70 FLRA No. 191

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
LOCAL 1450
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND
AEROSPACE WORKERS
(Union)

and

UNITED STATES
DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT
SEATTLE, WASHINGTON
(Agency)

0-NG-3398

_____

DECISION AND ORDER
ON NEGOTIABILITY ISSUE

December 10, 2018

_____

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

I. Statement of the Case

In this case, we consider the negotiability of a proposal that would prohibit an Agency official from providing any input to an employee's rating official about the employee's performance of customer-service duties.[1]

The main question before us is whether the proposal impermissibly affects management's rights to direct employees and to assign work under § 7106(a)(2)(A) and (B) of the Statute.[2] Because the proposal excessively interferes with these management rights, it does not fall under an exception to those rights.[3] We also deny the Union's severance request.

II. Background

The parties began negotiations over the impact and implementation of new customer-relationship-management software (software). The software will be used by employees performing customer-service and receptionist duties. Using the software will also enable the Agency to establish a database of customer inquiries that includes the customer's contact information and issue.

The software will be used by two groups of employees: (1) customer service representatives (Representatives), who perform these duties as part of their regular job, and (2) employees from other program areas, who either volunteer or are directed to perform these duties (Volunteers).

To manage the overall customer experience, the Agency intends to create a new position, the Regional Customer Experience Officer (RCEO). An RCEO will oversee employees' use of the software, and manage customers' experiences when they contact an RCEO's region's offices by phone, email, or in person.

During negotiations, the parties reached tentative agreement on all but one Union proposal, relating to the RCEO position. On February 8, 2018,[4] the Agency declared this proposal nonnegotiable.

The Union filed a negotiability petition on February 13. The Authority held a Post-Petition Conference with the parties on March 15.[5]

III. The Proposal

A. Wording

> The Regional Customer Experience Officer will not be utilized to rate affected employees in their appraisals.

[1] This matter is before the Authority on a negotiability appeal (petition) filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (Statute).[1]
[2] 5 U.S.C. § 7106(a)(2)(A)-(B).
[3] *See* 5 U.S.C. § 7106(b)(3).

[4] All dates are in 2018.
[5] The Agency filed its statement of position on March 29; the Union's response was postmarked on April 24; and the Agency filed its reply on May 14. On May 25, the Authority issued an Order to Show Cause why the Union's response should be considered timely because it was postmarked twenty-six days after the Agency filed its statement of position. Section 7117(c)(4) of the Statute provides that the Union has fifteen days after receipt of the Agency's statement of position to file its response. The Union asserts—and the Agency does not dispute—that the Union's representative did not receive the Agency's statement of position until April 9, when he signed the return receipt. Using April 9 as the receipt date, the Union's response was timely filed on April 24.

B. Meaning

At the post-petition conference, the parties agreed that the proposal would prohibit an RCEO from providing *any* input into the performance appraisal of the Representatives or Volunteers utilizing the new software, who are not the RCEO's direct supervisees.[6]

As the parties' understanding of the proposal's meaning is consistent with the Union's explanation of its intent and with the record as a whole, we adopt this understanding of the proposal's meaning.[7]

C. Analysis and Conclusion: The proposal excessively interferes with management's right to direct employees and assign work and, thus, is not an appropriate arrangement under § 7106(b)(3) of the Statute.

The Union asserts that the proposal is an appropriate arrangement under § 7106(b)(3).[8] 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.[9] 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 right.[10] 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.[11]

Even assuming that the Union's proposal is an arrangement, we find, for the following reasons, that it is not appropriate because it excessively interferes with the Agency's right to direct employees and assign work.[12]

The proposal's burden on management's rights to direct employees and assign work is significant. Specifically, the proposal would create a blanket restriction preventing RCEOs from providing *any* information concerning the Representatives' and Volunteers' performance unless the RCEO is also the employee's immediate supervisor. This restriction would apply regardless of how much time an RCEO spends with an employee. Such a proposal would ultimately prohibit the Agency from obtaining any input from an RCEO, would restrict the information the Agency may use to appraise employees, and would limit which officials may be assigned to participate in the appraisal process.[13]

In contrast, the proposal's benefits to employees are limited. The Union asserts that employees will benefit from the proposal because prohibiting an RCEO from providing any input into the performance appraisal process will "ensure that employee performance evaluations are accurate, fair[,] and objective."[14] Specifically, the Union argues that because Volunteers may only perform receptionist duties a few hours per pay period, it would be unfair for RCEOs to appraise them for such work.[15]

But the proposal applies not only to Volunteers working limited hours performing receptionist duties under an RCEO's observation, but also to Representatives who would be using the new software, under an RCEO's observation, as part of their regular duties.[16] Based on the record in this case, we find that the burden on the Agency's exercise of its management rights outweighs the demonstrated benefits afforded to employees by the proposal's arrangement. Accordingly, based on the record, we find that the proposal excessively interferes with management's rights.[17]

---

[6] Record of Post-Petition Conference (Record) at 2.

