

**71 FLRA No. 76**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
NATIONAL VETERANS AFFAIRS  
COUNCIL #53  
(Union)

and

UNITED STATES  
DEPARTMENT OF VETERANS AFFAIRS  
(Agency)

0-AR-5429

DECISION

November 20, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member DuBester concurring)

Decision by Member Abbott for the Authority

**I. Statement of the Case**

In this case, the Authority further clarifies the principles of “specifically provided for” and “sole and exclusive discretion” as they relate to an agency’s bargaining obligations under 5 U.S.C. § 7106(b)(2) and (3).<sup>1</sup>

This case concerns the Agency’s duty to bargain over the implementation of the Veterans Affairs Accountability and Whistleblower Protection Act of 2017 (Accountability Act).<sup>2</sup> Arbitrator Hyman Cohen found that the Agency did not have a duty to bargain, and therefore, did not violate the parties’ agreement or § 7116(a)(5) of the Federal Service Labor-Management Relations Statute (Statute) by unilaterally implementing the Accountability Act without providing notice and an opportunity to bargain.

The Union argues that the award is deficient because the Arbitrator’s finding that there was no duty to bargain is contrary to the Statute. We agree. The Accountability Act does not specifically provide for all aspects that would preclude bargaining under § 7106(b)(2) and (3) of the Statute and does not provide the Agency with sole and exclusive discretion that would excuse it from its statutory duty to bargain. Therefore, we vacate the award.

**II. Background and Arbitrator’s Award**

The relevant facts of the case are straightforward. On June 23, 2017, the Accountability Act was signed into law, providing authority, under Title 38, for the Agency to address performance and misconduct concerns. On July 1, 2017, the Union submitted a demand to bargain implementation of the Accountability Act. The Agency proceeded to unilaterally implement the applicable provisions and procedures of the Accountability Act, without bargaining. Soon thereafter, the Union filed a national grievance against the Agency for its failure to engage in the bargaining process before implementing the Accountability Act, and subsequently invoked arbitration.

The stipulated issue was whether the Agency’s unilateral implementation of the Accountability Act violated the Statute and the parties’ agreement. The Arbitrator found that the Agency did not have a duty to bargain because, while the Accountability Act provided new procedures that would otherwise be conditions of employment, the procedures were not conditions of employment due to the Statute’s exclusion of matters “specifically provided for by federal statute” from the definition of conditions of employment.<sup>3</sup> He also found that the Agency did not have a duty to bargain because it had sole and exclusive discretion over the matter.

On October 31, 2018, the Union filed exceptions to the Arbitrator’s award. On November 30, 2018, the Agency filed its opposition to the Union’s exceptions.

<sup>1</sup> *U.S. Dep’t of the Air Force, Luke Air Force Base, Ariz. v. FLRA*, 844 F.3d 957, 961-63 (D.C. Cir. 2016) (*Luke Air Force*); *U.S. Dep’t of HHS, Public Health Serv., Indian Health Serv., Quentin N. Burdick Mem’l Health Care Facility, Belcourt, N.D.*, 57 FLRA 903, 907 (2002) (*Belcourt*).

<sup>2</sup> See Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017, Pub. L. No. 115-41 (codified as amended in scattered sections of 38 U.S.C.) (Accountability Act).

<sup>3</sup> Award at 25; see also 5 U.S.C. § 7103(a)(14)(C).

**III. Analysis and Conclusion: The award is contrary to law because the Accountability Act does not specifically provide for all procedures that would preclude bargaining under § 7106(b)(2) and (3) of the Statute and the Agency does not have sole and exclusive discretion.**

The Union argues that the Arbitrator erred as a matter of law when he found that the Agency did not have a duty to bargain over the implementation of the Accountability Act.<sup>4</sup> Specifically, the Union argues the Accountability Act does not specifically provide for all aspects to be followed in exercising the authority provided,<sup>5</sup> and it is not a matter over which the Agency has sole and exclusive discretion.<sup>6</sup> The Union contends that it only sought to bargain over the implementation of the prescribed procedures.<sup>7</sup> The Union also claims that the Arbitrator misunderstood the difference between the procedures that are prescribed by the Accountability Act and the bargaining over procedures and appropriate arrangements required by 5 U.S.C. § 7106(b)(2) and (3).<sup>8</sup>

After reviewing the record, we find that the award is contrary to law.<sup>9</sup> The Accountability Act does not specifically provide for all aspects that would preclude bargaining over procedures and appropriate arrangements,<sup>10</sup> and the Accountability Act does not give the Agency sole and exclusive discretion that would excuse bargaining over those procedures and arrangements.<sup>11</sup>

A. The Accountability Act does not specifically provide for all aspects that would preclude bargaining on its implementation and impact.

