

71 FLRA No. 78

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1998
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND WORKERS
(Union)

and

UNITED STATES
DEPARTMENT OF STATE
PASSPORT SERVICES
(Agency)

0-NG-3417

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

November 21, 2019

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

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).¹ It concerns seven proposals.

Because the Agency does not claim that Proposals 1-4 and 6-7 conflict with any law, rule, or regulation, there is no dispute as to the negotiability of those proposals. Therefore, we dismiss the Union's petition for review (petition) as to Proposals 1-4 and 6-7, without prejudice.

The remaining proposal, Proposal 5, relates to the establishment of compressed work schedules. The Agency claims that the proposal involves a permissive subject of bargaining that it elects not to bargain. As the Agency does not support that argument – or address the applicability of the Federal Employees Flexible and Compressed Work Schedules Act of 1982

(the Work Schedules Act)² – we find that Proposal 5 is negotiable.

II. Background

The Union submitted several proposals relating to the establishment and administration of alternative work schedules. In response, the Agency informed the Union that it would “no longer engage in bargaining over permissive subjects under . . . [§] 7106(b)(1)” of the Statute;³ but the Agency did not specify which of the Union's proposals allegedly concerned permissive subjects of bargaining. Subsequently, the Union filed the petition that is before us now, the Agency filed a statement of position (statement), and the Union filed a response. The Agency did not file a reply to the Union's response.

III. Preliminary Matters

A. We dismiss the petition as to Proposals 1-4 and 6-7, without prejudice.

The Union's petition concerns 7 proposals.⁴ However, the Agency asserts that it “never declared” Proposals 1-4 and 6-7 nonnegotiable.⁵ In addition, the Agency does not now contend that any of those proposals are contrary to law, rule, or regulation.⁶

Under § 7117 of the Statute and § 2424.2 of the Authority's Regulations, the Authority will consider a petition for review only where there is a negotiability dispute.⁷ The regulations define a “[n]egotiability dispute” as a “disagreement between a[] [union] and an agency concerning the legality of a proposal or provision.”⁸

As noted above, the Agency never explicitly alleged that Proposals 1-4 and 6-7 were nonnegotiable.⁹ The Union disagrees, arguing that the Agency – by failing to identify specific proposals in its allegation of nonnegotiable – declared *all* of the proposals nonnegotiable.¹⁰ But even if the Agency had made such an allegation during bargaining, it effectivity withdrew

² *Id.* §§ 6120-6133.

³ Union Resp., Ex. 1, Email Thread (Email Thread) at 1.

⁴ Pet. for Review (Pet.) at 3.

⁵ Agency Statement of Position (Statement) at 2-3.

⁶ *See id.* at 1-3.

⁷ 5 U.S.C. § 7117; 5 C.F.R. § 2424.2; *see, e.g., AFGE, Local 1164*, 65 FLRA 924, 927 (2011) (*Local 1164*).

⁸ 5 C.F.R. § 2424.2(c) (also stating that a “negotiability dispute exists when a[] [union] disagrees with an agency contention that . . . a proposal is outside the duty to bargain”).

⁹ *See* Email Thread at 1-3.

¹⁰ *See* Pet. at 3; Union Resp. Br. at 1.

¹ 5 U.S.C. § 7105(a)(2)(E).

that allegation with regard to Proposals 1-4 and 6-7 by (1) abandoning it before us now¹¹ and (2) not arguing that those proposals are contrary to any law, rule, or regulation.¹² Therefore, there is no disagreement between the Union and the Agency over the negotiability of Proposals 1-4 and 6-7, and we dismiss the Union's petition as to those proposals, without prejudice to the right to refile, if the conditions governing review of negotiability issues are satisfied.¹³

- B. We find that § 2424.30(a) of the Authority's Regulations does not require the dismissal of the petition.

