

73 FLRA No. 148

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2031
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
CINCINNATI VA MEDICAL CENTER
(Agency)

0-NG-3665

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

December 15, 2023

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

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 petition for review (petition) concerns one proposal. Because the Agency fails to support its argument that the proposal is outside the duty to bargain, we grant the petition.

II. Background

The Union requested to bargain over issues relating to “sharps containers” within the Agency’s medical facility.² The Union submitted a proposal governing contract employees’ performance of sharps-container duties. Thereafter, the Agency sent an

email to the Union alleging the proposal was “non-negotiable” because it “excessively interferes with [m]anagement[’]s rights.”³ On June 5, 2023,⁴ the Union filed its petition with the Authority. Then, with assistance from the Authority’s Collaboration and Alternative Dispute Resolution Office, the Union modified the proposal.

On June 9, the Authority’s Office of Case Intake and Publication (CIP) issued an order directing the Union to serve the petition on the Agency head. In response, the Union provided a statement of service showing that the Union served the Agency head on June 21.

On August 22, an Authority representative conducted a post-petition conference (conference) with the parties and issued a written record of that conference pursuant to § 2424.23 of the Authority’s Regulations.⁵ At the conference, the Union again modified the wording of the proposal, to which the Agency did not object. In addition, the Agency confirmed that it had not yet filed a statement of position.⁶ After the deadline to file a statement of position expired, CIP ordered the Agency to show cause why the Authority should not find that the Agency conceded the proposal’s negotiability by failing to file a statement of position. The Agency did not respond to the order.

III. The Proposal**A. Wording**

AFGE proposes using CVAMC/EMS/Logistics services BUEs in the delivery and removal of sharps containers at the worksite. No contractor will be used to perform any bargaining-unit employee duties associated with the sharps containers beyond delivering and picking up sharps containers from a designated staging area. No contractor can direct, coordinate, have input on performance, or discipline bargaining-unit employees in relation to sharps containers.⁷

¹ 5 U.S.C. § 7105(a)(2)(E).

² Pet. at 3.

³ Pet., Attach. 1 at 1.

⁴ Unless otherwise stated, all dates are in 2023.

⁵ 5 C.F.R. § 2424.23. We note that the Authority recently revised its negotiability Regulations, “to better expedite proceedings, consistent with Congress’s direction,” and “to benefit the [Authority’s] parties by clarifying various matters and streamlining the adjudication process for negotiability appeals, resulting in more timely decisions.” Negotiability Proceedings, 88 Fed. Reg. 62445, 62445 (Sept. 12, 2023). The revised

Regulations “appl[y] to all petitions for review filed on or after October 12, 2023.” *Id.* Because the Union filed its petition before that date, we apply the prior Regulations throughout this decision.

⁶ Record of Post-Pet. Conference (Record) at 2.

⁷ *Id.* This is the wording as modified at the conference. *Id.*; see *AFGE, Loc. 1748, Nat’l Council of Field Labor Locs.*, 73 FLRA 233, 236 n.44 (2022) (considering proposal wording as modified at conference in absence of agency objection to modification (citing *AFGE, AFL-CIO, Loc. 2361*, 57 FLRA 766, 766 n.3 (2002) (Chairman Cabaniss concurring))).

B. Meaning

The parties agree that the proposal's terms have the following meanings. "CVAMC" refers to the Cincinnati VA Medical Center; "EMS" stands for environmental management services; "BUEs" means bargaining-unit employees; and "sharps containers" are receptacles in which used needles are discarded.⁸ Additionally, the parties agree that "worksites" refers to any area in the facility outside the staging area where sharps containers are routinely placed, with "staging area" meaning an Agency-designated space where full and empty sharps containers are temporarily kept while awaiting processing.⁹

The Union states the proposal addresses who will perform sharps-container duties.¹⁰ The Union states further that the proposal restricts contract employees from engaging in certain activities relating to sharps containers at the Agency's facility.¹¹ Regarding the proposal's third sentence, the Union explains that this sentence prohibits contract employees from providing information to the Agency concerning bargaining-unit employees' performance or conduct.¹² The Agency agrees with the Union's explanation of the proposal's meaning and operation.¹³

C. Analysis and Conclusion

After a union files a petition for review, the agency must file a statement of position in order to inform the Authority, among other things, "why [the] proposal . . . is not within the duty to bargain or contrary to law."¹⁴ Section 2424.32(b) of the Authority's Regulations provides that "[t]he agency has the burden of raising and supporting arguments that the proposal . . . is outside the

duty to bargain or contrary to law."¹⁵ A party's "[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument."¹⁶

As noted above, the Agency did not file a statement of position or respond to the Authority's order. Under such circumstances, the Authority has considered an agency's position as set forth in its written allegation of nonnegotiability.¹⁷ In the Agency's allegation, it states – without elaboration – that the proposal "excessively interferes with [m]anagement[']s rights."¹⁸ This bare statement fails to identify a specific management right or explain how the proposal impermissibly infringes on management's rights. Therefore, we find that the Agency has waived its nonnegotiability argument and conceded that the proposal is within the duty to bargain.¹⁹ Accordingly, we grant the petition.²⁰

IV. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, bargain over the proposal. In finding the proposal within the duty to bargain, we make no judgment as to its merits.²¹

⁸ Record at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ 5 C.F.R. § 2424.24(a); *see id.* § 2424.24(b) ("Unless the time limit for filing has been extended . . . , the agency *must* file its statement of position within thirty (30) days after the date the head of the agency receives a copy of the petition for review." (emphasis added)).

