66 FLRA No. 125

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

0-NG-3070

_____

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

May 11, 2012

_____

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

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) and concerns the negotiability of four proposals.[2] The Agency filed a statement of position (SOP), to which the Union filed a response (response). The Agency filed a reply (reply) to the Union's response.

For the reasons that follow, we find that Proposals 2-4 directly implicate supervisors' conditions of employment and Proposal 1 excessively interferes with management's right to assign work. Therefore, we dismiss the petition for review (petition).

II. Background

This dispute arose when the Union requested impact and implementation bargaining over the schedules and shifts assigned to operations supervisors and front-line managers. Petition at 1. The Union submitted four proposals to the Agency to offset the alleged "adverse impact" on bargaining-unit employees (unit employees) of the Agency's current policy on schedules and shifts. *Id.* The Agency declared the proposals nonnegotiable. *Id.* at 1-2.

III. Proposals 1-4

A. Wording

Proposal 1

> Coverage for operations supervisors/front[-]line managers who are on regular days off (RDOs), leave of any kind, official travel, and official details will not be provided by A11 [unit employees] in order to reduce the adverse impact of working forced overtime.

Proposal 2

> Reduce the amount of annual leave available to operations supervisors/front[-]line managers from May 9 to September 11 each calendar year to two weeks per operations supervisor/front[-]line manager in order to reduce the adverse impact to A11 [unit employees] caused by forced overtime, reduced operational coverage, increased [Controller in Charge (CIC)] use, reduced [On-the-Job Training (OJT)] availability, increased traffic delays, the use of Traffic Management Initiatives, the reduction of fair and equitable training, the reduction of longevity of breaks away from operational areas, and

[1] Member DuBester's separate opinion, dissenting in part, is set forth at the end of this decision.

[2] In its petition for review (petition) and at the post-petition conference, the Union indicated that one proposal with four sections was in dispute. *See* Petition at 4; Record of Post-Petition Conference at 1. However, the Union's petition contains references to both "proposal" and "proposals." *See, e.g.*, Petition at 1, 3. Additionally, in the Agency's statement of position (SOP) and the Union's response (response), the parties refer to four proposals and provide specific arguments to address each proposal separately. S*ee* SOP at 2-16; Response at 1-15. Therefore, we interpret the Union's position as requesting that the four sections of the proposal be analyzed as separate proposals. *Cf. NATCA, Local ZHU*, 65 FLRA 738, 738 n.1 (2011) (considering each section of a proposal separately because the union made specific arguments for each section); *AFGE, Local 1226*, 62 FLRA 459, 460 n.3 (2008) (analyzing sections of a proposal separately because the union provided specific arguments to address each section).

> the reduced availability of non-prime time leave requests.
>
> Proposal 3
>
> Schedule multiple operations supervisors/front[-]line managers evenly throughout each calendar day in order to provide maximum supervisory coverage and to reduce the adverse impact to A11 [unit employees] caused by forced overtime, reduced operational coverage, increased CIC use, reduced OJT availability, increased traffic delays, the use of Traffic Management Initiatives, the reduction of fair and equitable training, the reduction of the longevity of breaks away from operational areas, and the reduced availability of non-prime time leave requests.
>
> Proposal 4
>
> Schedule the RDOs of operations supervisors/front[-]line managers evenly throughout the week in order to provide maximum supervisory coverage and to reduce the adverse impact to A11 [unit employees] caused by forced overtime, reduced operational coverage, increased CIC use[], reduced OJT availability, increased traffic delays, the use of Traffic Management Initiatives, the reduction of fair and equitable training, the reduction of the longevity of breaks away from operational areas, and the reduced availability of non-prime time leave requests.

Id. at 4.

B. Meaning

Proposal 1 requires that, in order to reduce the impact of working forced overtime, "coverage for operations for supervisors and/or front[-]line managers who are on their regular days off, leave of any kind, official travel, and other official details not be provided" by unit employees. *Id.* at 4-5. The Union states that Proposal 1 reflects the policy that "supervisors, rather than [unit employees], should fill-in for absent supervisors." Record of Post-Petition Conference (Record) at 2. The Union explains that Proposal 1 is intended to "ensure that supervisors' . . . RDOs do not impact [unit employees]." *Id.*

The Agency contends that Proposal 1 means that CICs – unit employees who have agreed to perform supervisory duties – effectively would be prohibited from filling in for supervisors. *Id.* The Union responds that CICs still may fill in for supervisors as part of their regular tour of duty. Response at 6. Because Proposal 1 states that coverage for supervisors not be provided by unit employees "to reduce the adverse impact of working forced overtime," the Union's meaning is not inconsistent with the language of the proposal. Therefore, we adopt the Union's explanation of the meaning of Proposal 1. *See NAGE, Local R-109*, 66 FLRA 278, 278-79 (2011) (citing *NAGE, Local R1-100*, 61 FLRA 480, 480-81 (2006)) (adopting the union's meaning where it was not inconsistent with the language of the proposal).