The Agency requests that the Authority dismiss the Union's petition pending the outcome of an Agency-filed grievance.¹⁴ In the grievance, the Agency alleges that the Union violated the parties' collective-bargaining agreement by failing to refer the negotiability dispute to the "national level" before filing the petition.¹⁵

Section 2424.30(a) of the Authority's Regulations provides that the Authority will dismiss a negotiability appeal without prejudice where the "exclusive representative files an unfair[-]labor[-]practice [(ULP)] charge . . . or a grievance alleging a[ULP] under the parties' negotiated grievance procedure, and the charge or grievance concerns issues directly related to the petition for review."¹⁶

Because the Agency – not the Union – filed the grievance,¹⁷ and the grievance does *not* involve a ULP,

§ 2424.30(a) is not applicable.¹⁸ Accordingly, we deny the Agency's request to dismiss the Union's petition on this basis.¹⁹

IV. Proposal 5

A. Wording²⁰

4. CWS Participation/Eligibility (Five/Four-Nine) / (Four Day Workweek). The four day workweek and the 5/4-9 compressed plan are the two types of Compressed Work Schedules available in the Department of State.

- a. Four Day Workweek: A full time employee must work 10 hours a day, 40 hours a week, and 80 hours a biweekly pay period.
- b. Five/ Four-Nine Plan: A full time employee must work eight 9-hour days and one 8-hour day for a total of 80 hours in a biweekly pay period.

¹¹ Statement at 2-3 (asserting that it "never declared . . . [Proposals 1-4 and 6-7] non[]negotiable").

¹² See *AFGE, Local 1164*, 49 FLRA 1408, 1411 (1994) (finding a negotiability appeal not appropriate for resolution because the agency did not allege, before the Authority, that the proposal was "inconsistent with law, rule or regulation").

¹³ See *AFGE, Nat'l Border Patrol Council*, 42 FLRA 935, 936-37 (1991) (dismissing petition, without prejudice, where agency had not alleged that "any specific proposal" was nonnegotiable and did not argue before the Authority that any proposal was contrary to law, rule, or regulation); *Am. Fed. of State, Cnty. & Mun. Emps., Local 3097*, 42 FLRA 412, 450 (1991) (finding that the "conditions governing review of negotiability issues ha[d] not been met" where it was unclear whether the agency had made an allegation of nonnegotiability, and it did not argue before the Authority that the proposal was nonnegotiable); *Fed. Prof'l Nurses Ass'n, Local 2707*, 34 FLRA 71, 71-72 (1989) (dismissing petition, without prejudice, where agency withdrew its allegation of nonnegotiability before the Authority).

¹⁴ Agency's Supp. Submission at 1-2.

¹⁵ *Id.*

¹⁶ 5 C.F.R. § 2424.30(a).

¹⁷ Section 2424.30(a) does not address the effect of an agency-filed ULP. Our decision is based on the wording of that regulation.

¹⁸ See *AFGE, Local 1938*, 66 FLRA 1038, 1039 (2012) (declining to find a grievance "directly related" to a negotiability appeal under § 2424.30(a) because it did not involve a ULP).

¹⁹ See *NFFE, Local 1998, IAMAW*, 71 FLRA 317, 317 n.2 (2019) (Member DuBester concurring) (finding that a similar grievance did not implicate § 2424.30(a)).

²⁰ On October, 23, 2018, the Authority held a post-petition conference with the parties. Record of Post-Pet. Conference (Record) at 1. During the conference, the Union modified the wording of Proposal 5 "so that the section after [S]ection d would be labeled [S]ection e, followed by [S]ection f, and[, then,] [S]ection g." Record at 2. In addition, the Union clarified that "RDO" meant "regular day off." *Id.* And "CWS" stands for Compressed Work Schedule. Pet. at 6(h).

