**64 FLRA No. 151**

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1547
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA
(Agency)

0-NG-2945

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DECISION AND ORDER ON
NEGOTIABILITY ISSUES

May 27, 2010

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

## 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 two proposals.[1] The Agency filed a statement of position (SOP). The Union filed a response to the Agency's SOP (Response).

For the reasons that follow, we find that both proposals are outside the duty to bargain.

## II. Background

Luke AFB has implemented several initiatives to reduce personnel. One of these initiatives is the Air Force Program Budget Decision 720 (PBD 720). Record of Post-Petition Conference (Conference Record) at 3; SOP at 2. The parties agree that actions taken under PBD 720 are subject to reduction-in-force (RIF) regulations. SOP at 2; Conference Report at 3; Response at 1-2. The Union's proposals address aspects of the RIF process.

## III. Proposal 10

> With respect to the abolishment of specific position job series, encumbered positions will be abolished based on employees' RIF Service Computation Dates (SCD); positions held by employees with the lowest RIF SCD will be abolished in inverse order.

Petition at 4.

A. Meaning of the Proposal

The parties agree that Proposal 10 requires that encumbered positions be abolished based on the employees' SCDs so that positions encumbered by employees with the lowest SCDs are abolished first. Conference Record at 2.[2] The Union further states that it does not intend Proposal 10 to require that a RIF be conducted based solely on the employees' SCDs. Rather, the SCD would be used to identify positions to be abolished. Once those positions have been identified, the remaining factors would be considered in implementing the RIF. Response at 1-2. As the Union's explanation of Proposal 10's meaning is not inconsistent with its plain wording,[3] we adopt it for purposes of determining Proposal 10's negotiability. *E.g.*, *NATCA*, 64 FLRA 161, 162 (2009).

B. Positions of the Parties

1. Agency

The Agency objects to Proposal 10's negotiability for two reasons. First, the Agency

1. The Union also filed two unfair labor practice cases in connection with the negotiability of these proposals. These cases were closed without resolving the negotiability of the proposals. *U.S. Dep't of the Air Force, Luke Air Force Base, Ariz.*, Case Nos. DE-CA-07-0059 & DE-CA-07-0293 (Dec. 7, 2007).

2. The parties also agree that "service computation date" has the meaning ascribed to it in government-wide RIF regulations. Conference Report at 2. *See* 5 C.F.R. § 351.503(d).

3. Member Beck disagrees that the Union's explanation is consistent with the plain wording of the proposal. The proposal speaks in absolute terms. By its plain meaning, this proposal neither contemplates nor permits that any other criteria -- such as those set forth in 5 C.F.R. §§ 351.501(a) and 351.502(a) -- may be used in determining which positions will be abolished.

claims that Proposal 10 violates management rights in § 7106(a)(2). SOP at 2-3.

Second, referring to government-wide RIF regulations in 5 C.F.R. § 351, the Agency argues that the proposal is inconsistent with the requirement that four factors, not only SCD, be used to determine how employees are to be affected by a RIF. *Id.* at 3. The Agency points out that employees' RIF retention standing is determined based on: (1) tenure group, (2) veterans preference, (3) length of service, and (4) credits for performance. *Id.* SCD relates to only one of these factors, length of service. *Id.* (citing 5 C.F.R. § 351.503).

2. Union

The Union claims that Proposal 10 is an appropriate arrangement[4] to lessen the adverse impact on senior employees of RIF actions taken under PBD 720. Petition at 5; Response at 1. The Union claims that Proposal 10 is needed because the process currently in place adversely affects senior employees, whose positions may be subject to a RIF while positions held by less senior employees are retained. Petition at 5.

The Union does not discuss Proposal 10's relationship to government-wide RIF regulations.

C. Analysis and Conclusions

We find that Proposal 10 is outside the duty to bargain.[5]

1. Proposal 10 is outside the duty to bargain because it is inconsistent with government-wide RIF regulations.

For the reasons that follow, we find that Proposal 10 is inconsistent with government-wide RIF regulations, and is therefore outside the duty to bargain pursuant to § 7117(a)(1) of the Statute.