The Arbitrator correctly asserted that conditions of employment do not include “policies, practices, and matters – . . . to the extent such matters are specifically provided for by statutes.”<sup>12</sup> However, the Arbitrator erred as a matter of law by concluding that mere mention of a matter precludes § 7106(b)(2) and (3) bargaining.<sup>13</sup> The Authority has rejected arguments that reference to a particular matter in a statute excepts that entire matter from the definition of conditions of employment.<sup>14</sup> Instead the Authority has found where “‘the governing statute leaves any discretion to the agency’ . . . that discretion is subject to being exercised through negotiation, and the matter is not specifically provided for by [f]ederal statute.”<sup>15</sup>

The Accountability Act leaves the Agency with discretion regarding aspects of the disciplinary process under Title 38.<sup>16</sup> While the Accountability Act leaves no discretion for the Agency on the timeline in a removal, demotion, or suspension,<sup>17</sup> it does give the Agency discretion in determining the form of the notice and how it is to be communicated to the employee, how the employee will respond, and whether the employee can

<sup>4</sup> Exceptions Br. at 5.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.* at 11.

<sup>7</sup> *Id.* at 7-8.

<sup>8</sup> *Id.* at 7.

<sup>9</sup> The Authority reviews questions of law de novo. *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)). In conducting a de novo review, the Authority determines whether the arbitrator’s legal conclusions are consistent with the applicable standard of law. *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998).

<sup>10</sup> *IAMAW, Franklin Lodge No. 2135*, 50 FLRA 677, 681 (1995) (*Franklin Lodge*), *aff’d mem. sub nom. BEP v. FLRA*, 88 F.3d 1279 (D.C. Cir. 1996).

<sup>11</sup> *Luke Air Force*, 844 F.3d at 961-63.

<sup>12</sup> Award at 13 (quoting 5 U.S.C. § 7103(a)(14)(C) (emphasis added)).

<sup>13</sup> *Id.* at 13-15.

<sup>14</sup> *Belcourt*, 57 FLRA at 907 (citing *Franklin Lodge*, 50 FLRA at 681); *see also U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 502-03 (2018) (Member DuBester dissenting) (finding that “conditions of employment” are not synonymous with “working conditions,” and emphasizing that “conditions of employment” are “personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions”).

<sup>15</sup> *NAIL, Local 7*, 64 FLRA 1194, 1200 (2010) (citing to *Franklin Lodge*, 50 FLRA at 682, 685). *But see U.S. Dep’t of the Air Force, 4th Fighter Wing, Seymour Johnson Air Force Base v. FLRA*, 648 F.3d 841, 847-48 (D.C. Cir. 2011) (finding that a provision was specifically provided for by statute when it would require an unauthorized expenditure of appropriated funds).

<sup>16</sup> *See* Accountability Act, Pub. L. No. 115-41.

<sup>17</sup> *See* 38 U.S.C. § 714(c)(1)(A) (“The aggregate period for notice, response, and final decision in a removal, demotion, or suspension under this section may not exceed 15 business days.”); 38 U.S.C. § 714(c)(1)(B) (“The period for the response of a covered individual to a notice of a proposed removal, demotion, or suspension under this section shall be 7 business days.”); 38 U.S.C. § 714(c)(4)(B) (“An appeal under subparagraph (A) of a removal, demotion, or suspension may only be made if such appeal is made not later than 10 business days after the date of such removal, demotion, or suspension.”).

request the record to assist in his or her response.<sup>18</sup> Therefore, the Arbitrator erred as a matter of law by summarily concluding that all bargaining was precluded because the Accountability Act specifically provided for some aspects of the disciplinary process under Title 38.<sup>19</sup>

Like *U.S. DOJ, INS*, where the Authority held that a matter is not specifically provided for when the statute at issue leaves discretion to the agency head as to the specific content of the regulations to be promulgated,<sup>20</sup> here, the Accountability Act gives the Agency discretion to determine the specific content of the regulations implementing the requirements of the Accountability Act.<sup>21</sup> Accordingly, we find that the Accountability Act does not specifically provide for all aspects of the disciplinary process that would preclude bargaining over procedures and appropriate arrangements under the Statute.

