not just those enrolled in a DDESS or other educational institution, can attend a DDESS." Record at 1. The Union also explained that the proposal "conditions this entitlement . . . on the grounds that if a dependent is not eligible to attend a DDESS based upon DoD Regulation, the [Agency] would not be bound under the [parties' agreement] to place those dependents in the DDESS." *Id.* at 1-2. The Union emphasized that a "child's eligibility to attend a DDESS was contingent on meeting the eligibility requirements set forth in DoD Regulations." *Id.* at 2.

The Union's explanation is consistent with the plain wording of the proposal. Accordingly, we adopt this meaning of the proposal for purposes of our analysis. *See Laurel Bay*, 51 FLRA at 737. Based on this, the proposal would entitle all dependents of FAA employees serving outside the continental United States (CONUS), including dependents who reach the age of eligibility and transfer students from other educational institutions, to attend a DDESS, *but only if* the employees meet the eligibility requirements set forth in the DoD regulation. [6]

B. The proposal is within the duty to bargain.

The Agency contends that the first sentence of the proposal effectively "obligates the Agency to provide accessibility for dependent children of FAA bargaining unit members to a DDESS regardless of DoD Regulations." Record at 2. As noted above, the regulation referred to permits the enrollment in DDESS of dependents of certain employees.

Consistent with the foregoing discussion of the meaning of the proposal, the proposal would entitle all dependents of FAA employees serving outside the CONUS, including dependents who reach the age of eligibility and transfer students from other educational institutions, to attend a DDESS, *but only if* the employees meet the eligibility requirements set forth in the DoD regulation. In particular, the proposal is intended to operate consistent with the regulation and, thus, would not require the Agency to provide accessibility for dependents of employees who do not meet the eligibility require-

6. Our interpretation of the meaning of this proposal, unless modified by the parties, would apply in other disputes, such as arbitration proceedings, where the construction of the proposal is at issue. *See ACT, Evergreen & Rainier Chs.*, 57 FLRA 475, 477 n.11 (2001) (citing *Laurel Bay*, 51 FLRA at 741-42).

ments set forth in the DoD Regulation.[7] Therefore, the Agency's argument that the proposal is inconsistent with the DoD regulation is unpersuasive.[8]

The Agency also claims that the determination of an employee's eligibility or qualifications required for participation in DoD's school program is a reserved management right. However, the Agency's claim is not supported by any argument or explanations. Thus, the claim is a bare assertion that does not demonstrate that the proposal is outside the duty to bargain. *See, e.g. AFGE, Local 1164*, 55 FLRA 999, 1000 (1999); *NAGE, Local R1-109*, 54 FLRA 521, 528 (1998) (wholly unsubstantiated allegations held to be bare assertions).

For the foregoing reasons, the Agency has not demonstrated that the proposal is outside the duty to bargain.

VII. Order

The Agency shall upon request, or as otherwise agreed to by the parties, negotiate over the proposal.[9]

7. In this respect, the proposal is similar to Proposal 3 in *PASS*, 64 FLRA No. 77. Thus, like Proposal 3 in *PASS*, the proposal at issue here would not require the Agency to "establish an entitlement over which [the Agency] has no control[,]" as the dissent alleges. Dissent at 1. In this connection, we note that the word "entitlement" in the first sentence of the proposal need not mean "entitlement" for purposes of what DoD will allow. It also is susceptible of the meaning ascribed by the Union: that it would "guarantee" that unit employees will be able to attend a DDESS "*provided* they meet DOD eligibility requirements and any qualification standards agreed to by the Parties." Petition at 4 (emphasis added). We also note that the dissent's review of the meaning of the Union's proposal is inconsistent with the well-established principle, discussed above, that the Authority adopts a union's clarification of the meaning of a proposal so long as the statement otherwise comports with the proposal's wording. *See Laurel Bay*, 51 FLRA at 737. Moreover, the decisions cited by the dissent are inapposite because the proposals at issue in those cases — unlike the proposal here — included wording or imposed requirements that were inconsistent with the unions' statements of meaning. *See AFGE, Local 12*, 60 FLRA 533, 537 (2004) (Member Armendariz concurring) (union explanation that proposal did not require agency to fill a position from a particular source was contrary to proposal's express requirement that agency fill positions "as a result of advertising"); *ACT, N.Y. State Council*, 56 FLRA 444, 446-47 (2000) (union explanation that proposal would not increase number of civilian technicians assigned to a particular sector was contrary to how proposal would operate).

8. That a proposal may simply restate existing obligations does not affect its negotiability. Further, parties frequently include in their collective bargaining agreements provisions that mirror, or are intended to be interpreted in the same manner as, provisions of law and regulation. *See, e.g., U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 351, 354 (2009) (citations omitted).

9. In finding the proposal to be within the duty to bargain, we make no findings as to its merits.

Member Beck, Dissenting:

I noted in my Dissent in *Professional Airways Systems Specialists* (*PASS*) that an Agency cannot be required to negotiate about a matter over which it has no control. *See PASS*, 64 FLRA No. 77 (Jan. 29, 2010). Here, the proposal purports to make the FAA unilaterally responsible for determining that the children of its employees enjoy an "entitlement" to attend DoD schools. However, it is the DoD, and not the FAA, that determines who is "entitled" to attend those schools. Consequently, the FAA cannot be required to negotiate from a proposal that establishes an entitlement over which it has no control. *See POPA*, 53 FLRA 625, 682-83 (1997).

Although the second sentence of the proposal states that some unidentified "options and rights" shall depend "on the eligibility to attend school," the proposal as a whole is not at all clear that this "eligibility" qualification was intended to limit the completely unqualified "entitlement" found in the first sentence. Indeed, if the "eligibility" qualification were intended to limit the "entitlement," the proposal could – and presumably would – say so.

Moreover, it is not clear that the "eligibility" qualification refers only to the eligibility to attend a DoD school. The second sentence raises the concept of "other educational institutions" and states that the relevant eligibility is the eligibility "to attend school" — pointedly, not "to attend a *DoD* school." That is, the plain language of the proposal conditions the "options and rights" granted to its beneficiaries on the eligibility to attend *any* school. Therefore, to the extent the Union argues that the "eligibility" qualification makes negotiable what would otherwise be a nonnegotiable proposal, the Union's argument is inconsistent with the language of the proposal and unpersuasive. *See AFGE Local 12*, 60 FLRA 533, 537 (2004); *ACT, N.Y. State Council*, 56 FLRA 444, 446 (2000). *

I conclude, therefore, that the proposal is outside the Agency's duty to bargain.

*. I cannot conclude, as does the Majority in footnote 7, that the Union's clarification "comports with the proposal's wording." The Majority's reliance on *Laurel Bay* is misplaced. In that case, the Authority held that a union's *post hoc* explanation of a proposal can be considered consistent with the plain language of a proposal when the plain language is silent as to the particular matter being explained. *Nat'l Educ. Ass'n, Overseas Educ. Ass'n, Laurel Bay Teachers Ass'n*, 51 FLRA 733, 737 (1996). The Union's *post hoc* explanation here is inconsistent with the proposal's reference to "other educational institutions" and the proposal's use of the term "school" without any modifier making it clear that this is a reference only to DoD schools.