Proposal 10 affects the RIF retention rights of Agency employees. Proposal 10 would require the Agency to make an initial selection of positions that would be subject to a RIF based only on employees' seniority, *i.e.*, employees' SCD. Once these positions, encumbered by employees with the lowest SCDs, have been identified, regular RIF procedures under 5 C.F.R. §§ 351.501 and 351.502 would apply.[6]

RIF regulations set forth requirements for determining employees' RIF retention rights that differ from Proposal 10's requirements. An agency that is preparing to conduct a RIF affecting a particular job series must establish a retention register. Employees are listed in the retention register in the order of their relative retention standings. Employees' retention standings are determined based on the application of four retention factors listed in the regulations applied "in descending order." 5 C.F.R. §§ 351.501(a), 351.502(a). These factors are: 1) tenure group; 2) veterans' preference; 3) length of service; and 4) performance. *Id.* Furthermore, as the order of the factors indicates, the initial determination distinguishing among employees for retention purposes is based on employees' tenure group; *e.g.*, whether an employee is a career employee not serving a probationary period, whether an employee is serving a probationary period because the employee was newly appointed, or whether the employee is serving under a term appointment. *See* 5 C.F.R. §§ 351.501(b) & 351.502(b).

As is apparent from the foregoing discussion, Proposal 10 would change how employees are initially distinguished for RIF retention purposes. Proposal 10 would make an employee's SCD the initial determinant of the employee's retention standing, rather than tenure group. Proposal 10 is therefore inconsistent with government-wide RIF regulations and is outside the duty to bargain under § 7117(a) of the Statute.

This conclusion is consistent with Authority precedent. Proposal 10 is similar to sentences two and three of Proposal 1 in *Laborers' International Union of North America, AFL-CIO-CLC, Local 1267*, 14 FLRA 686, 688 (1984) (*Laborers' Int'l*), which

4. Although the Union cites § 7106(b)(2) of the Statute rather than § 7106(b)(3), this appears to be a typographical error. Section 7106(b)(3) authorizes the negotiation of appropriate arrangements. Alternatively, assuming that the Union's citation is not a typographical error, it constitutes a bare assertion that does not provide a reason for finding the Union's proposal negotiable. *See, e.g., PASS*, 60 FLRA 609, 612 (2005) (union's claim that proposals constitute negotiable procedures rejected as a bare assertion).

5. Chairman Pope agrees that Proposal 10 is outside the duty to bargain but joins the opinion only as to Part C.2., finding that the proposal excessively interferes with management's right to layoff.

6. 5 C.F.R. § 351.501concerns employees in the competitive service and 5 C.F.R § 351.502 concerns employees in the excepted service.

the Authority found to be outside the duty to bargain. In *Laborers' Int'l*, the Authority found that sentences two and three of the proposal were intended to govern RIF retention rights of employees because they required the agency, during a RIF, to offer vacant shifts to employees based only on seniority. The Authority held that this was inconsistent with RIF regulations[7] because the proposal barred consideration of all the factors affecting retention standing set forth in the regulations. *Laborers' Int'l*, 14 FLRA at 688. Proposal 10 has a substantially similar effect, establishing employee seniority as the primary factor in determining how a RIF will affect an employee. Based on the above, we find that Proposal 10 is not within the duty to bargain.

2. Proposal 10 is outside the duty to bargain because it affects management's right to layoff under § 7106(a)(2)(A), and is not an appropriate arrangement under § 7106(b)(3) of the Statute.

In addition to the reasons discussed above, we also find that Proposal 10 is outside the duty to bargain because of its effect on management's rights.

a. Proposal 10 affects management's right to layoff under § 7106(a)(2)(A) of the Statute.

