70 FLRA No. 189

ASSOCIATION OF CIVILIAN TECHNICIANS
KENTUCKY LONG RIFLE CHAPTER AND
BLUEGRASS CHAPTER
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
KENTUCKY NATIONAL GUARD
FRANKFORT, KENTUCKY
(Agency)

0-NG-3396

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DECISION AND ORDER ON A NEGOTIABILITY ISSUE

November 21, 2018

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

(Member DuBester, concurring in part and dissenting in part)

I. Statement of the Case

In this case, we reaffirm that parties may set conditions on the execution of their agreements before triggering agency-head review under § 7114(c) of the Federal Service Labor-Management Relations Statute (the Statute).[1]

This matter is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Statute.[2] The petition for review (petition) involves one proposal concerning the uniforms that military technicians wear when performing civilian duties. The Agency filed a statement of position (statement), to which the Union filed a response (response).

For the reasons that follow, we find that the proposal is outside the duty to bargain. Accordingly, we dismiss the petition.

[1] 5 U.S.C. § 7114(c).
[2] *Id.* § 7105(a)(2)(E).

II. Background

The parties' ground rules for bargaining specify how they will execute any agreement. Execution requires that the Union "submit the draft [agreement] for ratification by the [Union's] members[,] and management will review with the Adjutant General."[3] If either side does "not ratify any provision, the parties will re-negotiate the provision(s) . . . [until] ratification of all provisions" by the Union's members and the Adjutant General.[4] Upon the "ratification of all provisions," both sides' negotiators sign and date the contract to execute it.[5] Then, the Agency "deliver[s] the executed contract to the [h]ead of the Agency, or his or her designee," for Agency-head review under § 7114(c) of the Statute.[6]

During term bargaining, the parties' negotiators agreed to a proposal concerning uniforms. After the negotiators also reached an agreement on all other subjects, the Union submitted the draft agreement to its members for ratification, and the Agency submitted the draft to the Adjutant General for review. The Adjutant General rejected the proposal concerning uniforms, and the parties tried, but failed, to re-negotiate that proposal. Because the Agency asserted that the proposal was nonnegotiable, the Union filed the petition.

III. Proposal

A. Wording

SECTION 7. UNIFORMS

> b. Technicians will be afforded the opportunity to wear organizational or military items such as unit undershirts or hats while in the performance of their technician duties in their respective work areas.[7]

B. Meaning

The parties agree that the "proposal would require the Agency to allow military technicians to wear, at the technician's discretion, organizational or military items" while performing civilian duties in the technician's work areas.[8]

[3] Pet., Attach., Ground Rules Mem. of Understanding (Ground Rules) § 7, at 3.
[4] *Id.*
[5] *Id.*
[6] *Id.* § 8, at 3.
[7] Pet. Br. at 3; *see also* Post-Pet. Conf. Record (Record) at 2 & n.3 (parties agreed that proposal's wording is accurately set forth in the petition brief).
[8] Record at 2.

C. Analysis and Conclusions

1. The parties did not execute an agreement, so the Agency was entitled to withdraw from bargaining over § 7106(b)(1) matters.

The parties agree that,[9] under existing Authority precedent,[10] the particular uniforms that military technicians wear while performing civilian duties are part of their "methods[] and means of performing work," within the meaning of § 7106(b)(1) of the Statute.[11]

An agency may "elect[]" to bargain over the methods and means of performing work,[12] as well as other § 7106(b)(1) matters, but the agency is not required to do so.[13] Further, "an agency that elects to bargain over [§]7106(b)(1) matters may withdraw from bargaining [over those matters] at any time before reaching agreement."[14] But, if the parties execute an agreement on such matters, then, under § 7114(c) of the Statute, the head of the agency "shall approve [that] agreement" *unless* it is inconsistent with applicable law, rule, or regulation.[15]

The Agency argues that it withdrew from bargaining over technician's uniforms, which are the methods and means of performing technicians' work under § 7106(b)(1), *before* the parties reached an agreement that would trigger Agency-head review under § 7114(c).[16] By contrast, the Union argues that, when the Adjutant General rejected the disputed uniform wording, he did so *as part of* Agency-head review under § 7114(c).[17] And the Union asserts that, because the Adjutant General was conducting Agency-head review, he acted unlawfully by disapproving the uniform provision solely because it concerns a § 7106(b)(1) matter.[18]

As relevant here, the Authority has recognized that the period for agency-head review under § 7114(c) begins after the *execution* of an agreement.[19] Further, parties may adopt ground rules that specify the conditions under which they will recognize an agreement as executed.[20] Here, the parties adopted ground rules for that very purpose. And the ground rules require that *both* the Union's members *and* the Adjutant General "ratify" all provisions in a draft agreement before the agreement may be executed.[21] Because the Adjutant General did not ratify the uniform proposal,[22] the parties never executed an agreement that would trigger Agency-head review under § 7114(c), and we reject the Union's contrary argument. Consequently, the Statute entitled the Agency to withdraw from negotiations over the subject of uniforms.

