

71 FLRA No. 231

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL #170
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE CONTRACT MANAGEMENT AGENCY
(Agency)

0-NG-3468

DECISION AND ORDER
ON NEGOTIABILITY ISSUE

December 21, 2020

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

With this case, we again remind the federal labor relations community that arguments will be deemed waived if a party fails to support them.¹

This case involves a dispute over a Memorandum of Understanding (MOU) between the parties. This matter 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 (Statute).²

For the reasons that follow, we find the proposal within the duty to bargain. Accordingly, we grant the petition.

II. Background

At issue in the petition for review (petition) is one proposal concerning agency actions when Contingent Response Force (CRF) personnel fail their

¹ See *AFGE, Local 3430*, 71 FLRA 881, 885-86 (2020) (*Local 3430*) (Member Abbott concurring); 5 C.F.R. § 2424.32(c)(1).
² 5 U.S.C. § 7105(a)(2)(E).

pre-deployment physicals.³ The Union requested a written declaration of non-negotiability from the Agency over the proposals, and the Agency responded stating that the proposal was nonnegotiable because it interfered with management’s right to assign personnel.⁴

On December 4, 2019, the Union filed the petition with the Authority.⁵ On February 7, 2020, the Authority issued an Order to Show Cause directing the Agency to show cause why the Authority should not find that the Agency’s failure to respond to the Union’s petition was a concession that the proposals are negotiable.⁶ The Agency responded to the Order to Show Cause, stating that it had not filed its statement because the Union’s service of the petition on the Agency was defective.⁷ Based on the Agency’s response, the Authority issued an order directing the Union to correct the procedural deficiency by serving its petition on the Agency by certified mail, first-class mail, or commercial delivery.⁸ The Union cured the procedural deficiency by serving the petition on the Agency via commercial delivery on March 12, 2020.⁹ Subsequently, the Agency filed its statement of position (statement).

Thereafter, an Authority representative conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority’s Regulations.¹⁰ The Union filed a response to the statement (response). The Agency did not file a reply to the response.

III. Proposal 1

A. Wording of Proposal 1

The parties agree to the following in reference to CRF personnel who fail their pre-deployment physicals: 1. CRF personnel who fail their

³ Pet., Attach. 1, Proposal at Issue at 1; Pet. at 3-4.
⁴ Pet., Attach. 2, Agency’s Written Allegation of Nonnegotiability at 1.
⁵ Pet. at 8.
⁶ Order to Show Cause at 2.
⁷ Agency’s Response to Order to Show Cause at 1. The Agency argues in its response to the Order to Show Cause that the Union’s petition should be dismissed because the Union failed to serve the petition to the Agency within fifteen days of the Agency’s written allegation of nonnegotiability. *Id.* at 2. The time limits for filing a petition for review require the Union to file a petition of review *with the Authority* within fifteen days of the Agency’s written allegation of nonnegotiability. See 5 C.F.R. § 2424.21(a). The time limits for filing a petition for review do not apply to the service requirement, which is pursuant to a separate regulation. See 5 C.F.R. § 2424.22(d).
⁸ Order to Correct Procedural Deficiency at 1-2.
⁹ March 2020 Statement of Service.
¹⁰ 5 C.F.R. § 2424.23.

pre-deployment physicals are placed in a non-deployment-eligible billet. If they can resolve the reasons for failure they are placed back on the eligible list. If not, they stay on as regular, non-deploying employee.¹¹

B. Meaning of Proposal 1

At the PPC, the Union explained that “CRF” refers to Contingency Response Force, and that “billet” refers to a document containing job duties, qualifications, and GS-grade that is serialized to the employee.¹² The Union further explained that a “non-deployment-eligible billet” would be the same as a standard “billet” except that the employee would be ineligible for deployment.¹³ The Agency agreed with the Union’s explained meaning of these terms.¹⁴

In regards to the operation of the proposal, the parties agreed that the proposal would permit employees who fail their pre-deployment physical to continue working while they resolve their medical situation.¹⁵ While the employee is on a non-deployment-eligible billet, they cannot be terminated by the Agency.¹⁶ Furthermore, employees remain on the non-deployment-eligible billet until they can pass their physical and return to the deployment-eligible billet.¹⁷ The Union clarified that the proposal only applies to employees who qualified for full CRF duties previously but are now unable to continue working on the deployment-eligible-billet due to their failed physical examination.¹⁸

C. Analysis and Conclusion

The Agency argues the proposal is nonnegotiable because it interferes with management rights.¹⁹ Specifically, the Agency states that “[it] reserves the right to determine internal security practices, to assign work and to determine the personnel by which [A]gency operations will be conducted as defined in § 7106(a).”²⁰

After an exclusive representative files its petition, the agency must file its statement, in which it must “inform the Authority and the exclusive

representative why a proposal is not within the duty to bargain or contrary to law.”²¹ Further, an agency “has the burden of raising and supporting arguments that the proposal . . . is outside the duty to bargain or contrary to law.”²² The Authority has held that an agency fails to meet its regulatory burden when it merely cites a law or regulation without explaining how a particular proposal conflicts with that law or regulation.²³ Additionally, § 2424.32(c)(1) of the Authority’s Regulations provides that “[f]ailure to raise *and support* an argument will . . . be deemed a waiver of such argument.”²⁴

Here, the Agency generally asserted that the proposal interferes with management rights, without providing any arguments supporting its position.²⁵ Instead of explaining *how* the proposal interferes with a specific management right, the Agency summarized § 7106(a) of the Statute.²⁶ Therefore, we conclude that the Agency has waived its argument that the proposal interferes with management rights.²⁷ Because this is the only reason the Agency asserted the proposal was nonnegotiable,²⁸ we are constrained to find that the proposal is within the duty to bargain.²⁹

IV. Order

We grant the Union’s petition.

¹¹ Pet., Attach. 1, Proposal at Issue at 1; Pet. at 3-4.

¹² Record at 2.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Statement Form at 4-6; Statement Br. at 1-2.

²⁰ Statement Form at 5; Statement Br. at 2.

²¹ 5 C.F.R. § 2424.24(a).

²² *Id.* § 2424.32(b).

²³ *AFGE, Local 940*, 71 FLRA 415, 415 (2019) (citing *NFFE, Fed. Dist. 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)).

²⁴ 5 C.F.R. § 2424.32(c)(1) (emphasis added).

²⁵ Statement Br. at 1-2.

²⁶ *Id.* at 2 (“[Section 7106(a) of the Statute], as interpreted by [Authority] cases, provides that nothing in this chapter shall affect the authority of any management official or any agency to hire, assign, direct, layoff, and retain employees in the agency and to determine the personnel by which agency operations shall be conducted.”).

²⁷ *Local 3430*, 71 FLRA at 886 (citing 5 C.F.R. § 2424.32(c)(1)).

²⁸ Statement Form at 4-6; Statement Br. at 1-2.

²⁹ Member Abbott notes, as he has before, that the Authority cannot salvage arguments that are argued poorly, presented insufficiently, or are not supported at all. *See Local 3430*, 71 FLRA at 886 (Concurring Opinion of Member Abbott).

Member DuBester, concurring:

I agree with the Order granting the Union's petition.