

**63 FLRA No. 138**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1968  
(Union)

and

UNITED STATES DEPARTMENT  
OF TRANSPORTATION  
SAINT LAWRENCE SEAWAY  
DEVELOPMENT CORPORATION  
MASSENA, NEW YORK  
(Agency)

0-NG-2940

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DECISION AND ORDER ON  
NEGOTIABILITY ISSUES

June 22, 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), and concerns the negotiability of three proposals relating to the size of the crews utilized by the Agency to operate the locks in the Great Lakes Saint Lawrence Seaway. The Agency filed a statement of position (SOP), to which the Union did not file a response.<sup>1</sup>

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

**II. Background**

The Agency notified the Union that, commencing with the 2007 navigation season, it intended to utilize only 3-person crews to operate the locks in the Great Lakes Saint Lawrence Seaway. Corrected Record of Post-Petition Conference (Conference Report) at 1-2. The Agency stated that the shift from the use of 4-person to 3-person crews would be accomplished through

attrition. *Id.* In response to the Agency's notice, the Union submitted the proposals at issue in this case.

**III. Proposals**

## Proposal 1

The Union proposes that the Lock Operations Wall Crew size remain at four (4) until the end of July 2007 such that a joint committee may be formed immediately with equal representation from Management and the Bargaining Unit to establish Standard Operating Procedures (SOP's) for the 3-Man Crew and address Safety Concerns that will be forthcoming.

## Proposal 2

The Union proposes that through attrition that the Senior Lock Crew member has first chance at a vacancy that occurs within a 3-man crew. That is, when a Lock Crew member from a 3-Man Crew retires the Senior member from any other crew has first opportunity at the Vacancy if they want to switch crews.

## Proposal 3

The Union proposes that when a Vacancy occurs within a 3-Man Crew and no other Lock Crew Member requests to be switched that the position be filled internally through Article 25 Employee Development and then through Merit Promotion.

Petition at 4; Conference Report at 2-3.

**IV. Meaning of the Proposals**

The parties agree that, under Proposal 1, the Agency would continue to utilize 4-person crews until a joint labor-management committee could be established. Conference Report at 2. The "joint committee" would be composed of an equal number of management and Union representatives and would develop standard operating procedures with respect to the use of 3-person crews, as well as address any safety-related concerns that may arise as a result of the use of 3-person crews. *Id.* Under the proposal, the decisions of the committee would be binding on the Agency.

With respect to Proposal 2, the parties explain that the lock crews are set, meaning that they are composed of a permanent crew of unit employees who work together. *Id.* The parties agree that, under Proposal 2, whenever a vacancy arises on any of the lock crews, the most senior member of any other lock crew would have the first opportunity to request reassignment to the crew with the vacancy. *Id.*

1. For the reasons set forth *infra* Section V, we consider the Agency's SOP by waiving the expired time limit.

Under Proposal 3, when a vacancy occurs in any of the 3-person lock crews and no existing member of any other lock crew requests to be placed in the vacant position, the position would be filled internally according to Article 25 of the parties' agreement. *Id.* at 3.

## V. Preliminary Matter

The Authority's Regulations require an exclusive representative to serve a copy of the petition for review on both the agency's principal bargaining representative and the head of the agency. 5 C.F.R. § 2424.2(g). Here, because the Union failed to serve a copy of its petition for review on the head of the Agency, the Authority directed the Union to provide a statement of service demonstrating service of the petition on the Agency head's designee. April 3, 2007, Notice and Order (April 3<sup>rd</sup> Order) at 2.<sup>2</sup> In that Order, the Authority stated that "the prescribed period for the Agency to file a [SOP] on the Union's petition will not begin until the Agency head's designee receives the Union's petition[.]" *Id.* (citing 5 C.F.R. § 2424.24(b)). The order further stated that the Union's failure to comply "may result in dismissal of the petition." *Id.*

In response to the April 3<sup>rd</sup> Order, the Union demonstrated that it served the Agency head's designee with the petition on April 4. However, the Union failed to serve the Agency's principal bargaining representative with its response as required under 5 C.F.R. §§ 2424.2(g) and 2429.27(a). May 11<sup>th</sup> Order at 1. Accordingly, the Authority directed the Union to provide a statement of service demonstrating service of the Union's response to the April 3<sup>rd</sup> Order on the Agency's principal bargaining representative. *Id.* at 2. The Union served its response to the April 3<sup>rd</sup> Order on the Agency's principal bargaining representative on May 15.

