66 FLRA No. 187

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1938
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
ARMY CORPS OF ENGINEERS
HUNTINGTON, WEST VIRGINIA
(Agency)

0-NG-3114

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

September 26, 2012

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester, Member

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 (the Statute). The appeal concerns the negotiability of one proposal dealing with local-travel area issues such as mileage reimbursement and overtime pay for travel to a temporary work location.

The Agency filed a statement of position (SOP), to which the Union filed a response. The Agency did not file a reply to the response.

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

II. Background

The Agency is responsible for maintaining various water-control projects in Kentucky, Ohio, and West Virginia. SOP at 1. The Agency refers to the geographic area for which it is responsible as "the Huntington District." *See id.* The Agency uses a traveling party of "Repair Fleet" employees for this purpose. *Id.* at 1-2. The Repair Fleet's responsibilities include maintaining nine locks and dams and thirty-six flood-control projects. *Id.* at 1. Approximately ninety percent of a Repair Fleet employee's duty time is spent on temporary duty at worksites in the Huntington District other than the employee's permanent duty station. *See id.* at 2.

In March 2008, the Agency issued "Commander's Policy Memorandum #14" (Memorandum #14). Petition, Attach. 4, Memorandum #14. Memorandum #14 changed Agency policy on local-travel area issues. Among other things, Memorandum #14 identified permanent duty stations within the Huntington District and set forth the Agency's determinations on the local-travel areas surrounding those permanent duty stations. These determinations provide the basis for computing, among other things, allowable transportation expenses for employees working at temporary work locations within the local travel area limits of their permanent duty stations. In response, the Union submitted the proposal at issue here.

III. Preliminary Issue

In its petition, the Union indicated that in addition to submitting a proposal for negotiations, it also responded to Memorandum #14's policy changes by filing a grievance. Petition at 3. Subsequently – relying on § 2424.30(a) of the Authority's Regulations (set forth in the text, below) – the Authority issued an Order to Show Cause (Order) directing the Union to show cause why its petition should not be dismissed, without prejudice. Order at 3. The Order required the Union to explain how the grievance is not "directly related" to the negotiability appeal. *Id.* (citing 5 C.F.R. § 2424.30(a)). In response, the Union argued that the grievance is only indirectly related to the negotiability appeal because the grievance concerned only one duty station affected by the Agency's policy change, whereas the negotiability appeal concerns all duty stations. In a later Order, the Authority deferred ruling on whether the grievance is "directly related" to the negotiability appeal under § 2424.30(a).

The Authority has explained the origin and purpose of § 2424.30(a):

> Section 2424.30(a) of the Authority's Regulations provides that the Authority will dismiss a negotiability appeal without prejudice where the union has filed "a grievance alleging [an unfair labor practice (ULP)] under the parties' negotiated grievance procedure, and the . . . grievance concerns issues directly related" to a negotiability appeal. This regulation was adopted in 1999 as part of a "unified process" for negotiability petitions that raised both negotiability and bargaining obligation disputes.

> 63 Fed. Reg. 66410 (December 2, 1998). Under this process, where a ULP has been alleged, either through statutory ULP procedures or through a negotiated grievance procedure, those procedures are considered to be "better suited to resolving the entire dispute" than is the negotiability procedure. *Id*. The regulations thus provide that the Authority will dismiss the negotiability appeal, that the parties will utilize the ULP or grievance procedure, and that the Union may refile the negotiability petition if the issues remain unresolved after the conclusion of the ULP or grievance procedure.

NTEU, 62 FLRA 267, 268 (2007) (Chairman Cabaniss dissenting in part as to another matter), *pet. for review granted in part and denied in part as to other matters*, 550 F.3d 1148 (D.C. Cir. 2008).