B. The Agency does not have sole and exclusive discretion.

Again, the Arbitrator correctly asserted that agencies are not required to bargain over matters over which they have sole and exclusive discretion.<sup>22</sup> However, the Arbitrator again failed to apply the correct standard in determining whether the Agency has sole and exclusive discretion.<sup>23</sup> In fact, the Arbitrator failed to identify or analyze any statutory language or legislative history to support his conclusion that the Agency has sole and exclusive discretion.<sup>24</sup>

<sup>18</sup> See generally Accountability Act, Pub. L. No. 115-41. This is not an exhaustive list of potential bargaining topics, and does not limit the Union's ability to bargain over procedures and appropriate arrangements.

<sup>19</sup> In its opposition, the Agency focuses on a hypothetical proposal regarding the Secretary's authority to choose to use the disciplinary procedures under Title 38. Opp'n at 5-8. According to the record, the Union did not submit specific proposals because the Agency failed to respond to the Union's demand to bargain. Award at 1, 9. Therefore, the Agency's argument is premature.

<sup>20</sup> 55 FLRA 892, 897-98 (1999) (Member Cabaniss dissenting, in part; Member Wasserman dissenting, in part); see also *AFGE, Local 1917*, 55 FLRA 228, 232 (1999) (finding a matter was not "specifically provided for" because the statute gave the agency head the discretion to determine the "categories of employees who may use force . . . and the circumstances in which such force may be used").

<sup>21</sup> See generally 38 U.S.C. § 714(c).

<sup>22</sup> Award at 25; see also *U.S. Dep't of the Treasury, IRS*, 66 FLRA 120, 122 n.3 (2011) ("[A]gencies are not required to bargain over matters over which they have discretion if that discretion is 'sole and exclusive.'").

<sup>23</sup> Award at 25-27. The Arbitrator failed to analyze the Agency's claim of sole and exclusive discretion under more recent case law, particularly *Luke Air Force*. 844 F.3d at 961-63.

<sup>24</sup> Award at 19-27.

In analyzing claims of "sole and exclusive" discretion, the Authority looks at the plain wording and the legislative history of the statute in question.<sup>25</sup> In the absence of any indication that Congress intended the agency's discretion to be sole and exclusive, the exercise of discretion through collective bargaining is not inconsistent with law.<sup>26</sup>

In *U.S. Department of the Air Force, Luke Air Force Base v. FLRA*, the U.S. Court of Appeals for the D.C. Circuit found that the Secretary of Defense had sole and exclusive discretion over access to commissaries and exchanges, relying on the fact that the language of the section governing commissaries and exchanges was almost identical to the language in the section that authorized Branch Secretaries to "prescribe regulations to carry out [their] functions, powers, and duties under this title,' subject only to 'the authority, direction, and control of the Secretary of Defense.'"<sup>27</sup> Here, however, the plain wording of the Accountability Act does not support a conclusion that the Agency has sole and exclusive discretion that would preclude bargaining over any processes, procedures, or matters relating to the disciplinary process provided by Title 38. For example, 38 U.S.C. § 714(a)(1) provides "the Secretary may remove, demote, or suspend a covered individual . . . if the Secretary determines the performance or misconduct

<sup>25</sup> *Ill. Nat'l Guard v. FLRA*, 854 F.2d 1396, 1402 (D.C. Cir. 1988) (where the governing statute provided that the agency head was required to grant compensatory time for overtime work, instead of paying overtime pay, and prescribe duty hours for employees "notwithstanding any other provision of law," court found that agency head had sole and exclusive discretion); *NAGE, Local R5-136*, 56 FLRA 346, 348 (2000); *Ass'n of Civilian Technicians, Mile High Chapter*, 53 FLRA 1408, 1412-15 (1998) (finding that even though the plain language did not indicate sole and exclusive discretion, the legislative history could demonstrate that Congress intended the agency to possess sole and exclusive discretion).