Management's right to layoff employees under § 7106(a)(2)(A) of the Statute includes the right to conduct a RIF and to exercise discretion in determining which positions will be abolished and which retained. *See, e.g., AFGE, Local 1827*, 58 FLRA 344, 345 (2003). As discussed in § III.C.1., above, Proposal 10 would prevent the Agency from conducting a RIF as prescribed in government-wide RIF regulations, and from determining which positions to abolish and which to retain. The proposal therefore affects management's right to layoff employees under 5 U.S.C. § 7106(a)(2)(A).

b. Proposal 10 is not an appropriate arrangement under § 7106(b)(3) of the Statute.

When a proposal affects a management right under § 7106(a) of the Statute, the proposal is nevertheless within the duty to bargain if it constitutes an appropriate arrangement under § 7106(b)(3) of the Statute. *AFGE, Local 1156*, 63 FLRA 340, 341 (2009). A proposal constitutes an appropriate arrangement if it is: (1) intended as an arrangement for employees adversely affected by the exercise of a management right; and (2) appropriate because it does not excessively interfere with the exercise of management's rights. *E.g., NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (KANG). The Authority determines whether a proposal excessively interferes with the exercise of a management right by weighing the benefits afforded employees under the proposed arrangement against the burden on the exercise of the right. *See NTEU*, 59 FLRA 978, 981 (2004).

Proposal 10 excessively interferes with management's right to layoff employees under § 7106(a)(2)(A). Focusing first on the proposal's benefits to unit employees, as described by the Union, the proposal is intended to benefit senior employees who might be affected by a RIF by requiring that less senior employees be RIFed first. Petition at 5; Response at 1.

As is apparent, the proposal is not an unqualified benefit to unit employees. It is true that the proposal clearly would benefit some employees by protecting them from the adverse effects of a RIF. However, those benefits are offset in equal measure by the proposal's adverse effect on other employees whose positions the proposal would require the Agency to abolish pursuant to RIF procedures, in place of the positions of employees whom the proposal would protect.

With regard to the burden on management's rights, the proposal totally eliminates the Agency's discretion in exercising its right to layoff. The proposal would require the Agency to abolish positions of less senior employees even though the Agency might choose other positions to abolish after applying the other factors specified in §§ 351.501(a) and 351.502(a).

Weighing the benefits and burdens, we find that the proposal interferes excessively with management's right to layoff. The proposal's burden on management's rights, removing the Agency's discretion as to the positions to be abolished, outweighs the proposal's uncertain benefit to unit employees. *Cf. Fed. Union of Scientists & Eng'rs*, 22 FLRA 731, 734 (1986) (holding nonnegotiable a proposal that would have eliminated the agency's discretion to determine which positions to abolish in

7. The RIF at issue in *Laborers' Int'l* concerned employees in the competitive service. Therefore, while they were not specifically cited, the RIF regulations at issue in that case included the requirements set forth in 5 C.F.R. § 351.501.

a RIF by requiring that part-time employees be RIFed before full-time employees). Accordingly, we conclude that Proposal 10 is not an appropriate arrangement and is outside the duty to bargain as contrary to § 7106(a)(2)(A) of the Statute.

## IV. Proposal 11

> With the exception of term and temporary positions that will expire on the effective date of the RIF, all RIF actions will be placed on hold until all probationary Excepted Service positions become Competitive Service so that all Luke positions will be part of the RIF. This does not include temporary student positions identified in 5 [C.F.R.] § 213.3202 and 5 [C.F.R.] § 213.3102.

Petition at 6.

### A. Meaning of the Proposal

The parties agree that Proposal 11 would delay a RIF until all excepted service Veterans Readjustment Appointment (VRA)[8] employees, like those listed in the Union's Petition at Attach. 3, are converted to the competitive service and therefore become subject to RIF procedures. The Union explains that when VRA employees are converted to the competitive service, those positions would be available to more senior competitive service employees for bump and retreat purposes.[9] Petition at 7; Conference Report at 2-3.

