

67 FLRA No. 7

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C.
(Agency)

0-NG-3158

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

October 31, 2012

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 petition for review (petition) involves one proposal that would bring some disputes concerning the separation of probationary employees (separation disputes) within the scope of the parties’ negotiated grievance procedures (grievance procedures). The Agency filed a statement of position (statement), to which the Union filed a response (response), and the Agency filed a reply to the response (reply).

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

II. Background

The parties’ existing collective-bargaining agreement excludes disputes concerning “the separation of a probationary employee” from the scope of the grievance procedures. Petition at 2 (quoting Collective-Bargaining Agreement, Art. 41, § 1.D.8.). The Union proposed to amend the agreement to permit grievances concerning certain separation disputes, and the Agency alleged that the proposal was nonnegotiable. *See id.*; Statement at 1-2.

III. Proposal

A. Wording

The grievance procedures . . . shall not apply to the following: . . . [(8)] the separation of a probationary employee unless the grievance is confined to enforcing the procedures or rights contained in a statute, and any subsequent arbitration decision is controlled solely by the requirements of law and government-wide regulation such that the arbitrator is merely substituting for the federal authority that would hear the employee’s challenge.

Petition at 1-2 (second omission in original); Record of Post-Petition Conference (Record) at 1 (changing subsection number from “(11)” to “(8)”).

B. Meaning

The parties agree that the proposal would permit the Union to grieve and arbitrate a separation dispute if the grievance were “limited to enforcing statutory rights.” Record at 1-2. The parties also agree that, as used in the proposal: “(1) ‘separation’ includes a termination; (2) ‘a statute’ refers to any statute, including the [Statute]; and (3) ‘any subsequent arbitration decision’ refers to an arbitration decision resolving a grievance filed pursuant to the proposal.” *Id.* at 2.

C. Positions of the Parties

1. Agency

The Agency contends that the proposal is outside the duty to bargain under § 7117(a)(1) of the Statute because it is contrary to law and regulation.¹ Statement at 1, 10; Reply at 3. According to the Agency, separation disputes are excluded as a matter of law from grievance procedures. Statement at 3-5 (citations omitted); Reply at 4. In addition, the Agency contends that both the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) and the Authority have “consistently ruled over the past [thirty] years,” Statement at 3, that even if a probationary employee has the right to challenge his or her separation in a particular administrative or judicial forum, the

¹ Section 7117(a)(1) states that, subject to § 7117(a)(2), “the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.” 5 U.S.C. § 7117(a)(1).

employee may not pursue that challenge through grievance procedures and arbitration, *id.* at 7 (citing *NTEU v. FLRA*, 848 F.2d 1273 (D.C. Cir. 1988) (*NTEU II*), *denying pet. for review of NTEU*, 25 FLRA 1067 (1987) (*NTEU I*); *NTEU, Chapter 103*, 66 FLRA 416 (2011) (*NTEU IV*); *U.S. DOL, Bureau of Labor Statistics*, 66 FLRA 282 (2011) (*DOL*)). Further, the Agency argues that the proposal is inconsistent with 5 C.F.R. part 315, subpart H, which contains the Office of Personnel Management's (OPM's) regulations on probationary employment.² Statement at 4-6; Reply at 4.

2. Union

The Union argues that two early Authority decisions – *National Council of Field Labor Locals of the AFGE, AFL-CIO*, 4 FLRA 376 (1980), and *AFGE, AFL-CIO, National INS Council*, 8 FLRA 347 (1982) (*National Council*) – correctly held that the Statute permits negotiating over proposals that would allow probationary employees to grieve and arbitrate separation disputes. Response at 3-4 & n.1 (citing 5 U.S.C. §§ 7103(a)(2), 7103(a)(9), 7103(a)(14), 7121(c)). The Union acknowledges that the D.C. Circuit's decision in *U.S. DOJ, INS v. FLRA*, 709 F.2d 724 (D.C. Cir. 1983) (*INS*), reversed *National Council*, and that subsequent Authority decisions have adopted *INS*'s reasoning. Response at 5, 17. But according to the Union, that reasoning is wrong, and the Authority should reconsider it, for four reasons. *Id.* at 17-18.