Arrival / Departure Times

Arrival Time	Departure Time	Length of Lunch
6:30 AM	4:15 PM	45 minutes
7:00 AM	4:30 PM	30 minutes
7:00 AM	4:45 PM	45 minutes
7:15 AM	4:45 PM	30 minutes
7:15 AM	5:00 PM	45 minutes
7:30 AM	5:00 PM	30 minutes
7:30 AM	5:15 PM	45 minutes
7:45 AM	5:15 PM	30 minutes
8:00 AM	5:45 PM	45 minutes
8:00 AM	5:30 PM	30 minutes
8:15 AM	6:00 PM	45 minutes
9:00 AM	5:30 PM	30 minutes

- c. A maximum of three BUEs will be permitted to utilize a CWS during the first four months of the effective period of this Agreement. If more than three BUEs are eligible to work a CWS (eligibility for CWS is subject to the criteria outlined below), selection for CWS shall be based upon seniority within CA/PPT/S/L/LE. CWS selections will be permanent unless the BUE is removed from the CWS program pursuant to the terms of the Master Agreement or withdraws from the AWS.
- d. After this four-month period, the Division Chief will consider allowing one or more additional BUEs, who otherwise are eligible, to work a CWS. The Union may propose to bargain additional slots for BUEs to participate in the CWS consistent with Articles 12, and 26 of the Master Agreement.
- e. In order to be considered for participation in the CWS program, a BUE must submit a written request, email is acceptable, to the Division Chief. This request shall specify which day in each two-week pay period the BUE wishes to be their RDO, and which day the BUE wishes to be their shorter work day, with the remaining eight days to be their longer work days as described. The request also shall state on which date the BUE would like their requested CWS to commence; this date shall be at least 14 calendar days after the date of the request and at the beginning of a pay period.

- f. The Division Chief will respond to the request in writing within a reasonable time, generally within fourteen (14) calendar days from receipt; this response will indicate clearly whether the BUE’s request has been granted or denied. If the request is granted, it will be put in effect on the next pay period following approval.
- g. When a BUE is enrolled in the Government-funded formal training class or is on official travel, and the formal training or official travel interferes with the CWS, the BUE may be required to discontinue the CWS for the pay period that includes the training or travel. (For example, Government-funded formal training or travel consisting of more than four consecutive work days requires temporary suspension of CWS.)²¹

B. Meaning

Proposal 5 establishes two types of compressed work schedules: the “four[-]day workweek” and the “[f]ive/[f]our-[n]ine [p]lan.”²² Section c, among other things, sets the maximum number of bargaining-unit employees that are permitted to work a compressed work schedule during the first four months of the agreement.²³ And Section d provides that after those four months, the Agency will consider allowing more bargaining-unit employees to work a compressed work schedule.²⁴

C. Analysis and Conclusion: Proposal 5 is negotiable.

The Agency argues that Proposal 5, Sections c and d concern “permissive subjects” that it “elects not to bargain.”²⁵ In this regard, the Agency asserts that those sections of Proposal 5 “identify the numbers, types[,] and grades of employees or positions assigned to a tour of duty.”²⁶ In response, the Union

²¹ Pet., Attach. 2, Union’s Proposals at 3-5.

²² *Id.* at 3-4.

²³ *Id.* at 4.

²⁴ *Id.*

²⁵ Statement at 2.

²⁶ *Id.*; see 5 C.F.R. § 2424.2(c) (“A negotiability dispute exists when a[union] disagrees with an agency contention that . . . a proposal is bargainable only at its election.”); see also 5 U.S.C. § 7106(b)(2) (stating that agencies may elect to bargain “on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work”).

contends that the proposal is negotiable under the Work Schedules Act.²⁷

Section 2424.32 of the Authority's Regulations states that agencies have "the burden of . . . supporting arguments that [a] proposal . . . is outside the duty to bargain,"²⁸ and a failure to support an argument will "be deemed a waiver of such argument."²⁹ That section further provides that 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."³⁰

Here, the Agency fails to support or explain its argument that Proposal 5 is nonnegotiable,³¹ and it does not address the Union's contention that Proposal 5 is negotiable under the Work Schedules Act.³² Consequently, consistent with § 2424.32, we find that the Agency has waived its nonnegotiability argument³³ and conceded that the proposal is within the duty to bargain under the Work Schedules Act.³⁴ Thus, we conclude that Proposal 5 is negotiable.

