73 FLRA No. 108

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 222
(Union)

and

UNITED STATES
DEPARTMENT OF
HOUSING AND URBAN DEVELOPMENT
REAL ESTATE
ASSESSMENT CENTER (REAC)/OFFICE
OF PUBLIC & INDIAN HOUSING (PIH)
(Agency)

0-NG-3632

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

June 7, 2023

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Before the Authority: Susan Tsui Grundmann, Chairman, and Colleen Duffy Kiko, Member

I. Statement of the Case

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.[1] The Union's petition for review (petition) involves four proposals – Proposals 5, 7, 8, and 9 – that relate to employees' official duty stations.

For the reasons that follow, we find that Proposal 5 is contrary to government-wide regulation, and Proposal 8 is contrary to law because it would award backpay without statutory authorization. Further, we find that Proposals 7 and 9 are inextricably intertwined with Proposals 5 and 8, respectively. Accordingly, we dismiss the petition in full.

II. Background

The employees at issue perform work that requires recurring travel throughout the United States.[2] Before June 2021, the Agency set these employees' official duty stations based on the locations listed in the vacancy announcements through which the Agency hired the employees. However, the Agency concluded that government-wide regulations prohibited designating official duty stations based solely on vacancy-announcement locations. Therefore, in June 2021, the Agency changed the employees' official duty stations to their home residences, where the employees regularly perform work while not on travel assignments.

Both before and after the duty-station changes, the employees' compensation has included locality-based comparability payments (locality pay)[3] – compensatory enhancements that are based on the location of an employee's official duty station within a specific geographic region (locality-pay area). When the Agency changed the employees' duty stations, the employees experienced a reduction in pay because their official duty stations were now in areas with lower locality pay. In response, the Union requested, as relevant here, to negotiate over Proposals 5, 7, 8, and 9. After the Agency alleged that the proposals were outside the duty to bargain, the Union filed the petition. The Authority conducted a post-petition conference with the parties; the Agency filed a statement of position (statement); the Union filed a response (response); and the Agency filed a reply to the response (reply).

III. Proposal 5

A. Wording

> As an appropriate arrangement under 5 U.S.C. § 7106(b)(3) to minimize the adverse effects of significant locality pay cuts and personal financial hardship, for each affected REAC Construction Analyst/housing inspector employee, Management will establish an official duty station with the highest/closest level of locality pay as the employee had before where she or he has been or is regularly assigned inspections given that the employees encumber recurring travel positions with varying work locations and regularly work and travel

[1] 5 U.S.C. § 7105(a)(2)(E).

[2] However, some of these employees may not have undertaken recurring travel assignments during the COVID-19 national and public-health emergencies. *See* Pet. at 5 (explaining that, under Proposal 5, "[a]ffected inspector employees who have not been traveling since June . . . 2021 . . . shall be given an opportunity to begin traveling again"); *id.* at 12 (providing similar explanation).

[3] *See* 5 U.S.C. § 5304; 5 C.F.R. pt. 531, subpt. F.

> throughout the entire United States as stated in the vacancy announcements and position descriptions from which they were hired. An affected REAC Construction Analyst/housing inspector who has not been regularly traveling to and performing work at varying locations throughout the United States on a recurring basis since June of 2021, shall be offered by Management the opportunity to begin regularly traveling and performing work at varying locations throughout the United States on a recurring basis in order for HUD to establish a new official duty station with the highest/closest level of locality pay as the employee had before the change in official duty station to the home residence.[4]

B. Meaning

The clarifications in this paragraph apply to both sentences of the proposal. "REAC" stands for Real Estate Assessment Center[5] – an Agency subcomponent in which the "affected" employees work.[6] In accordance with their plain meanings, "regularly" means more often than occasionally or infrequently,[7] and "recurring" means occurring multiple times.[8] "[H]ighest/closest level of locality pay as the employee had before" is the locality-pay adjustment closest in numerical value to the adjustment that the employee received before June 2021.[9] There are roughly fifteen affected REAC employees.[10] As discussed above, in June 2021, the Agency changed the affected employees' official duty stations from the locations listed in their respective positions' vacancy announcements to the employees' home residences.[11]

