

63 FLRA No. 131

NATIONAL WEATHER SERVICE
EMPLOYEES ORGANIZATION
(Union)

and

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION
MARINE AND AVIATION OPERATIONS
AIRCRAFT OPERATIONS CENTER
TAMPA, FLORIDA

and

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL ENVIRONMENTAL
SATELLITE DATA
AND INFORMATION OFFICE
OFFICE OF OPERATIONS
WALLOPS COMMAND DATA
ACQUISITION STATION
WALLOPS ISLAND, VIRGINIA

and

UNITED STATES DEPARTMENT
OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION
OFFICE OF GENERAL COUNSEL

and

UNITED STATES DEPARTMENT
OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION
NATIONAL WEATHER SERVICE

(Agency)

0-NG-2956

DECISION AND ORDER ON
NEGOTIABILITY ISSUES

June 9, 2009

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). As relevant here, the appeal involves the negotiability of three provisions concerning the Agency's implementation of a five-tier performance rating system. The Agency filed a statement of position (SOP) to which the Union did not file a response.

For the reasons that follow, we find that all of the provisions are outside the Agency's duty to bargain. Accordingly, we dismiss the petition for review.

II. Background

The parties' dispute arises from the Agency's proposed implementation of Departmental Administrative Order (DAO) 202-430, which "sought to establish a five-tier rating system, as opposed to a pass/fail rating system." SOP at 3. Following joint negotiations between the Union and four activities within the Agency, the parties entered into a memorandum of understanding (MOU) concerning the implementation of DAO 202-430. On Agency-head review, the Agency declared nine provisions of that MOU nonnegotiable.

At the post-petition conference, the parties clarified that only Provisions 1, 2, 3, 4, 6, 8, and 9 of the nine provisions set forth in the Agency's disapproval letter were in dispute.¹ The Union subsequently withdrew its negotiability appeal with respect to Provisions 1, 2, 6, and 9. *See* Union Supplemental Submission (January 22, 2008); Union Supplemental Submission (December 27, 2007). Accordingly, only Provisions 3, 4, and 8 remain in dispute here.

III. Provisions**Provision 3**

A pre-established distribution of ratings (i.e., a quota) shall not be permitted.

Petition at 8; SOP, Ex. 4 at 2.

Provision 4

1. The Conference Report follows the numbering of the disputed provisions set forth by the Agency in its disapproval letter, which is different from the numbering set forth in the Union's petition for review. *See* Conference Report at 2. As the Agency, in its SOP, and the Union, in its partial withdrawals of certain provisions, follows the numbering set forth in the Agency's disapproval letter, we do so here.

The customer service element of an employee's plan will reflect a combination of the identification of the employee's customers, who include but are not limited to colleagues, external entities, and members of the public, with a measure of the employee's responsiveness to the customers in the performance of the employee's official duties. "Responsiveness" means attention to customer needs or requests within an appropriate time frame.

Petition at 10; SOP, Ex. 4 at 3.

Provision 8

The NOAA Office of Civil Rights will compile and review the summary ratings given to employees within each affected bargaining unit at the following intervals:

- a) Within 90 days of the end of the first performance rating cycle of the 5-Tier performance system, and
- b) every two years thereafter, within 90 days of the end of the performance rating cycle, and/or
- c) in any year prior to the implementation of a RIF.

The findings will be shared with the Union. If the review determines that members of protected classes as defined by rule, law or regulation are disparately impacted by the 5-tier rating system, all employees within that affected bargaining unit will receive the same RIF credit (12 years), regardless of their summary rating.

Petition at 14; *see also* SOP, Ex. 4 at 5 (only the underlined portion of the provision is in dispute).

IV. Meaning of the Provisions

The parties agree that Provision 3 means that a ratings quota will not be used in rating employees. Conference Report at 3.

The parties agree that Provision 4 means that an employee's customer service element will define "customer" and how to measure "responsiveness." *Id.* at 3.

The parties agree that, under the disputed portion of Provision 8, the Agency would be required to conduct a review to determine if any protected class of employees has been disparately impacted by the five-tier system, and, in the event that it has, then the Agency would be required to treat all employees within the affected

bargaining unit alike and provide them with a blanket twelve-year reduction-in-force (RIF) credit. *Id.* at 4.