We note that unlike the other proposals, the Agency explicitly asserts that Proposal 5 concerns a "permissive subject[]" of bargaining that it "elects not to bargain."³⁵ As § 2424.2(c) of Authority's Regulations states, when an agency contends "that a proposal is bargainable only at its election," "[a] negotiability dispute exists."³⁶ The dissent chooses to ignore the plain wording of that regulation and, instead, relies on the Agency's characterization of its

argument as involving only a "bargaining dispute."³⁷ But the Agency's characterization is wholly irrelevant to what its argument *actually* is. The Agency recites, nearly word-for-word, § 7106(b)(1) and specifically argues that Proposal 5 is outside the duty to bargain because it concerns a permissive subject.³⁸ Applying the unambiguous wording of § 2424.2(c), and longstanding Authority precedent, there is simply no way to interpret that argument as anything but a negotiability dispute.³⁹ Even the dissent acknowledges that the Agency "*unequivocally*" claims that it "elects not to bargain" over Proposal 5.⁴⁰

Strangely, even though the dissent finds that the parties have not made *any* arguments concerning the negotiability of Proposal 5, the dissent addresses, in great detail, the negotiability of Proposal 5.⁴¹ And in doing so, the dissent reaches issues, and makes arguments, that neither of the parties have raised. We decline to make this case about anything more than what it is: the Agency raised, but did not support, a negotiability argument as to Proposal 5, *and* it did not, in any way, contest the Union's argument that Proposal 5 is negotiable. Under these circumstances, the Agency waived its nonnegotiability argument and conceded the negotiability of the proposal.⁴²

V. Order

We dismiss the Union's petition, without prejudice, as to Proposals 1-4 and 6-7. We direct the Agency to bargain, upon request, over Proposal 5.

²⁷ Resp. to Proposal 5, Section c at 1; Resp. to Proposal 5, Section d at 1; *see also* Office of Personnel Management Guidance, Negotiating Flexible & Compressed Work Schedules, available at <https://www.opm.gov/policy-data-oversight/labor-management-relations/law-policy-resources/#url=Negotiating-Flexible-and-Compressed-Work-Schedules> (stating that "management rights under 5 U.S.C. § 7106 are not a bar to negotiations of flexible or compressed work schedules") (last visited November 20, 2019).

²⁸ 5 C.F.R. § 2424.32(b).

²⁹ *Id.* § 2424.32(c)(1).

³⁰ *Id.* § 2424.32(c)(2).

³¹ The Agency does not explain how Proposal 5 affects either the numbers, types, or grades of any particular employees or positions. Nor does it identify any organizational subdivision, work project, or tour of duty that is affected by the proposal.

³² We note, again, that the Agency did not file a reply to the Union's response.

³³ *See, e.g., NFFE, Local 1450, IAMAW, 70 FLRA 975, 977 (2018) (rejecting, "as a bare assertion," union argument that proposal was negotiable under § 7106(b)(2)).*

³⁴ *See Local 1164, 65 FLRA at 926 (finding that union conceded nonnegotiability of proposal by failing to respond to agency's argument).*

³⁵ Statement at 2.

³⁶ 5 C.F.R. § 2424.2(c) (emphasis added).

³⁷ Dissent at 8.

³⁸ *Compare* Statement at 2 (arguing that Proposal 5 concerns "the numbers, types[,] and grades of employees or positions assigned to a tour of duty"), with 5 U.S.C. § 7106(b)(1) (agencies can "elect[]" to bargain "on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty").

³⁹ *See* 5 C.F.R. § 2424.2(c) ("A negotiability dispute exists when an exclusive representative disagrees with an agency contention . . . that a proposal is bargainable only at its election."); *AFGE, Local 1336, 52 FLRA 794, 798 (1996) (noting the approach that the Authority applies "in negotiability disputes where parties disagree whether a proposal comes within the terms of . . . [§] 7106(b)(1)."*); *NAGE, Local R5-184, 51 FLRA 386, 393 (1995) (discussing a "determination that a proposal is negotiable at the election of the agency under [§] 7106(b)(1)".*

⁴⁰ Dissent at 8 (emphasis added).

