

65 FLRA No. 115

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R1-144
FEDERAL UNION OF SCIENTISTS
AND ENGINEERS
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
NAVAL UNDERSEA WARFARE
CENTER DIVISION NEWPORT
NEWPORT, RHODE ISLAND
(Agency)

0-NG-3015

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

February 23, 2011

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Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

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). The appeal involves the negotiability of one proposal. The proposal addresses the eligibility of Union officials to perform representational duties while teleworking on official time from their homes. Record of Post-Petition Conference at 2. The Agency filed a statement of position (SOP). The Union filed a response (Response) and a supplemental submission. The Agency did not file a reply.

For the reasons set forth below, we find that the proposal is negotiable.

II. Preliminary Issue

The Agency asks that the Authority dismiss the petition for review (petition) because the Union (1) mailed it to the wrong address and therefore failed

to properly serve the petition on the Agency head and (2) failed to serve the Agency head's designee. SOP at 1-2. The Agency claims that the Union's service of the petition is thus in violation of 5 C.F.R. § 2424.2(g).¹ *Id.* at 2. The Agency claims that, as a result of the Union's defective service of the petition, it was not timely notified that the Union had filed a petition, consequently reducing the time that the Agency had to respond. *Id.* In the Agency's view, it was, therefore, "severely disadvantaged[.]" *Id.*

The Agency does not sufficiently support its request that the Authority dismiss the petition. First, even if the Union failed to properly serve the Agency head by mailing the petition to the wrong address, failure to serve an agency head where no prejudice is shown does not warrant the petition's dismissal. *See AFGE, Local 3342*, 36 FLRA 367, 374 (1990) (petition not dismissed based on union's failure to serve petition on agency head where agency timely filed SOP and did not show prejudice). Here, the Agency was able to timely file its SOP and has not otherwise shown that it was prejudiced by the defective service. Second, with regard to the Agency's argument that the Union "chose to flaunt the Authority's service regulation by ignoring its obligation to properly serve the Agency [h]ead's designee[.]" *see* SOP at 2, this regulation does not require that service be made on the Agency head's designee. *See* 5 C.F.R. § 2424.2(g). We therefore reject the Agency's request to dismiss the petition.²

III. Background

According to the Union, the proposal is intended to clarify the Agency's telework policy. The telework policy establishes policies and procedures for employees wishing to work from home.

1. 5 C.F.R. § 2424.2(g) provides that "[s]ervice means the delivery of copies of documents filed with the Authority to the other party's principal bargaining representative and, in the case of an exclusive representative, also to the head of the agency."

2. Although the Agency requests that the Authority take official notice that the petition was mailed to the incorrect address and that the Agency head's designee was not served, we decline to do so, as such action is not necessary to resolve the Agency's claims. In addition, the Union's supplemental submission addresses service issues regarding both the petition and the response. As the Agency was not prejudiced by the alleged service deficiencies with respect to the petition, and does not allege any service deficiencies with respect to the response, it is unnecessary to address the Union's supplemental submission or decide whether it is properly before us.

Response at 11. The Union contends that in 2004 and 2005, Agency policy permitted Union officials to telework. Petition at 5. However, now, the Union claims, Union officials are not allowed to perform representational duties while teleworking. Response at 11. Accordingly, the Union presented the Agency with the proposal set forth below, addressing Union officials' eligibility to perform representational duties while teleworking.

IV. Proposal

Up to 5 full-time and/or part-time union officials are eligible for telework to perform union-related duties on official time at their home worksite, not to exceed 20 hours per week per person. This will not add to the overall amount of official time used by the union to perform representational duties.

Petition at 3.

V. Positions of the Parties

A. Agency

The Agency challenges the negotiability of the proposal on three bases. First, the Agency interprets the proposal as requiring it to allow Union officials to telework. On this basis, the Agency argues that the proposal is non-negotiable as affecting management's rights to assign and direct employees and determine its organization under § 7106(a) of the Statute. SOP at 8, 10, 13. The Agency also argues that the proposal violates 5 U.S.C. § 7131 because it would require management to permit Union officials to telework in contravention of the telework law. In the Agency's view, requiring the Agency to allow Union officials to telework while performing representational duties on official time essentially grants the Union officials additional "official time" beyond that which was intended by § 7131.³ *Id.* at 14-15.

Second, the Agency interprets the proposal as requiring it to allow Union officials to work exclusively on representational duties while teleworking. On this basis, the Agency alleges, the proposal is non-negotiable as affecting management's rights to assign work, *see id.* at 6, and determine its

3. Section 7131(d) provides that the use of official time for representational activities other than negotiations or participation in Authority proceedings is subject to negotiation. 5 U.S.C. § 7131(d).

budget under § 7106(a) the Statute. *Id.* at 13-14. For this same reason, the Agency also argues that the proposal is non-negotiable because it concerns representational duties and, therefore, does not concern "conditions of employment" as that term is defined in § 7103(a)(14) of the Statute. *Id.* at 11-12. In addition, the Agency claims that the proposal violates the Antideficiency Act by requiring it to allow Union officials to perform representational duties while teleworking. According to the Agency, this will require the Agency to expend appropriated funds for the Union's activities that have not been expressly provided for this purpose by legislative appropriations. *Id.* at 16.