As the Agency head's designee was served a copy of the petition on April 4, the Agency's SOP should have been filed with the Authority no later than May 9. 5 C.F.R. § 2424.24(b) ("the agency must file its [SOP] within thirty (30) days after the date the head of the agency receives a copy of the petition for review"). On June 1, the Agency simultaneously filed its SOP and a request for an extension of time to file its SOP. In support of its request, the Agency argues that it had no knowledge that the Union had served the petition on the Agency head's designee until it received the May 11<sup>th</sup> Order directing the Union to serve the Agency's princi-

pal bargaining representative with its response to the April 3<sup>rd</sup> Order. According to the Agency, its principal bargaining representative "had no knowledge that the Union had served the petition on the Agency head's designee until May 11, and had no knowledge of the actual date it was served until May 15." Cover Letter to SOP at 2. The Agency further asserts that its SOP "was prepared but held pending notice that the Union had complied with [the Authority's] procedures and the case was not dismissed." *Id.*

The Authority may waive any expired time limit, with exceptions not relevant here, in "extraordinary circumstances." 5 C.F.R. § 2429.23(b). For the reasons that follow, we find that the Agency has established extraordinary circumstances warranting waiver of the expired time limit.

As set forth above, under 5 C.F.R. § 2424.24(b), the time limit for the filing of the SOP begins to run from the date that the Agency head's designee receives the petition for review. Here, the Union initially failed to serve the petition for review on the Agency head's designee. In curing that deficiency, the Union failed to serve the Agency's principal bargaining representative with notice that the Agency head's designee had been served. As such, the Agency's principal bargaining representative was not aware that the Union had served the Agency head's designee, and, thus, that the time limit for filing the SOP had begun to run, until it received the Authority's May 11<sup>th</sup> Order, two days after the May 9 time limit for filing the SOP had already passed. Had the Union properly served the Agency's principal bargaining representative at the time it cured the initial deficiency, the Agency's principal bargaining representative would have had thirty days from that date to file its SOP. As the Agency's principal bargaining representative did not receive such notice until May 11, and as the Agency filed its SOP within 30 days of receiving notice that the Agency head's designee had been served, we find that, in these circumstances, the Agency has established extraordinary circumstances warranting waiver of the expired time limit. *Cf. AFGE, Local 3601*, 38 FLRA 177, 180-81 (1990) (motion for reconsideration granted where union failed to serve a copy of revised petition on the agency's principal bargaining representative).

## VI. Positions of the Parties

### A. Agency

#### 1. Proposal 1

2. All subsequent dates refer to 2007.

The Agency argues that Proposal 1 excessively interferes with management's right to determine the number of employees under § 7106(a)(1) of the Statute because it would require the Agency to hire five additional employees in order to bring each lock crew up to four people. SOP at 4.

The Agency also asserts that Proposal 1 raises a bargaining obligation dispute because there is already a standard operating procedure in place for the utilization of 3-person crews that has been in place for over twenty years and that has not been changed since 2006, at which time the Union had an opportunity to bargain.<sup>3</sup> *Id.* at 2-4 (citing SOP, Attachs. 1, 2).

## 2. Proposal 2

The Agency contends that Proposal 2 excessively interferes with management's right to select from any other appropriate source under § 7106 (a)(2)(C) of the Statute because the proposal would require the Agency to fill vacant lock crew positions by transferring current employees who wish to transfer by seniority. The Agency asserts that this would prohibit it from considering external applicants for those positions and would prohibit the consideration of qualifications and experience in choosing employees for crews. *Id.* at 6. Further, the Agency claims that the proposal would preclude it from deciding not to fill a crew vacancy at all.

The Agency also asserts that Proposal 2 raises a bargaining obligation dispute because lock crew changes are covered by Article 21 of the parties' agreement. *Id.* at 5-6.