⁴¹ *Id.* at 8-10.

⁴² 5 C.F.R. § 2424.32(c)(1)-(2).

Member Abbott, dissenting in part:

I agree that the Petition regarding Proposals 1-4 and 6-7 should be dismissed without prejudice because the Agency has *not* declared these proposals to be *non-negotiable*. However, I part company with the majority's decision at Proposal 5 for several reasons.

Responding to Proposal 5, the Agency repeats the exact same sentence – “[t]he agency never declared that this proposal was nonnegotiable” – for Proposal 5 as it did for all seven proposals.¹ Unlike the other proposals, however, the Agency makes an alternative argument that Proposal 5 raises a “bargaining dispute” because parts c. and d. are permissive subjects of bargaining that the “[A]gency elects not to bargain.”² I cannot conclude that this distinction warrants treating Proposal 5 differently than Proposals 1-4 and 6-7 and would dismiss the entire petition without prejudice to the right to refile.

Although I would conclude that it is unnecessary to address whether the Agency has a duty to bargain over Proposal 5 in order to dismiss the petition, I do not agree that the Agency is obligated to bargain over parts c. and d.

First, the majority erroneously asserts that Proposal 5 “establishes two types of compressed work schedules”³ when in fact the proposal does not establish a new compressed work schedule at all. It simply proposes to expand “participation” and “eligibility” under the existing “two types of [CWS] available in the Department of State.”⁴ This distinction is particularly relevant here because the Agency asserts that parts c. and d. are permissive subjects of bargaining. Under longstanding Authority precedent, when an Agency asserts that “a proposal concerns a matter within the subjects set forth in section 7106(b)(1), [the Authority] will analyze whether the proposal falls within one of the two categories stated in that section.”⁵

That is a seminal question that should be addressed. The proposal seeks to determine the specific number, “[a] maximum of three” and “allowing one or more additional,” of BUES “who will be permitted to utilize a CWS”, over what period of time, “during the first four months ... of this Agreement” and “after this four month period”,⁶ and also seeks to mandate specific criteria the Agency must use to determine

eligibility for “additional slots.”⁷ It is obvious then that the proposal concerns “the numbers ... of employees ... assigned to any ... tour of duty.”⁸ The Agency has no duty to bargain over such matters unless it elects to do so. The Agency has stated unequivocally that it “elects not to bargain” over Proposal 5 parts c. and d.⁹ In support of that argument, it asserts that “[t]he Union simply cannot direct how many employees are allowed to assume a particular tour of duty”, a matter specifically covered by § 7106(b)(1).¹⁰ Thus, applying the Authority's precedent set forth in *NAGE*, I would conclude that the Agency has no duty to bargain because it has elected not to bargain over those matters.¹¹

Second, the central premise of the majority's analysis – that the Work Schedules Act makes all aspects of an alternative work schedule subject to bargaining without regard to the management rights under § 7106 of the Statute¹² – is flawed in several respects, and (as we have seen before) it “is support[ed] [by nothing more] than the Authority's own repetition of it.”¹³

The “all aspects” assertion, rests upon a faulty presumption that the Work Schedules Act is somehow unclear and that it is thus necessary to look to legislative history for clarification. The Supreme Court has held that, when construing statutes, “we do not start from the premise that th[e] language is imprecise. Instead, we assume that in drafting th[e] legislation, Congress said what it meant.”¹⁴ There is, however, no need to look to legislative history here because the language of the Work Schedules Act is quite plain and clear – bargaining is only required over the “establishment” of or “termination” of “any flexible or compressed work schedule.”¹⁵

I also do not agree that *FLRA v. SSA*¹⁶ and *Bureau of Land Management, Lakeview Dist. Office*,

¹ Statement of Position at 2-3.