Third, the Agency argues that by requiring it to allow Union officials to perform representational duties while teleworking, the proposal violates § 359 of Public Law 106-346 (the telework law). According to the Agency, in *American Federation of Government Employees, National Council of HUD Locals 222, AFL-CIO*, 60 FLRA 311 (2004) (*HUD*), the Authority held that, under the telework law, teleworking is only available to employees performing "official duties" and that representational duties do not qualify as "officially assigned duties" within the meaning of the law. *Id.* at 18 (citing *HUD*, 60 FLRA at 313). The Agency claims that subsequent Authority case law holding that the telework law does not prohibit parties from negotiating an agreement permitting union officials to perform representational duties on telework "has no precedential value" in this case. *Id.* at 19-20.

B. Union

The Union argues that a number of the Agency's contentions are based on its misinterpretation of the proposal. First, the Union argues that the Agency's contentions are based on the false premise that the proposal requires the Agency to allow Union officials to telework. Response at 13-14. According to the Union, this interpretation of the proposal is incorrect. Rather, the Union claims, under the proposal, all teleworkers, including Union officials, would need to be approved for telework by their supervisors. Therefore, the Union asks that the Authority reject the Agency's claims of non-negotiability based on this premise. Thus, the Union claims that the Authority should reject the Agency's arguments that the proposal affects management's rights to assign and direct employees and that it violates § 7131 of the Statute. *Id.* at 14, 17.

Second, the Union contends that a number of the Agency's arguments are based on the false premise

that the proposal would require the Agency to allow Union officials to work exclusively on representational duties while teleworking. According to the Union, this interpretation of the proposal is incorrect. Rather, the Union claims, Union officials' duties while on telework would not be limited to representational duties, but would also include duties assigned by the Agency. *Id.* at 15. Therefore, the Union asks that the Authority reject the Agency's claims of non-negotiability based on this premise - namely that the proposal affects management's rights to assign work, *see id.* at 14, determine its organization, and determine its budget under the Statute, *id.* at 17-20. Similarly, the Union argues that the Authority should reject the Agency's argument that the proposal is non-negotiable because it concerns only Union officials' representational duties, which do not constitute a condition of employment under the Statute. *Id.* at 18. In this same vein, the Union asks that the Authority reject the Agency's argument that the proposal violates the Antideficiency Act. *Id.* at 20.

Third, the Union contends that the proposal does not violate the telework law. The Union relies on Authority precedent holding that the telework law does not prohibit union officials from performing representational duties while teleworking on official time. *Id.* at 22.

VI. Meaning of the Proposal

The parties dispute what the proposal requires with regard to teleworking Union officials. First, the parties dispute whether the proposal requires management to allow Union officials to telework. Second, the parties dispute whether the proposal requires management to allow Union officials to work exclusively on representational duties while teleworking.

When parties dispute the meaning of a proposal, the Authority will examine the wording of the proposal as well as the union's statement of intent. If the union's explanation is consistent with the proposal's plain wording, then the Authority adopts that explanation for the purpose of construing what the proposal means. *Prof'l Airways Sys. Specialists*, 64 FLRA 474, 477 (2010) (citing *AFGE, Local 1900*, 51 FLRA 133, 138-39 (1995)). If the union's statement is not consistent with the wording of the proposal, however, the Authority will not adopt it for the purpose of determining whether the proposal is within the duty to bargain. *Id.* (citing *IFPTE, Local 3*, 51 FLRA 451, 459 (1995)).

First, the proposal's plain wording provides that Union officials are "eligible" for telework. Petition at 3. For an employee to be "eligible" for telework means that an employee is qualified to be chosen for telework.⁴ It does not mean that there is a requirement that an employee be assigned to telework. Response at 13. Accordingly, under the proposal's plain wording, anywhere from 0 to 5 Union officials are eligible to be chosen for telework. Further, the Union expressly asserts that all teleworkers, including Union officials, would need to be approved for telework by their supervisors. *Id.* As the Union's statement of intent is consistent with the plain wording of the proposal, we adopt the Union's interpretation of this portion of the proposal. *See AFGE, Local 12*, 60 FLRA 533, 537 (2004).

Second, the proposal's plain wording provides that teleworking Union officials would perform representational duties "not to exceed 20 hours per week per person." Petition at 3. The "not to exceed" language provides a maximum number of hours that the Union officials must be allowed to perform representational duties while teleworking. The proposal does not provide a minimum amount of time that Union officials can spend performing representational duties while teleworking. Further, the Union expressly asserts that the proposal does not preclude the Agency from assigning the Agency's work to the teleworking Union officials, as needed. *See Response at 15.* As the Union's statement of intent with regard to this portion of the proposal is consistent with the proposal's plain wording, we adopt the Union's interpretation of this portion of the proposal.

VII. Analysis and Conclusions

For the reasons set forth below, we find that the proposal is negotiable.