2. The proposal is not an appropriate arrangement under § 7106(b)(3) of the Statute.

A proposal that interferes with management's rights under § 7106(b)(1) may nevertheless be a mandatory subject of negotiation if the proposal is an appropriate arrangement under § 7106(b)(3) of the Statute.[23] The Union argues that, even if the Adjutant General did not unlawfully reject the uniform wording on Agency-head review, the proposal is negotiable as an appropriate arrangement for the Agency's exercise of its right to determine technicians' methods and means of performing work.[24]

When determining whether a proposal is within the duty to bargain under § 7106(b)(3), the Authority has

[9] Pet. Br. at 4; Statement at 10-11.
[10] *E.g.*, *Ass'n of Civilian Technicians*, 38 FLRA 1005, 1012-13 (1990) (Proposal 2, parts b, d, f, and g), *pet. for review granted on other grounds & decision remanded sub nom. U.S. DOD, Nat'l Guard Bureau, R.I. Nat'l Guard, R.I. v. FLRA*, 982 F.2d 577, 580 (D.C. Cir. 1993).
[11] 5 U.S.C. § 7106(b)(1).
[12] *Id.*
[13] *U.S. Dep't of Commerce, Patent & Trademark Office*, 53 FLRA 858, 871-72 (1997) (*Commerce*) (citing *FDIC, Headquarters*, 18 FLRA 768, 771 (1985)); *cf. AFGE, Local 3937, AFL-CIO*, 64 FLRA 17, 21-22 (2009) (insisting on bargaining to impasse on a permissive subject is an unfair labor practice).
[14] *Commerce*, 53 FLRA at 871.
[15] 5 U.S.C. § 7114(c)(2).
[16] Statement at 12.
[17] Pet. Br. at 3, 5-6.
[18] *Id.*
[19] *E.g.*, *SSA*, 46 FLRA 1404, 1405 n.4 (1993) (citing *POPA*, 41 FLRA 795, 803 (1991)).
[20] *E.g.*, *id.* ("The . . . argument that the [u]nion's failure to ratify the [memorandum of understanding (MOU)] was of no effect . . . is misplaced. As the [u]nion properly had conditioned execution of the MOU on ratification, . . . [any §]7114 review, which is triggered by execution of an agreement, was not effective.").
[21] Ground Rules § 7, at 3.
[22] The Union argues that the Statute prohibits the Authority from recognizing the *Agency's* right to ratify agreements because, according to the Union, the Statute reserves that right to the *Union* only. Resp. at 2-4. But we reject this argument because the Authority has previously recognized that ground rules may require higher-level agency approval of agreements as a precondition to execution. *Dep't of HHS, Phila. Reg'l Office, Region III*, 12 FLRA 167, 169 & n.3 (1983) (despite negotiators' initials on all proposals, agreement was not "final" because ground rules required approval by higher-level manager). The Adjutant General's review here was a lawful product of the parties' ground rules.
[23] *NATCA*, 61 FLRA 341, 344 (2005). A proposal that interferes with § 7106(b)(1) rights may also be negotiable as a procedure under § 7106(b)(2) of the Statute. *Id.*
[24] Pet. Br. at 3-4.

recognized that an appropriate arrangement may not "negate" the exercise of a management right by reversing management's substantive decision altogether.[25] Here, the Agency has prescribed the uniform that technicians will wear while performing their civilian duties, and the proposal attempts to negate that choice by allowing a different uniform "*at the technician's discretion*."[26] The proposal would clearly violate the Agency's prerogative under the Statute to elect not to bargain *at all* over the *substance* of this § 7106(b)(1) matter.[27] Therefore, we find that the proposal is not an appropriate arrangement under § 7106(b)(3).[28]

IV. Order

The petition for review is dismissed.

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[25] *E.g.*, *AFGE, Local 1164*, 66 FLRA 112, 117 (2011) (*Local 1164*) (proposal to use different model workstation than agency had chosen "negate[d] the [a]gency's determinations entirely" as to methods and means of performing work under § 7106(b)(1)), *pet. for review denied*, 483 F. App'x 577, 578 (D.C. Cir. 2012) (per curiam) (unpublished); *AFGE, Nat'l Council of Field Labor Locals, Local 2139*, 57 FLRA 292, 294-95 (2001) (*Local 2139*) (proposal to prevent management from using the word "courteous" in performance standards completely precluded management from exercising its rights to direct employees and assign work under § 7106(a)(2)(A) and (B) of the Statute); *NAGE, Local R7-23*, 23 FLRA 753, 759 (1986) (*Local R7-23*) (where management exercised § 7106(a)(1) right to change internal-security policy so that employees were liable for property damage due to "negligence," proposal that would preclude employee liability except in cases of "gross negligence" "completely reverse[d] the substantive effect of management's action").