The proposal's first sentence operates as follows. The Agency must "determine the locality-pay areas in which [each] employee has, since June 2021, been regularly conducting inspections" (first determination).[12] In addition, the Agency must determine the locality-pay areas where each employee is "regularly assigned inspections at present" (second determination).[13] The Agency has the discretion to select the time period for assessing whether an employee regularly performed, or is currently assigned to regularly perform, inspections in a particular locality-pay area.[14] Next, the Agency must consider all of the locality-pay areas identified in the first and second determinations for each employee, and the Agency must select the one area "with the highest/closest level of locality pay as the employee had before."[15] Finally, the Agency must designate an official duty station within the selected area for each employee,[16] but the Agency retains the authority to make further changes to official duty stations on an ongoing basis to account for the locations of employees' future assignments.[17]

The proposal's second sentence operates as follows. It applies only to affected employees who have not regularly traveled for work since June 2021.[18] The Agency must offer these employees the opportunity to perform work "on a recurring basis"[19] in locality-pay areas that differ from the locality-pay area in which their home residence is located (new work opportunity).[20] The Agency has the discretion to determine where – other than the home residence – the new work opportunity occurs, and what assignments the new work opportunity entails.[21] However, the Agency need not place these employees on travel assignments.[22] If an affected employee accepts the new work opportunity, then the Agency must consider all of the locality-pay areas where the employee regularly works, and establish a new official duty station for the employee in the one area "with the highest/closest level of locality pay as the employee had before."[23]

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[4] Pet. at 4; *see* Record of Post-Pet. Conf. (Record) at 2 (parties agree that petition accurately sets forth wording of Proposal 5).
[5] Record at 2.
[6] Pet. at 4 (first sentence refers to "affected REAC Construction Analyst/housing inspector employee[s]"; second sentence refers to "affected REAC Construction Analyst/housing inspector[s]"); *id.* at 5 (explaining that "affected employees" are part of "the Real Estate Assessment Center (REAC) division within the Agency's Office of Public and Indian Housing (PIH)"); *see* Statement Br. at 1 (stating that proposals concern "Real Estate Assessment Center . . . employees").
[7] Record at 2. "'[R]egularly' is accorded its plain meaning." *Id.* (quoting Pet. at 4).
[8] *See id.* at 3 (explaining that "recurring basis" takes its plain meaning (quoting Pet. at 4)).
[9] *Id.* at 2-3. If the highest-paying locality-pay area differs from the locality-pay area with the adjustment closest to what the employee received before June 2021, then the latter pay area controls. *Id.* at 3.
[10] *Id.* at 2.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Pet. at 4; Record at 2-3.
[16] Record at 3.
[17] *Id.*
[18] Pet. at 4; Record at 3.
[19] Pet. at 4.
[20] Record at 3.
[21] *Id.*
[22] *Id.*
[23] Pet. at 4; Record at 2-3.

C. Analysis and Conclusion: Proposal 5 is contrary to 5 C.F.R. § 531.605(a)(2).

The Agency argues that the proposal is contrary to 5 C.F.R. § 531.605(a)(2) because the proposal requires the Agency to designate an employee's official duty station in a particular area even when the work activities of the employee's position of record are not based in that area.[24] It is undisputed that some of the affected employees do not travel to any specific city on a regular or recurring basis to perform work, and that the only locations where this subset of employees regularly work are their home residences.[25]

Section 531.605(a)(2) states that,

> [i]f the employee's work involves recurring travel or the employee's work location varies on a recurring basis, the official worksite is the location where the work activities of the employee's position of record are based, as determined by the employing agency, subject to the requirement that the official worksite must be in a locality[-]pay area in which the employee regularly performs work.[26]

The parties do not identify any material distinctions between "official duty station" under Proposal 5[27] and "official worksite" under § 531.605(a)(2),[28] so we treat those phrases as synonymous for the purpose of determining whether Proposal 5 is negotiable.