Proposal 2 requires "the Agency [to] reduce the amount of annual leave available to operations supervisors/front[-]line managers" during peak travel times between May and September. Petition at 5. The Union explains that Proposal 2 is intended to ensure "adequate supervisory coverage during peak travel times." Record at 2. The Agency does not dispute the Union's asserted meaning. *Id.*

Proposals 3 and 4 require "that the Agency schedule the RDOs . . . of operations supervisors and front[-]line managers evenly throughout the week, and that supervisors and front line managers are scheduled evenly throughout the calendar day." Petition at 6. The Union explains that Proposals 3 and 4 are intended to "mitigate the impact of uneven operational coverage" for unit employees and to "reduce the negative impact resulting from supervisors' scheduling their RDOs together." Record at 2. The Agency does not dispute the Union's asserted meaning. *Id.* at 2-3.

C. Positions of the Parties

1. Agency

The Agency argues that the proposals are nonnegotiable because they are "principally focused" on non-unit employees and, therefore, do not pertain directly to conditions of employment of unit employees. SOP at 2. As such, the Agency asserts that the proposals concern a permissive subject of bargaining, over which the Agency has not elected to bargain. *Id.*

Specifically, the Agency argues that Proposal 1 effectively prohibits the Agency's use of CICs because unit employees may not fill in when a supervisor is taking any kind of leave. SOP at 4. The Agency claims that, because Proposal 1 restricts the Agency's CIC use, it excessively interferes with management's rights to determine its budget, assign work, and determine the personnel by which agency operations shall be conducted. *Id.* at 8. The Agency also argues that Proposal 1 is not an appropriate arrangement because the negative impact outweighs "whatever small benefit might inure" to unit employees. *Id.*

The Agency argues that Proposal 2 is contrary to the Family Medical Leave Act and the Agency's Employee Relations policies because it would limit when supervisors may take leave, *id.* at 11, and may require them to forfeit "use or lose" leave to the Agency, *id.* at 9.

The Agency asserts that Proposal 3 would "impede accomplishment of the Agency's core mission" because it would limit the Agency's ability to modify supervisory schedules. *Id.* at 12. As to Proposal 4, the Agency claims that the mathematical parity required by the Union's proposed language is impossible. *Id.* at 14-15.

2. Union

The Union argues that the proposals are negotiable because they relate "principally to the conditions of employment of unit employees" as well as supervisors. Response at 2. According to the Union, in the absence of a supervisor, a CIC must "cover" for the supervisor, which, in turn, forces other employees to "control more airspace with less assistance." *Id.*

The Union concedes that the proposals affect management's right to assign work, but argues that the proposals constitute appropriate arrangements. *Id.* The Union argues that, because Proposal 1 "seeks to modify how the Agency backfills empty supervisory positions," it mitigates the adverse effects resulting from unit employees working forced overtime. *Id.* at 5. According to the Union, forced overtime can cause "employee burn out" or may require employees to work despite any "personal conflicts." *Id.* The Union also suggests that the effect on the Agency is minimal because Proposal 1 does not prohibit unit employees from working as CICs in all situations, such as "as part of their regular tour of duty in the supervisor's absence." *Id.* at 6.

The Union contends that Proposal 2 is an appropriate arrangement because it alleviates the increased workload of unit employees due to reduced operational coverage when supervisors are on leave. *Id.* at 7-10. The Union further asserts that Proposal 2 is not contrary to Agency policies because it would not force supervisors to forfeit leave. *Id.* at 11.

The Union argues that Proposals 3 and 4 are appropriate arrangements because the lessened forced overtime outweighs any burden on the Agency. *Id.* at 13-14, 17.

D. Analysis and Conclusions

1. Proposals 2-4 concern supervisors' conditions of employment; Proposal 1 does not concern supervisors' conditions of employment.

The Authority has held that an agency does not have a duty to bargain with a union over proposals that directly implicate supervisors' conditions of employment. *Fraternal Order of Police, Lodge #1F*, 57 FLRA 373, 380 (2001) (*Lodge #1F*) (citing *NATCA, Rochester Local*, 56 FLRA 288, 291 (2000) (*NATCA*)). But proposals that principally relate to the conditions of employment of unit employees are not removed from the mandatory scope of bargaining simply because they indirectly affect supervisors. *See IFPTE, Local 49*, 52 FLRA 830, 835-36 (1996).