<sup>26</sup> *POPA*, 53 FLRA 625, 648 (1997) (Absent an indication in the statutory language or the legislative history that the agency's discretion is sole and exclusive, the exercise of that discretion is subject to bargaining.); *Franklin Lodge*, 50 FLRA at 692; *NAGE*, 43 FLRA 1008, 1009-10 (1992) (finding that the proposal was negotiable because there was no indication in the language of the statute or the legislative history that the agency had unfettered discretion); see also *U.S. DOE, W. Area Power Admin.*, 71 FLRA 111, 111-12 (2019) (Member DuBester dissenting) ("If a law indicates that an agency's discretion over a matter is 'sole and exclusive' . . . then the agency is not obligated under the Statute to exercise that discretion through collective bargaining.") (quoting *NTEU*, 59 FLRA 815, 816 (2004)); *U.S. DHS, U.S. ICE*, 67 FLRA 501, 502 (2014) (Member Pizzella dissenting) (stating that "[m]atters concerning conditions of employment over which an agency has discretion are negotiable if the agency's discretion is not sole and exclusive").

<sup>27</sup> 844 F.3d at 961 (emphasis added) (citations omitted).

. . . warrants such removal, demotion, or suspension.<sup>28</sup> This is in contrast to another portion of Title 38, which provides:

an issue of whether a matter or question concerns or arises out of (1) professional conduct, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title *shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by another agency.*<sup>29</sup>

Therefore, if Congress intended to exclude § 7106(b)(2) and (3) regarding the implementation of the Accountability Act, it could have used similar language as other portions of Title 38 to do so.<sup>30</sup>

The legislative history of the Accountability Act does not indicate that Congress intended to provide the Agency with sole and exclusive discretion.<sup>31</sup> Unlike *NTEU*, where the Authority found that the Agency had sole and exclusive authority to set the pay of employees because the House Report emphasized that “all personnel-related matters including determinations regarding pay are within the ‘exclusive authority of the [Agency] to determine,’”<sup>32</sup> here, there is no such indication by Congress.<sup>33</sup> Therefore, we find that the Accountability Act does not provide sole and exclusive discretion over all processes, procedures, and matters related to the disciplinary process. Accordingly, we find that the award is contrary to law. The Agency was not excused from its duty to bargain under § 7106(b)(2) and

(3) concerning the impact and implementation of the Accountability Act.<sup>34</sup>

#### IV. Order

We vacate the award as contrary to law.

<sup>28</sup> See Accountability Act, 38 U.S.C. § 714(a)(1).

<sup>29</sup> 38 U.S.C. § 7422(d) (emphasis added).

<sup>30</sup> See *POPA*, 53 FLRA at 686-87 (finding that the agency’s discretion pursuant to a specific regulation was not sole and exclusive because other portions of the regulation “clearly indicate[d] that other authorities are to be exercised at the ‘sole discretion’ of the [agency].”).

<sup>31</sup> See generally 163 Cong. Rec. H4863-02 (June 13, 2017); 163 Cong. Rec. H4867-07 (June 13, 2017); 163 Cong. Rec. H4884-01 (June 13, 2017). We note that the Arbitrator and the Agency fail to cite any legislative history to support the conclusion that the Agency has sole and exclusive discretion.

<sup>32</sup> 59 FLRA 815, 817-18 (2004) (Member Pope dissenting) (citation omitted).

<sup>33</sup> See generally 163 Cong. Rec. H4863-02; 163 Cong. Rec. H4867-07; 163 Cong. Rec. H4884-01.

<sup>34</sup> Because the Arbitrator’s vague finding of no duty to bargain under the parties’ agreement is based solely on his erroneous statutory conclusion, we also vacate the portion of the award concerning the Agency’s alleged violation of its contractual bargaining obligation. Award at 13-14; see also *U.S. DHS, U.S. ICE*, 70 FLRA 628, 630 (2018) (Member DuBester dissenting) (setting aside contractual-violation finding where based on an erroneous legal conclusion).

**Member DuBester, concurring:**

I agree with the Decision to vacate the award as contrary to law.