[26] Record at 2 (emphasis added).

[27] *See Local R7-23*, 23 FLRA at 759 (proposal was not negotiable where it "completely reverse[d] the substantive effect of management's action"). The dissent is wrong to suggest that we have abandoned the balancing test set forth in *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*), for evaluating the negotiability of proposals under § 7106(b)(3). Dissent at 6. Rather, we rely on precedent that recognizes that there are no benefits to employees that could, on balance, render an arrangement "appropriate" if it totally negates management's substantive decision. *See NTEU*, 70 FLRA 100, 104 (2016) (applying *KANG* to find that a "proposal . . . [that] negates the [a]gency's . . . determination entirely . . . is not an 'appropriate' way to ameliorate a right's adverse effects within the meaning of § 7106(b)(3)").

[28] *See Local 1164*, 66 FLRA at 117; *Local 2139*, 57 FLRA at 294-95; *Local R7-23*, 23 FLRA at 759.

Member DuBester, concurring in part and dissenting in part:

I agree with the majority that in the circumstances of this case, the parties did not execute an agreement concerning the disputed proposal, triggering Agency-head review. But I disagree with the majority's resolution of whether the proposal is an appropriate arrangement under § 7106(b)(3) of the Statute.[1]

As the majority has repeatedly reaffirmed, "in the negotiability context, to determine whether a union proposal is an appropriate arrangement under § 7106(b)(3) of the Statute . . . [, the Authority applies a] 'balancing' excessive-interference test."[2] And the majority has a detailed understanding of what that test entails. As the majority explained in a recent decision: "When determining whether a proposal is within the duty to bargain under § 7106(b)(3), the Authority initially determines whether the proposal is intended to be an 'arrangement' for employees adversely affected by the exercise of a management right. If the proposal is an arrangement, the Authority determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with the relevant management rights. The Authority makes this determination by weighing 'the competing practical needs of employees and managers' in order to ascertain whether the benefits to employees flowing from the proposal outweigh the proposal's burdens on the exercise of the management right involved."[3] This analytical framework is often referred to as the *KANG* analysis.[4] All of the Authority's various panels of Members, and the federal courts,[5] have applied the *KANG* analysis since 1986; that is, for over thirty years.

So, is the Authority's thirty-something *KANG* analysis alive and well? If the majority's decision in this case is a reliable indicator, the answer is "No." With only the briefest discussion, the majority effectively jettisons the *KANG* excessive-interference balancing analysis, and replaces it with a lopsided "negates" test.[6] Adopting a *per se* rule, the majority holds that "an appropriate arrangement may not 'negate' the exercise of a management right by reversing management's substantive decision altogether."[7] As the majority explains, under their new "negates" test, "there are no benefits to employees that could, on balance, render an arrangement 'appropriate' if it totally negates management's substantive decision,"[8] regardless of how limited or inconsequential that management decision is.

The majority's new, unexplained "negates" test has no foundation in the Statute or the Authority's case law. The four cases the majority cites, from the thousands the Authority has issued, do not support the majority's new test. In three of the cases, the Authority's observation that the disputed proposal would "negate" a management determination was only one factor among many in the Authority's application of the *KANG* balancing test.[9] And in the fourth case, decided shortly after the Authority issued *KANG*, the Authority applied an "abrogation" test.[10] The majority does not claim in this case that the Union's proposal, concerning uniform items such as the undershirts and hats employees may wear at work, "abrogates" the pertinent management

[1] 5 U.S.C. § 7106(b)(3).

[2] *U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Lompoc, Cal.*, 70 FLRA 596, 598 n.27 (2018) (Member DuBester dissenting as to other matters); *see also U.S. Dep't of the Treasury, IRS*, 70 FLRA 792, 794 n.36 (2018) (Member DuBester dissenting as to other matters) (stating that the Authority will continue to use the Authority's established excessive-interference balancing test to resolve appropriate-arrangement claims in the negotiability context); *NTEU*, 70 FLRA 691, 692-93 (2018) (*NTEU*) (Member DuBester dissenting as to other matters) (citing *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*)) (same).

[3] *NTEU*, 70 FLRA at 692.