The Authority has found that a proposal that mandated a minimum number of supervisors who must be on duty during off-hour shifts directly implicated the conditions of employment of supervisors and was outside the duty to bargain. *Lodge #1F*, 57 FLRA at 380. Proposal 2 explicitly limits the amount of leave a supervisor may take during peak travel times between May and September. Petition at 4. Similarly, Proposals 3 and 4 expressly require the Agency to schedule supervisors' shifts evenly throughout the day and to schedule their RDOs evenly throughout the week. *Id.* These proposals directly affect supervisors' conditions of employment because they explicitly direct when supervisors must be scheduled and how much leave they may take. Thus, we find that Proposals 2-4 are outside the duty to bargain. *See NATCA*, 56 FLRA at 290 (finding a proposal to be outside the duty to bargain because it required the agency to schedule supervisors "as efficiently as possible").

On the other hand, the Authority has found that a proposal establishing a methodology for selecting unit employees to serve as backups to absent supervisors did not directly determine supervisors' conditions of employment. *See NFFE, Local 1482*, 45 FLRA 1132, 1136-38 (1992) (*Local 1482*). Proposal 1 is explicitly directed at unit employees rather than supervisors because it prohibits the Agency from requiring unit employees to work forced overtime in order to cover for

supervisors when they are on any kind of leave. *See Nat'l Ass'n of Agric. Emps., Local 39*, 49 FLRA 319, 330 (1994) (finding that a proposal did not directly affect conditions of employment of supervisors when it required the agency to assign overtime to unit employees before supervisors because it was "explicitly directed toward officer overtime") (internal quotation marks omitted). Because Proposal 1 does not limit when supervisors may take leave and is explicitly directed at unit employees, we find that Proposal 1 does not directly implicate supervisors' conditions of employment. *See Local 1482*, 45 FLRA at 1136-38.

We find that Proposals 2-4 are outside the duty to bargain because they directly implicate supervisors' conditions of employment, but that Proposal 1 does not directly implicate supervisors' conditions of employment.

2. Proposal 1 excessively interferes with management's right to assign work.

Because Proposal 1 is not outside the duty to bargain on the basis that it affects supervisors' conditions of employment, we must consider the Agency's argument that Proposal 1 is nonnegotiable because it excessively interferes with management's right to assign work. The right to assign work encompasses the right to determine the particular duties to be assigned, when work assignments will occur, and to whom or what positions the duties will be assigned. *AFGE, Local 3529*, 56 FLRA 1049, 1050 (2001) (*Local 3529*). Here, the Union concedes that Proposal 1 affects the Agency's right to assign work. *See* Response at 2 ("[t]he Union acknowledges that its proposal[] interfere[s] with management's right to assign work"). Therefore, we must consider whether Proposal 1 is an appropriate arrangement under § 7106(b)(3) of the Statute.

The framework for determining whether a proposal is within the duty to bargain under § 7106(b)(3) is set out in National Association of Government Employees, Local R14-87, 21 FLRA 24 (1986). Under that framework, the Authority initially determines whether a proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right. *Id.* at 31. If a proposal is an arrangement, the Authority then determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with the relevant management rights. Id. at 31-33. The Authority makes this determination by weighing "the competing practical needs of employees and managers" to ascertain whether the benefit to employees flowing from the proposal outweighs the proposal's burden on the exercise of the management right or rights involved. *Id.* at 31–32.

Even assuming that Proposal 1 constitutes an arrangement that is sufficiently tailored, we agree with the Agency that it does not constitute an appropriate arrangement because it excessively interferes with management's right to assign work. *See Local 3529*, 56 FLRA at 1051.

Proposal 1 benefits unit employees because it mitigates the adverse effects, such as "employee burn out," resulting from unit employees working forced overtime to cover for absent supervisors. *See* Response at 5. However, this benefit is limited because the Agency has procedures in place by which unit employees may be relieved of working forced overtime, such as an overtime roster allowing unit employees to volunteer for overtime opportunities and the ability for unit employees to find a replacement for any overtime shifts they are assigned. *See AFGE, Local 3937*, 66 FLRA 393, 397 (2011) (finding that the benefit to employees was limited where the agency had taken steps to mitigate the adverse effects). The Union also argues that Proposal 1 benefits employees because it alleviates the adverse effects on unit employees of reduced training opportunities, reduced breaks, and reduced ability to take leave. *Id.* at 5. However, consistent with the meaning of the proposal set forth above, the Agency still may assign supervisory duties to CICs during their regular tours of duty. *Id.* at 6. Therefore, the proposal provides at most a limited benefit because unit employees still will have to "control more airspace with less assistance," *see id.* at 2, while the CIC is acting as a supervisor.