## 3. Proposal 3

The Agency asserts that Proposal 3 excessively interferes with management's right to select under § 7106(a)(2) of the Statute. *Id.* at 8-9 (citing *AFGE, Local 738*, 39 FLRA 872 (1991)). In this regard, the Agency argues that the proposal: mandates that lock crew vacancies be filled only by internal candidates; limits the types of internal candidates that may be considered; does not allow for the consideration of external candidates; and precludes the Agency from not filling vacant positions at all. *Id.* at 8.

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3. A "bargaining obligation dispute" is "a disagreement between an exclusive representative and an agency concerning whether, in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable." 5 C.F.R. § 2424.2.

## B. Union<sup>4</sup>

The Union states that the Agency refused to bargain over Proposal 1 based on its assertion that there is an established 3-person procedure, but does not dispute the Agency's assertion in this respect. Petition at 4.

As to Proposal 2, the Union argues that the proposal would allow bargaining unit employees "the option of being able to work with a different crew" in the event that there is "tension or dislike" within an employee's existing crew. *Id.* at 5-6. The Union acknowledges, but does not dispute, the Agency's assertion that the subject of this proposal is "covered by" Article 21. *Id.* at 6.

According to the Union, Proposal 3 would provide career development to existing employees in other classifications by allowing them the opportunity to develop skills and advance within the Agency by working on a lock crew. *Id.* at 7; Conference Report at 3. The Union acknowledges, but does not dispute, the Agency's assertion that the proposal interferes with management's right to select from any appropriate source. Petition at 7.

## VII. Analysis and Conclusions

### A. Proposal 1

Proposal 1 would require the Agency to continue using 4-person crews until a joint committee could be formed to establish the standard operating procedures for a 3-person crew. The Agency asserts that the proposal excessively interferes with management's right to determine the number of employees under § 7106(a)(1) of the Statute. By failing to respond to the Agency's SOP, the Union concedes that Proposal 1 affects management's right to determine the number of employees. *See, e.g., NLRB Union, 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 1226*, 62 FLRA 459, 460 (2008); *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."). The Union does not assert that the proposal is encompassed by any of the exceptions to management rights set forth in § 7106(b).

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4. 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.

Accordingly, we find that Proposal 1 is outside the Agency's duty to bargain.

B. Proposal 2

Under Proposal 2, whenever a vacancy arises on a lock crew, the Agency would be required to provide the most senior member of any other lock crew the first opportunity to request reassignment to the crew with the vacancy. The Agency asserts that the proposal excessively interferes with management's right to select from any appropriate source under § 7106(a)(2)(C) of the Statute. By failing to respond to the Agency's SOP, the Union concedes that Proposal 2 affects management's right to select from any appropriate source. *See, e.g., NLRB*, 62 FLRA at 401-03; *AFGE, Local 1226*, 62 FLRA at 460; *see also* 5 C.F.R. § 2424.32(c)(2). The Union does not assert that the proposal is encompassed by any of the exceptions to management rights set forth in § 7106(b). Accordingly, we find that Proposal 2 is outside the Agency's duty to bargain.

C. Proposal 3

Under Proposal 3, when no existing member of a lock crew requests to be transferred to a vacant position on another crew, the Agency would be required to fill the vacancy internally according to the parties' agreement. The Agency asserts that the proposal excessively interferes with management's right to select under § 7106(a)(2) of the Statute. By failing to respond to the Agency's SOP, the Union concedes that Proposal 3 affects management's right to select. *See, e.g., NLRB*, 62 FLRA at 401-03; *AFGE, Local 1226*, 62 FLRA at 460; *see also* 5 C.F.R. § 2424.32(c)(2). The Union does not assert that the proposal is encompassed by any of the exceptions to management rights set forth in § 7106(b). Accordingly, we find that Proposal 3 is outside the Agency's duty to bargain.

### VIII. Order

The petition for review is dismissed.<sup>5</sup>

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5. In light of this conclusion, it is unnecessary to address the Agency's claims that Proposals 1 and 2 raise bargaining obligation disputes because the proposals are not otherwise negotiable. *See, e.g., PASS*, 59 FLRA 485, 488 n.4 (2003); *see also* 5 C.F.R. § 2424.2.