

71 FLRA No. 77

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 940
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
PHILADELPHIA REGIONAL OFFICE
(Agency)

0-NG-3431

DECISION

November 20, 2019

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

I. Statement of the Case

This matter is before the Authority on a negotiability petition filed under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (Statute),¹ and concerns the negotiability of one proposal. Because the Agency failed to support its argument that the proposal is outside the duty to bargain, we grant the Union’s petition.

II. Background

On November 19, 2018, the Agency notified the Union by email that its proposal was “non-negotiable in accordance with 5 [U.S.C. §] 7106(a)(2)(B).”² The Union then timely filed its petition. After the deadline for the Agency’s statement of position (SOP) passed, the Authority’s Office of Case Intake and Publication issued an order directing the Agency to show cause why the Authority should not find that the Agency’s failure to file a SOP is a concession that the proposal is negotiable.³ The Agency did not respond to the order.

¹ 5 U.S.C. § 7105(a)(2)(E).

² Pet., Attach. 1 at 4.

³ Order to Show Cause at 2.

III. Proposal

The proposal states:

The parties agree that Lead LASs will only complete IQRs when there is an overflow of calls from the QRSs. Additionally, supervisors will not be completing bargaining unit work to hide the fact that the standards change created an issue for the QRSs and management will not hire more BUEs.⁴

IV. Analysis and Conclusions

After the exclusive representative files a petition for review, the agency must file its statement of position, in which it must, “among other things, . . . supply all arguments and authorities in support of its position.”⁵ In addition, an agency “has the burden of raising and supporting arguments that the . . . provision is . . . contrary to law.”⁶ The Authority has found that agencies fail to meet their regulatory burden when they merely cite a law or regulation without explaining how a particular proposal or provision conflicts with that law or regulation.⁷ Additionally, an agency’s “[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument.”⁸

Here, the Agency did not file a statement of position or respond to the order. Its email to the Union merely claims, without elaboration, that the proposal is contrary to § 7106(a)(2)(B) of the Statute.⁹ Although the Agency cites a specific section of the Statute,¹⁰ it does not explain which of the three management rights contained in § 7106(a)(2)(B) are affected by the proposal or why the proposal is contrary to law.¹¹ Accordingly,

⁴ Pet. at 4. The record shows that “LAS” means “Legal Administrative Specialist,” and “IQR” means “individual quality reviews.” Pet., Attach. 1 at 1. “QRS” is undefined in the record.

⁵ 5 C.F.R. § 2424.24(a); *see id.* § 2424.24(c)(2).

⁶ *Id.* § 2424.32(b).

⁷ *See NFFE, Fed. Dis. 1, Local 1998, IAMAW*, 66 FLRA 124, 128 & n.7 (2011); *AFGE, Local 1547*, 65 FLRA 911, 913 (2011), *pet. for review denied sub nom. U.S. Dep’t of the Air Force, Luke Air Force Base v. FLRA*, 680 F.3d 826 (D.C. Cir. 2012); *AFGE, Local 1367*, 64 FLRA 869, 875 (2010).

⁸ 5 C.F.R. § 2424.32(c)(1).

⁹ Pet., Attach. 1 at 4.

¹⁰ 5 U.S.C. § 7106(a)(2)(B) (“nothing in this chapter shall affect the authority of any management official of any agency . . . to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted”).

¹¹ *E.g., NAIL, Local 7*, 67 FLRA 654, 658-59 (2014) (Member Pizzella dissenting).

we conclude that the Agency has waived its argument that the proposal is contrary to law.¹²

V. Decision

We grant the Union's petition and order the Agency to bargain, upon request, over the proposal.

¹² 5 C.F.R. § 2424.32(c)(1).