### B. Positions of the Parties

#### 1. Agency

The Agency claims that Proposal 11 "excessively interferes with [management's] rights to hire, assign, direct, and layoff employees, and could [have a] significant[] impact [on the Agency's] budget and resources," as well as the Agency's ability "to shape the workforce in a timely manner." SOP at 4. The Agency also argues that Proposal 11 is not an appropriate arrangement because it restricts the Agency's ability to hire VRA applicants, which are its primary source for recruiting well-qualified aircraft maintenance candidates. *Id*. In addition, the Agency claims that Proposal 11 is speculative because it assumes that, at some future time, excepted service VRA employees may have a lower retention standing during a RIF after they are converted to competitive service status. *Id*. Finally, the Agency asserts that Proposal 11 interferes with its management rights because, under the proposal, the Agency would have to wait until excepted service employees convert to the competitive service before it could conduct a RIF, a process that could take up to two years. *Id*.

#### 2. Union

The Union does not dispute that Proposal 11 affects management's rights under §7106(a)(2). However, the Union claims that Proposal 11 is an appropriate arrangement to lessen the adverse impact of a RIF on senior employees. Response at 1; Petition at 7. The Union asserts that, knowing that a RIF is imminent, the Agency can hire VRA employees into excepted service positions, fully aware that such positions would not be subject to the RIF. Petition at 7. The Union also argues that, unless a RIF is delayed, employees with many years of service could be separated while VRA employees with less than two years of service are retained. *Id*. Finally, the Union claims that Proposal 11 does not affect management's ability to hire because the Agency can hire VRA applicants under "other normal hiring authorities." Response at 2.

### C. Analysis and Conclusions

We find that Proposal 11 is outside the duty to bargain.

1. Proposal 11 is outside the duty to bargain because it affects management's rights under § 7106(a)(2), and is not an appropriate arrangement under § 7106(b)(3) of the Statute.

    a. Proposal 11 affects management's rights under § 7106(a)(2) of the Statute.

The Union does not dispute the Agency's claims that Proposal 11 affects management's rights under § 7106(a)(2). Accordingly, we assume, without

8. VRA appointments are excepted service positions with a two year probationary period after which these positions automatically convert to competitive service positions. These employees will be referred to as VRA employees.

9. "Bump and retreat" is the phrase used to describe the process whereby employees released from their competitive level in a RIF displace employees with lower retention standings. This process is set forth in 5 C.F.R. § 351.701.

deciding, that Proposal 11 affects management's rights. *See AFGE, Nat'l Council of Field Labor Locals*, 58 FLRA 616, 617 (2003) (assuming without deciding that proposal concerns the exercise of a management right).

b. Proposal 11 is not an appropriate arrangement under § 7106(b)(3) of the Statute.[10]

As indicated with regard to Proposal 10, above, when a proposal affects a management right under § 7106(a) of the Statute, the proposal is nevertheless within the duty to bargain if it constitutes an appropriate arrangement under § 7106(b)(3) of the Statute. *AFGE, Local 1156*, 63 FLRA at 341. A proposal constitutes an appropriate arrangement if it is: (1) intended as an arrangement for employees adversely affected by the exercise of a management right; and (2) appropriate because it does not excessively interfere with the exercise of management's rights. *E.g.*, KANG, 21 FLRA at 31.

i. Proposal 11 is not an arrangement.

A proposal must meet two requirements to constitute an arrangement. 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. The claimed arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights. *See, e.g., AFGE, Local 2280, Iron Mountain, Mich.*, 57 FLRA 742, 743 (2002) (*Iron Mountain*); *AFGE, Local 1687*, 52 FLRA 521, 523 (1996) (*AFGE, Local 1687*).

Proposal 11 satisfies the first, but not the second requirement for being an arrangement. Regarding the adverse effect requirement, there is no dispute that the employees here are undergoing RIF actions. Such actions, which can result in an employee's termination from employment, can have a severe, negative impact on any employee who undergoes them. *See U.S. Dep't of Def., Fort Bragg Dependents Sch., Fort Bragg, N.C.*, 49 FLRA 333, 352 (1994). Proposal 11 is intended to ameliorate this adverse effect by including VRA employees in a RIF, thereby making more positions available to senior competitive service employees for bump and retreat purposes. Therefore, Proposal 11 meets the first *KANG* requirement for being an arrangement.