A. The proposal does not affect management rights.

First, the Agency claims that the proposal would affect certain management rights because it would require management to allow Union officials to telework. SOP at 6-11. As discussed above, we find that the proposal does not require the Agency to allow Union officials to telework. Therefore, as the Agency premises its arguments that the proposal is

4. *See Webster's Third New International Dictionary* at 736 (3rd ed. 1986) (defining "eligible" as "fitted or qualified to be chosen").

non-negotiable as affecting its rights to assign and direct employees and its right to determine its organization on a misinterpretation of the proposal, we reject these management rights arguments.

Second, the Agency claims that the proposal would affect certain management rights because it would require management to allow Union officials to work exclusively on representational duties while teleworking. *Id.* at 6-11. As discussed above, we find that the proposal does not require the Agency to allow Union officials to work exclusively on representational duties while teleworking. Therefore, as the Agency premises its arguments that the proposal is non-negotiable as affecting its rights to assign work and determine its budget on a misinterpretation of the proposal, we reject these management rights arguments.

B. The proposal does not violate 5 U.S.C. § 7131.

The Agency claims that the proposal violates 5 U.S.C. § 7131 because it would require management to place Union officials on telework in contravention of the telework law. *See* 5 U.S.C. § 7131.⁵ In this regard, the Agency argues that by mandating that the Agency allow Union officials to telework while performing representational duties on official time, the proposal essentially grants the Union officials additional “official time” beyond that which was intended by § 7131. SOP at 15. Consequently, the Agency claims the proposal is non-negotiable. As discussed above, we find that the proposal does not require the Agency to allow Union officials to telework. Therefore, as the Agency premises its argument regarding § 7131 on a misinterpretation of the proposal, we reject the Agency’s claim.

C. The proposal concerns a condition of employment.

The Agency claims that the proposal is non-negotiable because it concerns representational duties and, therefore, does not concern “conditions of employment” as that term is defined in § 7103(a)(14) of the Statute. *Id.* at 11-12. Section 7103(a)(14) defines “conditions of employment” as “personnel policies, practices, and matters, whether established

by rule, regulation, or otherwise, affecting working conditions” The proposal pertains to official time, which “shall be considered hours of work.” *AFGE, Local 1770*, 64 FLRA 953, 958 (2010) (citing *ACT, Old Hickory Chapter*, 55 FLRA 811, 813 (1999) (quoting 5 C.F.R. § 551.424(b)) (rejecting claim that because a provision pertained to representational duties, the provision did not concern conditions of employment)). Therefore, we reject this argument.

D. The proposal does not violate the Antideficiency Act.

Citing 31 U.S.C. § 1341, the Agency claims that the proposal violates the Antideficiency Act because mandating that the Agency allow Union officials to perform representational duties while on telework will require it to spend appropriated funds on duties that are not the Agency’s work. The Antideficiency Act precludes an agency from expending funds: (1) in excess of those appropriated for the fiscal year in which the expenditure is made; and (2) prior to their appropriation. *See* 31 U.S.C. § 1341(a)(1)(A) and (B); *see also AFGE, Local 1770*, 64 FLRA at 957; *Ass’n of Civilian Technicians, Evergreen & Rainier Chapters*, 57 FLRA 475, 483 (2001). The Agency, which did not claim that the proposal would require it to expend funds in excess of its appropriation for a given fiscal year or to expend funds prior to their appropriation, has failed to establish that the proposal is contrary to the Antideficiency Act. Therefore, we reject this argument.

E. The proposal does not violate the telework law.

The Agency argues that the proposal violates the telework law because the telework law does not authorize Union representatives to perform representational duties while teleworking on official time. SOP at 18 (citing *HUD*, 60 FLRA at 313). The Agency further claims that Authority precedent subsequent to *HUD*, holding that the telework law does not prohibit union officials from performing representational duties while teleworking on official time, is inapplicable in this case. *See U.S. Dep’t of Agric., Food Safety & Inspection Serv.*, 62 FLRA 364, 367 (2008) (*DOA*); *see also U.S. Envtl. Prot. Agency*, 63 FLRA 30, 33 (2008) (*EPA*) (“§ 359 . . . does not prohibit union representatives from performing representational duties on official time from remote locations”). According to the Agency, those cases do not apply here because they involve instances in which there was a past practice of

5. Under § 7131(d), union representatives in the bargaining unit “shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.” 5 U.S.C. § 7131(d).

permitting Union officials to perform representational duties while teleworking on official time. SOP at 18-19.

The Agency's position that *DOA* and *EPA* do not apply to this case is incorrect. The Authority's holdings in *DOA* and *EPA* do not depend on the existence of a past practice allowing Union officials to telework on official time. Rather, in those cases, the Authority explained that even though *HUD* held that § 359 does not *require* union officials to be permitted to perform representational duties at home, that does not mean that § 359 *prohibits* parties from agreeing, pursuant to other authority, to contract terms or practices to that effect. *DOA*, 62 FLRA at 367; *EPA*, 63 at 33. Indeed, "the location at which official time is to be exercised" is a mandatory subject of bargaining. *U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1119 (1994). Thus, consistent with this precedent, we reject this argument.

VIII. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, negotiate over the proposal.