² *Id.* at 3.

³ Majority at 5.

⁴ *Id.* at 4 (quoting Proposal 5.A.4).

⁵ *NAGE, Local R5-184*, 51 FLRA 386, 394 (1995) (*NAGE*).

⁶ Majority at 4.

⁷ *Id.* at 4-5.

⁸ 5 U.S.C. § 7106(b)(1).

⁹ Agency Statement of Position at 2.

¹⁰ *Id.* at 3.

¹¹ *NAGE*, 51 FLRA at 394.

¹² Majority at 6 n.27.

¹³ *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 503 (2018) (Member DuBester dissenting) (quoting *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 80 (2014) (Dissenting Opinion of Member Pizzella); *see also Comptroller of Treasury of Md. v. Wynne*, 135 S.Ct. 1787, 1808 (2015) (Dissenting Opinion of Justice Scalia) (“The Court claims that the doctrine ‘has deep roots.’ . . . So it does, like many weeds. But age alone does not make up for brazen invention.”).

¹⁴ *United States v. LaBonte*, 117 S.Ct. 1673, 1677 (1997); *see also U.S. DOL, Wash., D.C.*, 59 FLRA 131, 136 (2003) (*DOL*) (Concurring Opinion of Chairman Cabaniss).

¹⁵ 5 U.S.C. § 6130(a)(1); *see also DOL*, 59 FLRA at 136.

¹⁶ 753 F.2d 156 (D.C. Cir. 1985).

*Lakeview, Or. v. FLRA (BLM Lakeview)*¹⁷ support the meaning ascribed to those cases by the majority. In *FLRA v. SSA*, the court quoted § 6130(a)(1) and noted the Senate Report as background.¹⁸ However, that case addressed a specific carve out in the Work Schedules Act that gave agencies, with pre-existing flexible or compressed schedules, a 90-day window in which to apply specific criteria to review and terminate those schedules.¹⁹ The D.C. Circuit held only that “unless an agency actually made the appropriate findings within the [90-day] period”, it was expected that the agency would “continue[]” those programs or “*new* flexitime programs [] would be subject to collective bargaining.”²⁰ The court did *not* determine that “all aspects” of a flexible or compressed work schedule are negotiable. As in *FLRA v. SSA*, the question in *BLM Lakeview* also concerned the negotiability of a proposal to establish a new and “comprehensive AWS plan.”²¹ The Court agreed with the Authority that the agency committed a ULP when it refused to bargain over the implementation of the program because AWS plans are “fully negotiable”, a commonsense interpretation of the plain language of § 6130(a)(1).²² The court then went on to acknowledge (a point missed entirely by the majority) that “there remains a limited range of issues bearing on the negotiation of alternate work schedule proposals which the [A]uthority may process under the procedures of the [Statute],”²³ undoubtedly referring to § 7106(a) and § 7106(b)(1).²⁴

I also believe that the majority’s decision concerning Proposal 5 runs counter to Executive Order No. 13836 which instructs that agencies “may *not* negotiate over the substance of the subjects set forth in [§]7106(b)(1).”²⁵ As I noted above, parts c. and d. of Proposal 5 unmistakably concern the numbers of employees assigned to tours of duty and is a matter that is negotiable only “at the election of the agency.”²⁶

Thus, to the extent that Proposal 5 should not be dismissed without prejudice (as proposals 1-4 and 6-7), I would conclude that the matter falls outside of the Agency’s duty to bargain.

¹⁷ 864 F.2d 89 (9th Cir. 1988).

¹⁸ 753 F.2d at 159.

¹⁹ *Id.* at 160.

²⁰ *Id.* at 161 (emphasis added).

²¹ 864 F.2d at 90.

²² *Id.* at 91.

²³ *Id.*

²⁴ 5 U.S.C. § 7106(a), (b)(1).

²⁵ Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining, 83 Fed. Reg. 25,329, 25,332 (June 1, 2018) (emphasis added).

²⁶ 5 U.S.C. § 7106(b)(1).