V. Positions of the Parties

A. Agency

1. Provision 3

The Agency contends that the evaluation of employee performance, including the determination of ratings to be assigned to employees, is an exercise of management's rights to direct employees and assign work. SOP at 13 (citing *AFGE, AFL-CIO, Local 1760*, 28 FLRA 160, 169 (1987) (*AFGE, Local 1760*)). According to the Agency, Provision 3 "completely prohibits" it from exercising its right to evaluate employee performance under the five-tier system because it prevents the Agency from determining how many employees will receive which ratings, and, as such, prevents the Agency from determining which rating each employee's performance merits and imposes a substantive limitation on its ability to determine each employee's rating. *Id.*

The Agency also claims that a contract provision that paraphrases or restates a government-wide regulation is not negotiable if it affects a management right because such a provision imposes an independent, contractual requirement on the Agency. SOP at 12-13 (citing *NTEU, Chapter 243*, 49 FLRA 176, 190 (1994)). Here, the Agency argues that, although Provision 3 "paraphrases" 5 C.F.R. § 430.208(c), it is nonnegotiable because it affects management's right to rate employees by imposing a substantive limitation on the Agency's exercise of that right. *Id.* at 13. In this respect, the Agency contends that it would be required to follow a provision that violates management rights if 5 C.F.R. § 430.208(c) should change in the future.

The Agency further asserts that the Union does not argue that Provision 3 constitutes either a procedure or an appropriate arrangement under § 7106(b) of the Statute.

2. Provision 4

The Agency asserts that proposals that seek to prevent management from changing elements or standards governing employee performance affect management's rights to direct employees and assign work. SOP at 15 (citing *AFGE, Local 225*, 56 FLRA 686 (2000)). According to the Agency, the Authority has previously found that proposals that "condition[] the content [of a critical element] by specifying criteria to which management must conform" are nonnegotiable because they affect management's rights to direct employees and

assign work. *Id.* at 15-16 (quoting *NTEU v. FLRA*, 767 F.2d 1315, 1317 n.4 (9th Cir. 1985)). Here, as Provision 4 would require an employee's customer service element to define "customer" and "responsiveness," the Agency asserts that it dictates the meaning of the element and, as such, is nonnegotiable. Further, the Agency claims that the provision would restrict management's right to change the element in the future.

As with Provision 3, the Agency asserts that the Union has failed to argue that Provision 4 is intended to be either a procedure or an appropriate arrangement.

3. Provision 8

Insofar as the disputed portion of Provision 8 requires the Agency to provide twelve years of RIF credit to employees who are disparately affected by the five-tier system "regardless of their summary rating[.]" SOP at 18 (citation omitted), the Agency argues that it violates 5 C.F.R. § 351.504(a), which it asserts permits the Agency to grant additional service credit for performance based only on a "rating of record." *Id.* at 17 (quoting 5 C.F.R. § 351.504(a)).

B. Union²

The Union claims that Provision 3 "restates the wording of Section 4.01.k of the [DAO] which . . . guarantees the protections and provisions of 5 [C.F.R. §] 430.20[8](c)." ³ Petition at 8. According to the Union, the purpose of Provision 3 is "to ensure that employees are rated accurately, based on the requirements of [5 C.F.R.] Chapter 43, and [are] not subject to an artificial ratings ceiling." *Id.* That is, the Union claims that this provision would prevent the Agency from placing a ceiling on the number of employees eligible for a particular rating prior to evaluating employee performance. *See id.*

The Union explains that the clarification of terms in Provision 4 "communicat[es] expectations" and "enables employees to know what it is [that] they are supposed to do." *Id.* at 10. According to the Union, consistent with the DAO's objective of linking performance to the achievement of goals and results, it is essential that employees understand who they are to

respond to and what "responsiveness" entails in the context of their duties. *Id.*

The Union states that the purpose of Provision 8 is to ensure that "no employee benefits []or suffers from a discriminatory performance appraisal system when retention standing is calculated." *Id.* at 14-15.

VI. Analysis and Conclusions

A. Provision 3

Under its terms, Provision 3 would prevent the Agency from utilizing a ratings quota when rating employees. As argued by the Agency, the Authority has held that the evaluation of employee performance, including the right to determine the ratings to be given to individual employees, constitutes an exercise of management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. *AFGE, Local 1760*, 28 FLRA at 169. By failing to respond to the Agency's SOP, the Union concedes that Provision 3 affects management's rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. *See, e.g., AFGE, Local 1226*, 62 FLRA 459, 460 (2008); *NLRB Union and NLRB Prof'l Ass'n*, 62 FLRA 397, 401-03 (2008) (*NLRB*), *aff'd sub nom. NLRB Union v. FLRA*, 2009 U.S. App. LEXIS 3280 (D.C. Cir. 2009); *AFGE, Local 1712*, 62 FLRA 15, 16-17 (2007); *see also* 5 C.F.R. § 2424.32(c)(2) (a party's "[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion."). Accordingly, as the Union does not dispute the Agency's claim, we find that Provision 3 affects management's rights to direct employees and assign work.