An examination of the Union's grievance and Authority precedent discussing it makes clear that the filing of the grievance does not require dismissal of the Union's negotiability appeal under § 2424.30(a). After an arbitrator denied the Union's grievance, the Union brought the award before the Authority on exceptions. *AFGE, Local 1938*, 66 FLRA 741 (2012). As the Authority found, the grievance alleged that the Agency improperly denied the grievants mileage reimbursement and overtime compensation for travel between their homes and a temporary work location in violation of law, various regulations, and the parties' agreement. *Id.* at 741.

Plainly, the grievance did not seek to accomplish what § 2424.30(a) precludes – litigation of identical bargaining obligation claims simultaneously in a negotiability appeal and a grievance. *See NTEU*, 62 FLRA at 268-69. For one thing, the grievance did not allege a ULP. And rather than raise a bargaining obligation claim, the grievance was limited to allegations that the Agency denied the grievants substantive benefits to which they were entitled under various existing authorities. We therefore find that the Union's grievance is not directly related to its negotiability appeal, and address the negotiability of the proposal.

IV. The Proposal

The proposal is divided into seven sections. However, the Agency, in its SOP, withdrew its allegation of non-negotiability as to sections 1, 2, 5, and 6 of the proposal. SOP at 2. Thus, only sections 3, 4, and 7 remain in dispute. Those sections are set forth in the appendix to this decision.

We also note that the Union did not request that any part of the proposal be severed. Petition at 8-9; Record of Post-Petition Conference (Record) at 4. Because the Union did not request that the parts of the proposal be severed, if one part of the proposal is outside the duty to bargain, then the entire proposal is outside the duty to bargain. *Nat'l Weather Serv. Employees Org., Branch 9-10*, 61 FLRA 779, 782 (2006) (*Weather Serv*.) (if any portion of a proposal is outside the duty to bargain, then the entire proposal is outside the duty to bargain); *AFGE, Local 1698, Local 1156*, 61 FLRA 615, 616 (2006) (same); *Nat'l Air Traffic Controllers Ass'n*, 61 FLRA 341, 347 (2005) (same).

For purposes of this decision, we focus on section 3.

A. Wording

In relevant part, section 3 of the proposal states as follows:

> 3. Employees who are authorized to use their privately owned vehicles for travel to and from their place of abode and a temporary duty assignment within the local area limits of their [permanent duty station (PDS)] on any day of work will be reimbursed for mileage . . . in accordance with the [Department of Defense Civilian Personnel Joint Travel Regulations]. . . . For employees that do not have a normal commute, . . . mileage will be reimbursed from the employee's residence to the temporary work site, and return. An employee will be considered to not have a normal commute if they do not report to their PDS over 50% of the workdays in a year. Examples would be employees doing telework or employees that report to alternate duty stations more than half the year (such as the Repair Fleet employees).

Petition at 5.

B. Meaning

The parties agree that under section 3 of the proposal, when employees travel from their homes to a temporary duty station, employees will be reimbursed for mileage in excess of the mileage traveled during their "normal commute" from their homes to their PDS. Record at 2-3. The parties also agree that certain employees, including Repair Fleet employees, who under section 3 are considered not to have a PDS for

commuting purposes – that is, who are considered not to have a "normal commute" – are also eligible for mileage reimbursement – and that such reimbursement would be made without taking into account any "normal commute" for those employees. *Id*

C. Positions of the Parties

1. Union

The Union argues that section 3, like the rest of the proposal, is intended to work as a policy for travel to counter Memorandum #14, with which the Union disagrees. Petition at 8. The Union contends that workers who do not report to a duty station to get work assignments should not have to deduct mileage from their homes to a duty station for mileage reimbursement purposes, when ordered to go to an alternate duty station to work. Response at 3-4.

2. Agency

The Agency contends that section 3 violates management's right to determine its organization under § 7106(a)(1) of the Statute. SOP at 3-4 (citing *AFGE, AFL-CIO, Local 3805*, 5 FLRA 693 (1981)). The Agency asserts that by mandating that certain employees will not be considered to have a "normal commute," section 3 precludes the Agency from determining the location of those employees' official duty stations for travel purposes. *Id.* at 3.