To select the locality-pay area with the "highest/closest level of locality pay as the employee had before,"[29] the proposal's first sentence requires the Agency to consider not only locality-pay areas where the employee is "regularly assigned inspections at present,"[30] but also the "locality-pay areas in which the employees has, since June 2021, been regularly conducting inspections."[31] Then, the first sentence requires the Agency to designate an employee's official duty station at a location within whichever of those locality-pay areas would produce the highest/closest level of locality pay.[32] Therefore, in some cases, the first sentence will require the Agency to designate an employee's official duty station based *solely* on where the employee regularly conducted inspections in the past, without regard to the locations of current work assignments.[33]

That would conflict with § 531.605(a)(2)'s condition that the "official worksite is the location where the work activities of the employee's position of record *are* based, as determined by the employing agency" – in other words, not where some work activities *were* based during a previous time period.[34] As an employee's past assignment locations may have no bearing on where the work activities of the employee's position are based at present,[35] Proposal 5's first sentence is contrary to § 531.605(a)(2).[36] Because the first sentence is contrary to government-wide regulation, Proposal 5 is, as a whole, outside the duty to bargain.[37]

IV. Proposal 7

A. Wording

> As a procedure and appropriate arrangement pursuant to 5 U.S.C. § 7106(b)(2) and (3), HUD shall provide AFGE Council 222 (Council) a copy of the Standard Form 50 for the official duty station determination for each affected REAC employee in accordance with Proposal 5 above. HUD may sanitize any personally invasive information subject to the Privacy Act

[24] Reply Br. at 1-2.
[25] *Id.* at 3.
[26] 5 C.F.R. § 531.605(a)(2).
[27] Pet. at 4.
[28] 5 C.F.R. § 531.605(a)(2).
[29] Pet. at 4.
[30] Record at 2.
[31] *Id.*
[32] *Id.* at 2-3. See note 9 above for clarification of the phrase "highest/closest level of locality pay." Pet. at 4.
[33] *See* Reply Br. at 3 ("The . . . proposal would require the Agency to retroactively determine the employee's duty station based on the [past] inspections rather than establish a duty station where the employee's position of record is based.").
[34] 5 C.F.R. § 531.605(a)(2) (emphasis added).
[35] *See* Pet. at 5 (confirming that Proposal 5 "does not affect" or place "any limitation[s] on Agency management in terms of where the employees are regularly assigned inspection work").
[36] As this conclusion is sufficient to determine the negotiability of Proposal 5 as a whole, we do not address the Agency's other arguments for finding Proposal 5 nonnegotiable. *E.g.*, *AFGE, Loc. 1938*, 66 FLRA 1038, 1040 & n.* (2012) (*Loc. 1938*).
[37] The Union requested that the Authority sever the first and second sentences if the Authority found that *the second sentence* was nonnegotiable. Record at 2 (requesting a "negotiability determination as to the first sentence alone" if the Authority concluded that the whole proposal was nonnegotiable). However, the Union did *not* request a negotiability determination on the second sentence alone if the first were found nonnegotiable. *See id.* Because we have found the first sentence nonnegotiable, we need not address the Union's severance request or the negotiability of the second sentence standing alone. *Cf. AFGE, Loc. 1858*, 56 FLRA 1115, 1118 & n.5 (2001) (citing *NTEU*, 55 FLRA 1174, 1183 n.14 (1999)) (where one portion of a proposal is contrary to law, and the union does not request severance, the Authority does not separately address other portions).

> (e.g., home street address, home phone number, Social Security Number, birth date, etc.).[38]

B. Meaning

The word "sanitize"[39] means "redact or withhold,"[40] and "the Privacy Act"[41] refers to 5 U.S.C. § 552a.[42] The Agency must provide the Union a Standard Form 50 copy showing that, for each affected employee, the Agency completed a change to the official duty station in accordance with Proposal 5.[43] The Agency has the authority to alter the copy so as not to reveal any information that the Privacy Act prohibits the Agency from disclosing.