First, the Union argues that the D.C. Circuit and the Authority have erroneously reasoned that management has a right to “summarily terminate” probationary employees. *Id.* at 12-14. Second, the Union argues that the D.C. Circuit and the Authority have wrongly held that probationary employees may not grieve or arbitrate claims that they already have the right to pursue in an administrative or judicial forum. *See id.* at 2 (citing *NTEU II*, 848 F.2d 1273; *NTEU I*, 25 FLRA 1067), 5. Third, the Union contends that public policy generally favors arbitration in all manner of disputes, *id.* at 16-17, and that the Supreme Court has implicitly rejected the reasoning of the D.C. Circuit and the Authority that arbitrating separation disputes would interfere with OPM's role in regulating probationary employment, *id.* at 8-9 (citing *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 266 (2009); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). Fourth, the Union argues that the D.C. Circuit and the Authority have erred in holding that proposals permitting separation-dispute grievances conflict with the President's probationary-employment authority under

5 U.S.C. § 3321,³ *id.* at 6, and with probationary employees' limited Merit Systems Protection Board (MSPB) appeal rights under 5 C.F.R. § 315.806,⁴ *id.* at 6-7. In this regard, the Union argues that the Authority has found that proposals affording benefits to employees that exceed those required by law are negotiable. *Id.* at 7 & n.4 (citing *Int'l Org. of Masters, Mates, & Pilots, Marine Div., Panama Canal Pilots Branch*, 51 FLRA 333, 346 (1995)).

But even if the Authority does not reconsider its post-*INS* precedent, the Union contends that the Authority has not previously considered a proposal similar to the one at issue here and, thus, has not had the opportunity to address the following four arguments in favor of the proposal's negotiability. First, the Union contends that, although the proposal would provide terminated probationary employees with “another procedural route” for protecting rights that they already possess under law and regulation, *id.* at 20, it would not add to those rights any “procedural or substantive hurdles for the employer to clear before” terminating a probationary employee, *id.* at 8. *See also id.* at 1. Second, the Union asserts that arbitrators deciding grievances under the proposal would serve the same functions and apply the same standards as the various federal administrative and judicial decision-makers who currently entertain disputes involving the separation of probationary employees. *Id.* at 1-2, 15. Third, the Union asserts that the proposal merely “reflect[s] . . . law and regulation . . . giv[ing] agencies the . . . right to establish internal review processes” because the proposal “does nothing more than provide [probationary employees with] an alternative venue *internal* to the [A]gency” to vindicate their rights. *Id.* at 8 (citing 5 C.F.R. part 771); *see also id.* at 6-7 (citing 5 C.F.R. part 771).⁵ Fourth, the Union contends that finding the proposal nonnegotiable would be inconsistent with Authority precedent holding that collective-bargaining agreements may cover probationary employees. *Id.* at 18-19 (citing *USDA, Food & Nutrition Serv., Alexandria, Va.*, 61 FLRA 16, 25 (2005) (then-Member Pope dissenting from determination that probationary employee's “pursuit of her contract rights . . . did not motivate [her]

² The pertinent text of 5 C.F.R. part 315, subpart H is set forth in the appendix to this decision.

³ Title 5, § 3321 of the U.S. Code states, in pertinent part:

(a) The President may take such action, including the issuance of rules, regulations, and directives, as shall provide as nearly as conditions of good administration warrant for a period of probation—

(1) before an appointment in the competitive service becomes final; and
(2) before initial appointment as a supervisor or manager becomes final.

5 U.S.C. § 3321(a).

⁴ The text of 5 C.F.R. § 315.806 is set forth in the appendix to this decision.