[4] *See, e.g.*, *NTEU (DHS)*, 70 FLRA 701, 704-05 (2018) (citing *NAIL, Local 5*, 67 FLRA 85, 87 (2012)) (applying *KANG* analysis).

[5] *See, e.g.*, *U.S. Capitol Police v. Office of Compliance*, 2018 WL 5795981, at *5 (Fed. Cir. Nov. 6, 2018); *U.S. Dep't of the Treasury, Office of the Chief Counsel, IRS v. FLRA*, 960 F.2d 1068, 1073 (D.C. Cir. 1992).

[6] Majority at 4.

[7] *Id.*

[8] Majority at 5 n.27.

[9] *See NTEU (CBP)*, 70 FLRA 100, 104 (2016) ("the proposal significantly burdens the Agency's right to determine internal-security practices and this burden outweighs any benefits that the proposal would afford to the officers"); *AFGE, Local 1164*, 66 FLRA 112, 117 (2011) ("After weighing the alleged benefits afforded to employees . . . against the burdens on management's rights to determine the methods and means of performing work, we find that the burdens on management's rights outweigh the benefits to employees."); *AFGE, Nat'l Council of Field Labor Locals, Local 2139*, 57 FLRA 292, 294-95 (2001) ("[T]he Union's proposal will benefit certain employees by preventing the Agency from changing the customer service policy to include language that could negatively impact employees' appraisals or subject them to disciplinary action. However, the Union's proposal will also severely restrict the Agency's ability to direct employees and assign work. In fact, the Union's proposal completely precludes the Agency from using the language that it wishes to use in the customer service policy, including the use of the word courteous. We conclude that this complete preclusion outweighs the benefits to employees of using the Union's offered language. . . . Therefore, the proposal is not within the duty to bargain under § 7106(b)(3) of the Statute.").

[10] *See NAGE, Local R7-23*, 23 FLRA 753, 759 (1986) ("Proposals which totally abrogate the exercise of a management right excessively interfere with that right and do not constitute 'appropriate arrangements.'").

right, management's right to determine the methods and means of performing work under § 7106(b)(1).

More fundamentally, the majority's new "negates" test negates core collective-bargaining principles. As the Authority's case law reflects, the collective-bargaining process exists to enable the parties to discuss and reconcile their *different*, often mutually exclusive views as to how conditions-of-employment/working-conditions issues should be resolved.[11] This is the "bargaining" part of collective bargaining. And as then-Judge Scalia explained in the D.C. Circuit's decision that gave rise to the excessive-interference balancing test, appropriate-arrangements bargaining "can contravene what would in other circumstances be management prerogatives."[12] By giving controlling effect to "management's substantive decision;" that is, management's position on any matter in negotiations, the majority's new *per se* "negates" test eliminates "bargaining" from the collective bargaining process. This is irrational, and fundamentally at odds with the Statute's basic purposes. Accordingly, on this issue I dissent.[13]

[11] *See, e.g.*, *NFFE, IAMAW, Fed. Dist. 1, Local 1998*, 69 FLRA 626, 629 (2016) (the Authority found a proposal allowing passport specialists to avoid certain adjudication procedures for minors negotiable as an appropriate arrangement despite the agency's different position that "the proposal would prevent the Agency from assigning specialists 'to perform certain types of SSA-related checks when adjudicating minors' passport applications'"); *NFFE, IAMAW, Fed. Dist. 1, Local 1998*, 69 FLRA 586, 593 (2016) (the Authority found a proposal allowing field-duty officers to contact management before processing an emergency-passport request negotiable as an appropriate arrangement despite the agency's different position that the proposal would allow officers to delay assignments handed down by supervisors; *AFGE, Council of Prison Locals 33*, 65 FLRA 142, 146-47 (2010) (the Authority found a proposal requiring an agency to maintain and issue stab-resistant security vests to correctional officers who request them negotiable as an appropriate arrangement despite the agency's different position that the proposal "would affect its internal security because it would have to provide access to the secure area for each officer who requests a vest and for additional individuals to facilitate the collection, storage and distribution of the vests.").

[12] *AFGE, AFL-CIO, Local 2782 v. FLRA*, 702 F.2d 1183, 1188 (D.C. Cir. 1983).

[13] The majority's additional suggestion, that the Union's proposal is not an appropriate arrangement because it "would clearly violate the Agency's prerogative under the Statute to elect not to bargain at all over the substance of this § 7106(b)(1) matter," is also without merit. As the majority acknowledges earlier in its decision, "[a] proposal that interferes with management's rights under § 7106(b)(1) may nevertheless be a mandatory subject of negotiation if the proposal is an appropriate arrangement under § 7106(b)(3) of the Statute." Majority at 4 (citing *NATCA*, 61 FLRA 341, 344 (2005)).