C. Analysis and Conclusion: Proposal 7 is outside the duty to bargain because it is inextricably intertwined with Proposal 5.

The Agency argues that it need not negotiate over Proposal 7 because that proposal requires compliance with Proposal 5, which is outside the duty to bargain.[44] "When a proposal is outside the duty to bargain, and another proposal is 'inextricably intertwined' with the former proposal, the Authority will dismiss the petition as to both proposals."[45] The Authority has held that two proposals were inextricably intertwined where, for example, the latter proposal incorporated a requirement from the former proposal.[46]

The parties agree that Proposal 7 requires the Agency to comply with Proposal 5.[47] Therefore, consistent with Authority precedent, we find that Proposal 7 is inextricably intertwined with Proposal 5, and Proposal 7 is outside the duty to bargain because Proposal 5 is outside the duty to bargain.[48]

V. Proposal 8

A. Wording

> As an appropriate arrangement pursuant to 5 U.S.C. § 7106(b)(3) due to HUD's unilateral implementation of the employees' changes in conditions of employment without first providing AFGE Council 222 notice and opportunity to bargain, HUD shall pay each affected REAC Construction Analyst/housing inspector employee retroactive back pay for the pay differential between the home residence official duty station's locality pay effective June of 2021 and the highest locality pay of the area where the employee was regularly assigned inspections given that the employees encumber recurring travel positions with varying work locations and regularly work and travel throughout the entire United States. The back pay period shall be from the effective date of the home residence's official duty station determination through the pay period when the back pay is actually paid. No back pay shall be provided to any affected REAC Construction Analyst/housing inspector employee who did not regularly travel subsequent to the unilateral change in official duty station effective in June of 2021.[49]

B. Meaning

Under Proposal 8, "affected employee[s]"[50] are the same individuals that Proposal 5 references,[51] and "regularly"[52] has the same meaning as the identical term in Proposal 5.[53]

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[38] Pet. at 10; *see* Record at 3 (parties agree that petition accurately sets forth wording of Proposal 7).
[39] Pet. at 10.
[40] Record at 3.
[41] Pet. at 10.
[42] *See* Record at 3 (Union "explained that the 'Privacy Act' is shorthand for a federal statutory authority found in the United States Code").
[43] *Id.*
[44] Statement Form at 4.
[45] *AFGE, Loc. 1748, Nat'l Council of Field Lab. Locs.*, 73 FLRA 233, 236 & n.51 (2022) (*Loc. 1748*) (citing *NTEU*, 70 FLRA 701, 705 (2018) (*NTEU*)).
[46] *Id.* at 236-37 & n.54 (citing *NAGE, Loc. R1-100*, 61 FLRA 480, 484 (2006) (*NAGE*) (Member Armendariz concurring)).
[47] Record at 3.
[48] As this conclusion is sufficient to determine the negotiability of Proposal 7, we do not address the Agency's other arguments for finding Proposal 7 nonnegotiable. *E.g.*, *Loc. 1938*, 66 FLRA at 1040 & n.*.
[49] Pet. at 17; *see* Record at 4 (parties agree that petition accurately sets forth wording of Proposal 8).
[50] Pet. at 17.
[51] *Compare id.* at 4 (Proposal 5's first sentence refers to "each affected REAC Construction Analyst/housing inspector employee"), *with id.* at 17 (Proposal 8's first sentence refers to "each affected REAC Construction Analyst/housing inspector employee").
[52] *Id.* at 17.
[53] *See* Record at 4.

Proposal 8's first sentence operates as follows. The Agency must determine all of the locality-pay areas in which each affected employee regularly conducted inspections since June 2021.[54] Then, the Agency must determine which of those locality-pay areas would have entitled the affected employee to the highest locality-pay adjustment (highest area).[55] For each affected employee, the Agency must calculate the difference between the amount of locality pay that the employee actually received since June 2021 and the amount of locality pay that the employee would have received if the employee's official duty station had been in the highest area (calculated difference).[56] Then, the Agency must compensate each employee with retroactive backpay in the amount of the calculated difference.