[7] *See NTEU*, 70 FLRA 701, 702-03 (2018); *AFGE, Local 1345*, 64 FLRA 949, 949 n.1 (2010).

[8] Pet. at 3-4. We note that the Union does not dispute, in either its petition or its response, the Agency's arguments that the proposal affects the Agency's right to direct employees and assign work. Under 5 C.F.R. § 2424.32(c)(2), where, as here, a union does not respond to an agency's claim that a proposal affects the exercise of a management right, the Authority will find that the union concedes that the proposal affects the claimed management right. *See AFGE, Local 2058*, 68 FLRA 676, 682-83 (2015); *AFGE, Local 1938*, 66 FLRA 1038, 1040 (2012).

[9] *E.g.*, *AFGE, Local 3937*, 66 FLRA 393, 400 (2011) (*Local 3937*) (citing *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*)).

[10] *Id.* at 400 (citing *KANG*, 21 FLRA at 31-33).

[11] *Id.* (quoting *KANG*, 21 FLRA at 31-32). Chairman Kiko and Member Abbott note that, while the *KANG* approach is *one way* to demonstrate whether a union's proposal is or is not an appropriate arrangement, it is not necessarily the *only way*. Here, as discussed throughout the decision, the *KANG* approach demonstrates that the Union's proposal is not an appropriate arrangement. Therefore, it is unnecessary to address this issue today.

[12] *See, e.g.*, *AFGE, Local 1164*, 66 FLRA 112, 117 (2011) (*Local 1164*) (even assuming that the proposal constituted an arrangement, it was not an appropriate arrangement because it excessively interfered with the exercise of a management right (citing *AFGE, Local 1164*, 65 FLRA 836, 841 (2011))).

[13] Record at 2.

[14] Response Br. at 3.

[15] Pet. at 4-5.

[16] *Id.*

[17] *See, e.g.*, *AFGE, Local 3529*, 56 FLRA 1049, 1052 (2001) (proposal with "blanket prohibition" on management's ability to assign work places "significant burdens on management.")

Because we find that the proposal is not an appropriate arrangement under § 7106(b)(3), it impermissibly affects management's rights to direct employees and assign work, and is therefore outside the Agency's duty to bargain.[18]

D. The Union's remaining arguments have no merit.

The Union argues that the proposal is a negotiable procedure under § 7106(b)(2) of the Statute. However, the Union does not explain how the proposal meets the requirements of that section. Accordingly, we reject this argument as a bare assertion.[19]

The Union also states that it seeks to "sever" its proposal.[20] The Authority's Regulations require a union to support a request for severance "with an explanation of how each severed portion of the proposal . . . may stand alone, and how such severed portion would operate."[21] Where a union fails to do so, the Authority denies the severance request.[22]

Here, the Union fails to explain how the proposal could be divided into parts, or how any severed parts of the proposal would operate. Therefore, the severance request fails to comply with the Authority's regulatory requirements, and we deny the request.[23]

Because the proposal excessively interferes with a management right, it is not necessary to address the Agency's remaining arguments.[24]

IV. Order

We dismiss the Union's petition.[25]

---

[18] *See NTEU*, 70 FLRA 701, 703 (2018); *AFGE, Local 1164*, 67 FLRA 316, 317 (2014) (Member Pizzella concurring); *Local 1164*, 66 FLRA at 116-17.

[19] *See NFFE, IAMAW, Fed. Dist. 1, Local 1998*, 69 FLRA 626, 628 (2016); 5 C.F.R. § 2424.32(c).

[20] Response Form at 1.

[21] 5 C.F.R. §§ 2424.22(c), 2424.25(d).

[22] *See NATCA*, 66 FLRA 213, 214 (2011).

[23] *Id.*

[24] Statement Br. at 2-3.

[25] The Union also asserts that the Agency cannot now argue that the proposal is nonnegotiable because it previously agreed to an identical proposal with a different union. Response Br. at 1-2; Response Br., Attachment A. However, an agency's determination to agree to a proposal does not establish precedent that resolves negotiability issues regarding future proposals, even if those future proposals are identical. Such precedent is the result of the Authority's resolution of negotiability issues in cases appealed under § 7117(c) of the Statute. The Union does not cite any such precedent in this case.