D. Analysis and Conclusions

Section 2424.32(c)(2) of the Authority's Regulations provides that a party's "[f]ailure to respond to an argument or assertion raised by the other party will . . . be deemed a concession to such argument or assertion." 5 C.F.R. § 2424.32(c)(2). Consistent with this regulation, when a union does not dispute an agency's claim that a proposal affects the exercise of management's rights, and does not argue that the proposal constitutes an exception to management's rights, the Authority will find that the proposal is outside the duty to bargain. *E.g., AFGE, Local 1164*, 65 FLRA 924, 926 (2011); *AFGE, Local 4052*, 65 FLRA 720, 722 (2011).

Here, the Union does not argue in its petition or response either that section 3 of the proposal does not affect a management right or that the section is within the duty to bargain as an exception to management's rights. Accordingly, consistent with § 2424.32 and the above-cited precedent, we find that the Union concedes that section 3 of the proposal is contrary to management's right to determine its organization under § 7106(a)(1) of the Statute, and that section 3 is outside the duty to bargain. *See AFGE, Local 1164*, 65 FLRA at 926; *AFGE, Local 4052*, 65 FLRA at 722.

As noted, the Union did not request that any part of the proposal be severed. Consequently, if one section of the proposal is outside the duty to bargain, the entire proposal is outside the duty to bargain. *E.g., Weather Serv.*, 61 FLRA at 782. Accordingly, we also find that the proposal is outside the duty to bargain.[*]

V. Order

The petition for review is dismissed.

[*] In view of this result, it is unnecessary to address the Agency's other arguments.

APPENDIX

The wording of sections 3, 4, and 7 of the Union's proposal is as follows:

> 3. Employees who are authorized to use their privately owned vehicles for travel to and from their place of abode and a temporary duty assignment within the local area limits of their PDS on any day of work will be reimbursed for mileage for the mileage in accordance with the JTR. C2401C2 of the JTR allows mileage (using the most direct route) to be paid from the place of abode to the alternate work site within the local area limits that is in excess of the mileage from their place of abode to their PDS. Example: Assuming the travel is authorized by the approving official and the distance from the place of abode to the PDS is 25 miles and the distance from place of abode to alternate site within the local area limits is 26 miles, the employee would be entitled to reimbursement for 1 mile[] each way (2 miles round trip). Alternatively, if the round trip to alternate site within the local area limits is closer than the roundtrip to PDS, no mileage reimbursement is allowed. For employees that do not have a normal commute, and the travel begins or ends outside of the official duty hours or on a non-schedule[d] workday, mileage will be reimbursed from the employee's residence to the temporary work site, and return. An employee will be considered to not have a normal commute if they do not report to their PDS over 50% of the workdays in a year. Examples would be employees doing telework or employees that report to alternate duty stations more than half the year (such as the Repair Fleet employees).
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> 4. All travel time between the place of abode and the PDS is considered normal home to work travel time and is not considered hours of work under the Fair Labor Standard[s] Act (FLSA) or Title 5 of the CFR (for employees exempt from FLSA). Travel time outside normal duty hours to and from a TDY location within the limits of duty station which are in excess of the time needed to commute to PDS will be considered hours of work per the FLSA. The Fair Labor Standard[s] Act (FLSA) or Title 5 of the CFR will be followed.
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> 7. In Commander's Policy Memorandum #10 is a list of all permanent duty stations within the Huntington District and the geographic area[s] that are considered local area outside the local area limits of the PDS. The PDS Travel within these locations may be limited to pay only mileage, Per Diem and time, in accordance with the JTR and FLSA. A travel-approving official may authorize these expenses when the travel is determined to be advantageous to the Government and the expenses are [necessary] in order to conduct the official business. The travel-approving official may authorize hotel if determined to be advantageous to the Government and the expenses are [necessary] in order to conduct the official business.

Petition at 5-7.