The proposal's second sentence sets the length of each affected employee's retroactive-backpay period as the time between (1) the date that the Agency designated the home residence as the employee's official duty station and (2) the date when the Agency pays the retroactive backpay. The third sentence specifies that the Agency does not owe retroactive backpay to any affected employee who has not regularly traveled for work since June 2021.

C. Analysis and Conclusion: Proposal 8 is contrary to law because it would award backpay without statutory authorization.

The parties agree that Proposal 8 is concerned with providing employees backpay,[57] but the Agency argues that the proposal is contrary to the Back Pay Act (the Act).[58] Specifically, the Agency contends that the Act authorizes backpay only when employees "have been affected by an unjustified or unwarranted personnel action,"[59] and, according to the Agency, the employees here were not affected by such an action.[60]

The Agency correctly states that employees must have been affected by an unjustified or unwarranted personnel action to receive backpay under the Act.[61] Authority precedent clarifies that a "violation of an applicable law, rule, regulation, or provision of a collective-bargaining agreement constitutes an 'unjustified or unwarranted personnel action.'"[62]

The Union claims that the Agency unilaterally changed employees' duty stations without first giving the Union notice and an opportunity to bargain.[63] However, the Union does not contend that the alleged unilateral change was an unjustified or unwarranted personnel action within the meaning of the Act, or that any appropriate authority has found it to be such an action. The Union also does not contend that Proposal 8's provision of backpay would depend on an appropriate authority's finding of such an action. Rather, the Union argues that Proposal 8 is negotiable because it is analogous to a proposal that the Authority found negotiable in *NATCA*.[64] However, the Authority noted in *NATCA* that the agency there did "not claim that the proposal [wa]s inconsistent with the [Act],"[65] so *NATCA* does not address the argument at issue in this case.

Because Proposal 8 requires the Agency to pay backpay without a determination that the recipients were affected by an unjustified or unwarranted personnel action, Proposal 8 would allow for backpay without regard to the Act's requirements.[66] Further, the Union does not identify any other statute that could potentially authorize backpay in this case. For these reasons, we find that Proposal 8 is outside the duty to bargain.[67]

VI. Proposal 9

A. Wording

HUD shall provide AFGE Council 222 a copy of the Standard Form 50 demonstrating that each affected REAC Construction Analyst/housing

[54] *See id.*
[55] *See id.*
[56] *See id.* If the calculated difference reveals that the employee received a *higher* amount of locality pay with a home-residence official duty station than the employee would have received with an official duty station in the highest area, then the Agency does not owe that employee retroactive backpay, and the Agency could not require that employee to pay back the calculated difference. *Id.*
[57] *Id.*
[58] Statement Br. at 5.
[59] 5 U.S.C. § 5596(b)(1).
[60] Statement Br. at 5.
[61] *E.g.*, *U.S. Small Bus. Admin.*, 70 FLRA 745, 747 (2018) (*SBA*) (Authority set aside backpay award because arbitrator did not find that employee was affected by unjustified or unwarranted personnel action); *Bremerton Metal Trades Council*, 19 FLRA 1023, 1024-25 (1985) (*Bremerton*) (Authority found contract provision inconsistent with the Act because provision required retroactive backpay without determining that employees were adversely affected by unjustified or unwarranted personnel action).
[62] *SBA*, 70 FLRA at 747 & n.17 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Pollock, La.*, 68 FLRA 151, 152 (2014) (Member DuBester dissenting)).
[63] Pet. at 18.
[64] *Id.* at 21 (citing *NATCA*, 61 FLRA 437 (2006) (*NATCA*)).
[65] *NATCA*, 61 FLRA at 440 n.4; *see* Reply Br. at 4 & n.7 (citing *NATCA*, 61 FLRA at 440 n.4).
[66] *See Bremerton*, 19 FLRA at 1024-25 (finding a provision contrary to the Act for the same reason).
[67] As this conclusion is sufficient to determine the negotiability of Proposal 8, we do not address the Agency's other arguments for finding Proposal 8 nonnegotiable. *E.g.*, *Loc. 1938*, 66 FLRA at 1040 & n.*.