While Proposal 1 provides a limited benefit to unit employees, it also significantly burdens the Agency because it completely prohibits the Agency from requiring unit employees to work overtime to cover for absent supervisors. The Authority has held that a proposal prohibiting compulsory overtime excessively interfered with management's right to assign work. *See AFGE, Local 1658*, 44 FLRA 1375, 1384-86 (1992) (*Local 1658*) (finding that a proposal prohibiting compulsory overtime for the purpose of performing duties below their grade level except where it was "necessary to accomplish essential mission and function" excessively interfered with management's rights). Proposal 1 is even more restrictive than the proposal in *Local 1658* because it does not provide any exceptions to the prohibition of requiring unit employees to work overtime to cover for absent supervisors.

Proposal 1 burdens the Agency because, by preventing the Agency from requiring unit employees to work forced overtime when supervisors are on any kind of leave, the Agency is limited to assigning CICs for absent supervisors during the unit employees' regular workweek. Therefore, there are fewer occasions during

which the Agency can assign work.[3] *See Local 3529*, 56 FLRA at 1052 (finding that a proposal that would preclude the agency from assigning certain unit employees to supervisors, regardless of supervisors' workload needs was not an appropriate arrangement). Proposal 1 also burdens the Agency because, by requiring it to assign CICs only during their normal tours of duty, the Agency must either redistribute the duties the CICs otherwise would perform or allow those duties to remain unperformed; by contrast, a CIC working overtime solely to cover a supervisory shift would not have any regular duties that the Agency must redistribute.[4]

Although Proposal 1 does not prohibit unit employees from working as CICs in all situations, such as "as part of their regular tour of duty in the supervisor's absence," Response at 6, it does not follow, as the Union suggests, that the effect on the Agency is minimal. There are currently only four supervisory employees working for the Agency, Record at 2, and those four supervisors are required to provide "watch supervision" coverage fifteen hours a day, seven days a week, and also are required to perform other non-watch supervision duties, SOP at 4-5. The Agency currently utilizes CICs to provide coverage when supervisors are absent, handling other tasks, or when no supervisors are on duty. *Id.* at 5. Thus, according to the Agency, by limiting the circumstances in which the Agency may utilize CICs, Proposal 1 would require it to either hire additional supervisors or force supervisors to work overtime to maintain full shift coverage. *Id.* Therefore, by prohibiting the Agency from assigning unit employees to work forced overtime, Proposal 1 severely burdens the Agency.

We conclude that, on balance, the benefit to the unit employees of working less forced overtime is outweighed by the significant burden on the Agency's right to assign work. *See AFGE, AFL-CIO, Local 1409*, 28 FLRA 109, 113 (1987) (finding a proposal that prohibited supervisors from assigning duties to unit employees that would conflict with any medical restrictions to excessively interfere with the agency's right to assign work). We find that Proposal 1 is not an appropriate arrangement and is, therefore, outside the duty to bargain.

The Agency also argues that the proposals are nonnegotiable because they are "covered by" the parties' agreement and excessively interfere with management's right to determine a budget and its right to determine personnel. *See* SOP at 3, 7. Further, the Agency contends that Proposal 2 is contrary to law. *Id.* at 11. However, in light of our conclusion that the proposals are nonnegotiable for the reasons stated above, it is unnecessary to address the Agency's remaining arguments.

IV. Order

We dismiss the petition for review.

[3] The dissent contends that "the need for compulsory overtime to cover for an absent supervisor appears minimal" and, therefore, that the Agency fails to provide a persuasive description of its burden. Dissent at 9. However, even assuming the dissent is correct on this point and there is only a minimal need for forced overtime, the dissent fails to show how that fact would affect *the balance of* the benefit to the unit employees to the burden on the Agency. That is, even if compulsory overtime by CICs to perform supervisory duties is not needed frequently, the complete prohibition on the Agency's ability to assign it outweighs the benefit to employees.

[4] Because Proposal 1 would require the Agency to assign supervisory duties only to the CICs who are on duty, the dissent's suggestion that the burden on the Agency would be limited if there are more available CICs is unpersuasive. *See* Dissent at 9. The total number of qualified CICs is irrelevant because there are only a finite number of those employees on duty at any given time.