¹⁵ *Id.* § 2424.32(b).

¹⁶ *Id.* § 2424.32(c)(1).

¹⁷ *See, e.g., AFGE, Loc. 32*, 73 FLRA 464, 466 (2023) (*Loc. 32*) (considering arguments provided in written allegation of nonnegotiability where statement of position untimely filed); *NTEU*, 72 FLRA 752, 753 (2022) (Chairman DuBester concurring in part and dissenting in part on other grounds) (citing *AFGE, Loc. 997*, 66 FLRA 499, 499-500 (2012)) (same).

¹⁸ Pet., Attach. 1 at 1.

¹⁹ 5 C.F.R. § 2424.32(c)(1); *see also AFGE, Council 170*, 72 FLRA 250, 251 (2021) (Chairman DuBester concurring)

(finding agency waived nonnegotiability arguments where agency "provide[d] no arguments, explanation, or case law supporting its position that" proposals were nonnegotiable).

²⁰ *See Loc. 32*, 73 FLRA at 467 (granting petition because agency's written allegation of nonnegotiability, standing alone, failed to support nonnegotiability argument); *AFGE, Loc. 940*, 71 FLRA 415, 415-16 (2019) (finding proposal within the duty to bargain where agency, by failing to file statement of position or respond to Authority show-cause order, waived argument that proposal was nonnegotiable).

²¹ *E.g., Antilles Consol. Educ. Ass'n*, 73 FLRA 282, 286 n.41 (2022) (*Antilles*). We note in this regard that, as is true with other proposals found within the duty to bargain, "the parties' obligation to negotiate in good faith does not compel either party to agree to the proposal." *AFGE, AFL-CIO, Nat'l INS Council*, 8 FLRA 347, 375 (1982) (citing 5 U.S.C. § 7103(a)(12)), *rev'd on other grounds sub nom. U.S. DOJ, INS v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983). In other words, requiring negotiations over a proposal does not require agreement to the proposal. *Antilles*, 73 FLRA at 286 n.41.

Chairman Grundmann, concurring:

As I have stated previously, I acknowledge that, under extant precedent, the Authority has considered arguments raised in an agency's allegation of nonnegotiability (allegation) when the agency failed to timely file a statement of position (statement).¹ I continue to reserve judgment on whether that precedent is rightly decided.² In this regard, I note § 2424.24(c) of the Authority's Regulations – both the version that applies in this case, and the amended version that applies in cases where the petitions for review are filed on or after October 12, 2023³ – requires agencies to put all of their legal arguments in their *statements* to the Authority.⁴ That requirement is part of a carefully constructed, regulatory process of briefings and burden-shifting.⁵ As such, I question whether it is appropriate for the Authority to give agencies a “pass” for failing to comply with that process by reaching back to, and relying on, the agency's prior allegation in order to resolve cases. Among other things, this practice can cause confusion as to which agency arguments unions should be responding to when they file their responses under § 2424.25 of the Authority's Regulations.⁶

However, for the reasons stated in the decision, I agree that the assertions in the Agency's allegation in this case do not demonstrate the proposal is outside the duty to bargain. Therefore, in order to form a majority opinion and avoid an impasse in the resolution of this case, I agree to apply extant precedent and consider the allegation. Nevertheless, I remain open to reconsidering that precedent in a future, appropriate case.

For these reasons, I concur.

¹ See *AFGE, Loc. 32*, 73 FLRA 464, 466 n.26 (2023).

² See *id. Cf. AFGE, Loc. 997*, 66 FLRA 499, 500 n.2 (2012) (in following some of that precedent, Authority noted the union “d[id] not challenge” the precedent or “argue that, because the [statement] was untimely, the [a]gency's allegation . . . [was] precluded from consideration by part 2424 of the Authority's Regulations”).

³ See 5 C.F.R. § 2424.1 (noting the revised negotiability regulations “appl[y] to all petitions for review filed on or after October 12, 2023”).

⁴ See *id.* § 2424.24(c)(2) (requiring agencies' statements of position to “[s]et forth in full [their] position on any matters relevant to the petition that [they] want the Authority to consider

in reaching its decision, including . . . [a] statement of the arguments and authorities supporting any bargaining obligation or negotiability claims”).

⁵ See *id.* § 2424.22(c) (describing required contents of union petitions for review); *id.* § 2424.24(c) (describing required contents of agency statements); *id.* § 2424.25(c) (describing required contents of union responses to statements); *id.* § 2424.26(c) (describing required contents of agency replies to union responses); *id.* § 2424.32 (setting forth parties' respective responsibilities and consequences of failing to comply with those responsibilities).

⁶ *Id.* § 2424.25.