> inspector employee was paid the appropriate amount of back pay and other appropriate evidence showing the calculation of how the back pay amount was determined as a procedure pursuant to 5 U.S.C. § 7106(b)(2). HUD may sanitize any personally invasive information subject to the Privacy Act (e.g., home street address, home phone number, Social Security Number, birth date, etc.). No back pay shall be provided to any affected REAC Construction Analyst/housing inspector employee who did not regularly travel subsequent to the unilateral change in official duty station effective in June of 2021.[68]

B. Meaning

The word "sanitize"[69] means "redact or withhold";[70] "the Privacy Act"[71] refers to 5 U.S.C. § 552a;[72] and "regularly"[73] under Proposal 9 has the same meaning as the identical term in Proposals 5 and 8.[74] Under Proposal 9, the Agency must provide the Union a Standard Form 50 copy showing that, for each affected employee, the Agency paid the employee retroactive backpay in the amount that Proposal 8 dictates.[75] Further, Proposal 9 requires the Agency to provide the Union with "appropriate evidence"[76] – specifically, documentation beyond the Standard Form 50 copy – that is sufficient to demonstrate how the Agency calculated the retroactive backpay amount for each affected employee.[77] The Agency has the authority to alter all documentation that the Union receives so as not to reveal any information protected by the Privacy Act.[78] Finally, Proposal 9 reiterates the condition from Proposal 8 that the Agency does not owe retroactive back pay to any affected employee who has not regularly traveled for work since June 2021.[79]

C. Analysis and Conclusion: Proposal 9 is outside the duty to bargain because it is inextricably intertwined with Proposal 8.

The Agency argues that it need not negotiate with the Union over Proposal 9 because that proposal requires compliance with Proposal 8.[80] As discussed in connection with Proposal 7 above: (1) "[w]hen a proposal is outside the duty to bargain, and another proposal is 'inextricably intertwined' with the former proposal, the Authority will dismiss the petition as to both proposals";[81] and (2) the Authority has held that two proposals were inextricably intertwined where, for example, the latter proposal incorporated a requirement from the former proposal.[82]

The parties agree that Proposal 9 requires the Agency to comply with Proposal 8.[83] Therefore, consistent with Authority precedent, we find that Proposal 9 is inextricably intertwined with Proposal 8, and Proposal 9 is outside the duty to bargain because Proposal 8 is outside the duty to bargain.[84]

VII. Order

We dismiss the petition.

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[68] Pet. at 23; *see* Record at 4 (parties agree that petition accurately sets forth wording of Proposal 9).
[69] Pet. at 23.
[70] Record at 4.
[71] Pet. at 23.
[72] *Cf.* Record at 3 (Union "explained that the 'Privacy Act' is shorthand for a federal statutory authority found in the United States Code").
[73] Pet. at 23.
[74] Record at 4.
[75] *Id.*
[76] Pet. at 23.
[77] Record at 4.
[78] *Cf. id.* (explaining the meaning of identical wording in Proposal 7).
[79] *Cf. id.* (explaining the meaning of identical wording in Proposal 8).
[80] Statement Form at 6.
[81] *Loc. 1748*, 73 FLRA at 236 & n.51 (citing *NTEU*, 70 FLRA at 705).
[82] *Id.* at 236-37 & n.54 (citing *NAGE*, 61 FLRA at 484); *see also NTEU*, 70 FLRA at 706 (where one proposal would be "meaningless" without reference to an earlier proposal, the two proposals were inextricably intertwined for negotiability purposes).
[83] Record at 5.
[84] As this conclusion is sufficient to determine the negotiability of Proposal 9, we do not address the Agency's other arguments for finding Proposal 9 nonnegotiable. *E.g.*, *Loc. 1938*, 66 FLRA at 1040 & n.*.