⁵ See *infra* note 8 for the text of 5 C.F.R. part 771.

termination”); *U.S. Dep’t of the Air Force, Nellis Air Force Base, Las Vegas, Nev.*, 46 FLRA 1323 (1993)).

Finally, the Union argues that the proposal does not affect management’s right to hire under § 7106(a)(2)(A) of the Statute. *Id.* at 14. And the Union claims that even if the proposal did affect that right, it would nevertheless be negotiable under: § 7106(a)(2) as enforcing an applicable law, § 7106(b)(2) as a procedure, and § 7106(b)(3) as an appropriate arrangement. *Id.* at 19-22.

D. Analysis and Conclusions

For nearly three decades, the Authority has consistently held that proposals are inconsistent with 5 U.S.C. § 3321⁶ and 5 C.F.R. part 315, subpart H to the extent that they grant probationary employees: (1) separation-related procedural protections beyond those required by statute or OPM regulations; or (2) the ability to grieve separation disputes. *See, e.g., NFFE, Local 29*, 20 FLRA 788, 790-91 (1985), *abrogated on other grounds by Fed. Emps. Metal Trade Council*, 38 FLRA 1410, 1428-30 & n.2 (1991), *as recognized in AFGE, AFL-CIO, Council of Marine Corps Locals, Council 240*, 39 FLRA 839, 846-47 (1991). *Cf. DOL*, 66 FLRA at 284 (setting aside arbitration award finding probationary employee’s separation-dispute grievance substantively arbitrable). Since deciding *NFFE, Local 29*, the Authority has reaffirmed these holdings in every case presenting similar questions. *See NTEU*, 46 FLRA 696, 763-65 (1992); *NTEU*, 45 FLRA 696, 715-18 (1992); *NTEU*, 40 FLRA 849, 860-64 (1991); *NTEU*, 39 FLRA 848, 850-53 (1991); *NTEU*, 38 FLRA 1366, 1370-72 (1991); *AFGE, Council of Marine Corps Locals (C-240)*, 35 FLRA 1023, 1026-27 (1990); *Bremerton Metal Trades Council*, 32 FLRA 643, 661 (1988) (*Bremerton*); *AFGE, AFL-CIO, Local 1625*, 30 FLRA 1105, 1127-28 (1988); *NTEU*, 30 FLRA 502, 502-04 (1987) (*NTEU III*); *NTEU I*, 25 FLRA at 1076-77. Moreover, the Authority’s holdings accord with the decisions of the D.C. Circuit, which is the only United States Court of Appeals to directly address these issues. *See NTEU II*, 848 F.2d 1273; *INS*, 709 F.2d 724.

More specifically, the Authority and the D.C. Circuit have stated that OPM has the authority to provide whatever procedural protections are necessary for probationary employees, *e.g., NTEU III*, 30 FLRA at 503, and that “Congress[] inten[ded] that collective bargaining *not* supplement probation[ary employees’] existing procedural protections,” *NTEU IV*, 66 FLRA at 418 (quoting *NTEU II*, 848 F.2d at 1276). In addition, both the D.C. Circuit and the Authority have recognized that probationary employees are precluded from grieving and arbitrating termination-related claims, even though

probationary employees have rights to pursue those same claims in an administrative or judicial forum. *E.g., NTEU II*, 848 F.2d at 1275-76; *NTEU IV*, 66 FLRA at 418; *NTEU I*, 25 FLRA at 1078; *accord DOL*, 66 FLRA at 284. In this regard, although Congress extended certain legal protections to both probationary and non-probationary employees, “Congress determined . . . that a single additional forum available to other federal employees [to vindicate their rights] – a negotiated grievance procedure – would remain unavailable to probation[ary employees].” *NTEU II*, 848 F.2d at 1277 (citing *INS*, 709 F.2d at 729).