However, regarding the second requirement, we find that the proposed arrangement is not sufficiently tailored. The Union has not explained and the record does not show how postponing a RIF until VRA employees are converted into the competitive service would lessen the effect of the RIF on more senior competitive service employees. The Authority has held that when a union fails to show how a proposal ameliorates adverse effects, it is not an arrangement. *See, e.g., AFGE, Nat'l VA Council 53*, 58 FLRA 8, 10 (2002), *aff'd sub nom. AFGE v. FLRA*, 352 F.3d 433 (D.C. Cir. 2003).

In this connection, nothing in the record indicates that converted VRA employees would necessarily have lower retention standings than senior competitive service employees. As noted by the Agency, there are four factors to be considered when placing employees in retention registers. These factors are: tenure group, veterans' preference, length of service, and performance. *See* 5 C.F.R. §§ 351.501 & 351.502. Under RIF regulations, it is possible that a VRA employee serving a two year probationary period could rank higher than some senior employees in the competitive service once all the retention factors are considered.

Accordingly, as the Union has not shown how senior competitive service employees would benefit from including VRA employees in a RIF, Proposal 11 is not sufficiently tailored and therefore fails to qualify as an arrangement. *Cf. AFGE, Nat'l VA Council 53*, 58 FLRA at 10.

ii. Proposal 11's claimed arrangement is not appropriate.

Furthermore, Proposal 11 excessively interferes with management's rights under § 7106(a)(2) of the Statute. As we have indicated with regard to Proposal 10, the Authority determines whether a proposal excessively interferes with the exercise of a management right by weighing the benefits afforded employees under the proposed arrangement against the burden on the exercise of the right. *See NTEU*, 59 FLRA at 981.

Proposal 11 would have uncertain benefits for unit employees. First, assuming that Proposal 11 intends to provide senior employees with more

10. Chairman Pope agrees that Proposal 11 is not an appropriate arrangement but joins the opinion only as to Part C.1.b.ii., finding that the proposal excessively interferes with management's right to layoff.

positions into which they can bump and retreat, as noted earlier, nothing in the record indicates that the converted VRA employees would necessarily have lower retention standings once all retention factors are considered. *See* 5 C.F.R. §§ 351.501 & 351.502. Second, even assuming that Proposal 11 ameliorated an adverse effect on unit employee by giving some senior competitive service employees more positions for bump and retreat purposes, this benefit would be offset by the proposal's adverse effect on other employees who, because of the proposal, would be displaced in the bump and retreat process.

With regard to the burden on management's rights, Proposal 11 could delay a RIF for up to two years, until all VRA employees are converted to the competitive service. Such a delay is incompatible with the purposes for which agencies conduct RIFs. These purposes include to compensate for a lack of work or a shortage of funds *See IFPTE, AFL-CIO, NASA Headquarters Prof'l Ass'n*, 8 FLRA 212, 213 (1982).

Weighing the burdens and benefits, we find that Proposal 11 excessively interferes with management's rights. The proposal's burden on management's rights, effectively preventing a timely agency response to the types of exigencies that lead to RIFs, outweighs the proposal's uncertain benefit to unit employees. *Cf. Nat'l Weather Serv. Employees Org.* (*MEBA/NMU*), 46 FLRA 49, 54-56 (1992) (finding that a proposal requiring the agency to delay for 180 days a decision to terminate services for which there was insufficient demand excessively interfered with management's rights).

Accordingly, because Proposal 11 does not constitute an arrangement, and because it excessively interferes with the Agency's rights, we conclude that Proposal 11 is not an appropriate arrangement and is outside the duty to bargain as contrary to § 7106(a)(2) of the Statute.

## V. Order

The petition for review is dismissed.