Member DuBester, dissenting in part:

I do not agree with my colleagues that Proposal 1 excessively interferes with management's rights.

As the majority recognizes, "[t]he Authority [determines excessive interference] by weighing 'the competing practical needs of employees and managers.'" Majority at 6 (quoting *Nat'l Ass'n of Gov't Employees, Local R14-87*, 21 FLRA 24, 31-32 (1986)). As a practical matter, I do not think that the Agency has established the nature of the proposal's burden on management's rights.

The Agency's claim that the proposal excessively interferes with management's rights is based on a fundamental misinterpretation of the proposal. In the Agency's view, Proposal 1 "prohibits [the] use of CICs" – unit employees who have agreed to perform supervisory duties – to cover for an absent supervisor. Agency's Reply at 4; *see* Agency's Statement of Position (SOP) at 4 ("[T]he Agency interprets [Proposal 1] to effectively ban the use of CICs in nearly all instances in which a CIC has historically been used."). However, Proposal 1's impact is far more limited. As my colleagues understand, Proposal 1 only prohibits the Agency from requiring CICs to work overtime to cover for an absent supervisor. Majority at 3, 7. Significantly, Proposal 1 permits assignment of a CIC to cover for an absent supervisor "as part of [the CIC's] regular tour of duty." Union's Response at 6.

To appreciate the questionable nature of Proposal 1's burden on management's rights, it is necessary to examine the case's undisputed facts. The facility involved, the Agency's Anchorage, Alaska terminal radar approach control (TRACON), has four supervisors and thirty-six air-traffic controllers. *See id.*; Agency's Reply at 3. Of these thirty-six controllers, sixteen were CICs at the time the case was briefed. *See* Union's Response at 5; Agency's Reply at 3. Moreover, the Agency projected that by the fall of 2011, twenty-seven of the TRACON's controllers would be CICs. *See* Agency's Reply at 4.

These numbers raise significant questions about the Agency's excessive interference claims. With even sixteen CICs, and perhaps as many as twenty-seven CICs, available during their regular tours of duty, the need for compulsory overtime to cover for an absent supervisor appears minimal. Put differently, the Agency does not explain its practical need to assign CICs compulsory overtime, given that almost half, and by now perhaps almost all, of the TRACON's controllers are CICs. With a pool of that size, and with a total of four supervisors distributed over a seven-day workweek (with a lesser number on duty at any one time), it is the Agency's responsibility to explain why it is unable to solve its coverage problems by using controllers who are CICs during the controllers'/CICs' regular tours of duty. In short, the Agency fails to provide a persuasive description of the proposal's burden on its management rights.

Although the majority agrees that the proposal has a limited effect on the Agency's use of CICs, the majority relies on the Agency's misinterpretation of the proposal in finding that the proposal excessively interferes with management's rights. Adopting the Agency's argument, the majority finds that Proposal 1 would excessively burden management's rights because the CIC use the proposal would permit "would require [the Agency] to either hire additional supervisors or force supervisors to work overtime to maintain full shift coverage." Majority at 8 (citing SOP at 5). However, the Agency claim that the majority adopts is explicitly predicated on the Agency's misunderstanding that "no CICs could be used in any of the situations named in Proposal 1." SOP at 5.

In addition, I find the majority's reliance on *AFGE, Local 1658*, 44 FLRA 1375, 1384-86 (1992), problematic. In that case, the Authority bases its rather conclusory excessive interference holding on the determination that "the [a]gency's ability to require employees to perform overtime assignments . . . [i]s seriously impaired by the provision." 44 FLRA at 1386. Because of that decision's conclusory analysis, and the vagueness of its "serious impairment" standard, I find the decision of limited value in the different circumstances of this case. To similar effect, the other Authority decisions the majority relies on do not dictate the result in this case because of the broader impact on management's rights of the disputed proposals in those cases.[*]

The Agency's other claims regarding Proposal 1, that the proposal excessively interferes with the Agency's rights to determine its budget and to determine the personnel by which Agency operations shall be conducted, have even less support than the Agency's claim regarding its right to assign work. The Agency also argues that the proposal is "covered by" the parties' agreement. *See* SOP at 7. But the Union responds, without contradiction by the Agency, that the parties have placed contractual limitations on the assertion of a "covered by" defense. *See* Union's Response at 5 n.1. As such, I do not believe the Agency's remaining claims have merit. I therefore conclude that Proposal 1 is within the parties' duty to bargain.

[*] *AFGE, Local 3529*, 56 FLRA 1049, 1052 (2001); *AFGE, AFL-CIO, Local 1409*, 28 FLRA 109, 113 (1987).