The exercise of management's rights under § 7106(a)(2) is limited by "applicable laws." *NTEU*, 42 FLRA 377, 388-91 (1991), *enforcement denied on other grounds*, 966 F.2d 1246 (D.C. Cir. 1993). Thus, proposals or provisions that require an agency to exercise its management's rights in accordance with applicable laws do not interfere with such rights and are within the duty to bargain. *See id.*

In its petition for review, the Union asserts that Provision 3 "restates the wording of Section 4.01.k of the [DAO] which . . . guarantees the protections and provisions of 5 [C.F.R. §] 430.20[8](c)." Petition at 8. However, the Union does not explicitly argue that 5 C.F.R. § 430.208 constitutes an "applicable law" within the meaning of § 7106(b)(2) of the Statute. Further, the Union does not explicitly assert either that compliance with 5 C.F.R. § 430.208 renders the provision negotiable, or that such compliance establishes that

2. As the Union did not file a response to the Agency's SOP, the Union's petition for review contains the Union's only arguments in support of its petition.

3. Although the Union states that Section 4.01.k of the DAO "contractually guarantees the protections and provisions of 5 [C.F.R. §] 430.209(c)[.]" petition at 8, we note that this is a typographical error because that section of the DAO specifically cites 5 C.F.R. § 430.208(c). *See* SOP, Ex. 1 at 3.

the provision does not conflict with managements rights under § 7106(a)(2). As such, the Union has failed to expressly state “[w]hether and why the . . . provision enforces an ‘applicable law,’ within the meaning of 5 U.S.C. [§] 7106(a)(2).” 5 C.F.R. § 2424.25(c)(1)(iv); *see also NLRB*, 62 FLRA at 401-02. Further, the Union does not assert that the provision is encompassed by any of the exceptions to management rights set forth in § 7106(b). Accordingly, we find that Provision 3 is outside the Agency’s duty to bargain.

B. Provision 4

By its terms, Provision 4 would require that the customer service element be composed of “a combination” of two factors: (1) “the identification of the employee’s customers”; and (2) “a measure of the employee’s responsiveness to the customers in the performance of the employee’s official duties.” Petition at 10; SOP, Ex. 4 at 3. Provision 4 would also require the Agency to define the term “customer” as “includ[ing] but . . . not limited to colleagues, external entities, and members of the public[.]” *Id.* The provision would, therefore, require the Agency to base its assessment of employee performance with respect to the customer service element on the factors and definition listed in Provision 4.

As argued by the Agency, the Authority has routinely held that the establishment of performance standards and elements constitutes an exercise of management’s rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute. *See, e.g., Fed. Educ. Ass’n, Stateside Region*, 56 FLRA 473, 475 (2000) (*FEA*) (citing *AFGE, Local 1687*, 52 FLRA 521, 522-23 (1996)). It is also well established that proposals or provisions that restrict an agency’s authority to determine the content of performance standards and elements affect the exercise of these rights. *See id.* at 475. By failing to respond to the Agency’s argument that Provision 4 affects management’s rights to direct employees and assign work, the Union concedes that it does. *See, e.g., AFGE, Local 1226*, 62 FLRA at 460; *NLRB*, 62 FLRA at 401-03; *AFGE, Local 1712*, 62 FLRA at 16-17. The Union does not assert that the provision is encompassed by any of the exceptions to management rights set forth in § 7106(b) of the Statute. Accordingly, we find that Provision 4 is outside the Agency’s duty to bargain.

C. Provision 8

The disputed portion of Provision 8 would require the Agency to provide employees disparately impacted by the five-tier system with a blanket twelve-year RIF

retention service credit “regardless of their summary rating.” Petition at 14; SOP, Ex. 4 at 5. The Agency asserts that the disputed portion of the provision is, therefore, in direct violation of 5 C.F.R. § 351.504(a), which states, in pertinent part, that “[o]nly ratings of record . . . shall be used as the basis for granting additional retention service credit in a [RIF].” By failing to respond to the Agency’s argument that the disputed portion of Provision 8 violates 5 C.F.R. § 351.504(a), the Union concedes that it does. *See, e.g., AFGE, Local 1226*, 62 FLRA at 460. Accordingly, we find that the disputed portion of Provision 8 violates 5 C.F.R. § 351.504(a) and, as such, is outside the Agency’s duty to bargain.

VII. Order

The petition for review is dismissed.