The Union argues that the Authority should reject existing precedent on this matter. The Union asserts that the D.C. Circuit and the Authority have “ignored” the “clear and unambiguous meaning” of the Statute – in particular, §§ 7103(a)(2), 7103(a)(9), 7103(a)(14), and 7121(c) – to render proposals involving separation disputes nonnegotiable. Response at 5; *see id.* at 3-5. But under § 7117(a)(1), proposals are nonnegotiable if they are inconsistent with government-wide rules or regulations, including regulations that implement laws other than the Statute – such as 5 C.F.R. § 315.806, which, as mentioned earlier, grants probationary employees only limited MSPB appeal rights. Applying § 7117(a)(1) to the proposal does not ignore the Statute.

The Union also argues that decisions of the D.C. Circuit and the Authority reflect a mistaken belief that management has a right to “summarily terminate” probationary employees. Response at 12-14. To the extent that the Union is arguing that the Authority has decided previous cases based on a finding that probationary employees have no appeal or due process rights, that is incorrect. The Authority’s decisions reflect that probationary employees receive only “minimal due process” in connection with their separation, *e.g., Bremerton*, 32 FLRA at 661, and that only OPM may expand such protections, *NTEU IV*, 66 FLRA at 418; *NTEU III*, 30 FLRA at 503. In addition, the Union’s assertion that probationary employees should be able to pursue claims through grievance and arbitration if they have the ability to pursue those claims in an administrative or judicial forum runs counter to “Congress[’s] determin[ation] . . . that a single additional forum available to other federal employees – a negotiated grievance procedure – would remain unavailable to probation[ary employees].” *NTEU II*, 848 F.2d at 1277.

Further, the Union’s invocation of the general public policy favoring arbitration, Response at 16-17, and its reliance on the specific holdings in *14 Penn Plaza, LLC* and *Gilmer*, *id.* at 8-9, are unavailing. As to the former, while public policy favors arbitration, that general policy does not require the arbitration of disputes that “would be inconsistent with the . . . framework and

⁶ See *supra* note 3 for the text of 5 U.S.C. § 3321.

purposes” of applicable law. *Gilmer*, 500 U.S. at 27. As to the latter, *14 Penn Plaza, LLC* held that federal law required enforcement of a collective-bargaining-agreement provision that subjected all union members’ age-discrimination claims to arbitration, 556 U.S. at 274, and *Gilmer* held that allowing the arbitration of age-discrimination claims would not undermine the role of the Equal Employment Opportunity Commission, 500 U.S. at 28-29. But because the Supreme Court decided both cases under the Federal Arbitration Act, 9 U.S.C. §§ 1-14 – not the Statute – and neither case involved a situation in which permitting arbitration would be inconsistent with a statute or governing regulation, there is no basis for finding that either decision undercuts existing precedent.

The Union also claims that parties may negotiate additional venues for probationary employees’ appeals beyond those in 5 C.F.R. § 315.806 because the Authority has found proposals granting benefits above statutory minimums to be negotiable. Response at 7 & n.4. But proposals that grant benefits above statutory minimums are still nonnegotiable if they conflict with law or governing regulations. 5 U.S.C. § 7117(a)(1); *e.g.*, *AFGE, Local 1547*, 65 FLRA 911, 916-17 (2011) (although it provided employees greater “bump and retreat” rights, proposal that was inconsistent with reduction-in-force regulations was nonnegotiable). And an expansion of probationary employees’ appeals rights beyond 5 C.F.R. § 315.806 would be contrary to “Congress’s intention that collective bargaining *not* supplement probation[ary employees’] existing procedural protections,” *NTEU IV*, 66 FLRA at 418 (quoting *NTEU II*, 848 F.2d at 1276). Consequently, the proposal’s broadening of probationary employees’ appeals rights and associated procedural protections is inconsistent with 5 C.F.R. § 315.806.⁷ See *NTEU I*, 25 FLRA at 1077-78.

For the foregoing reasons, we reject the Union’s request to depart from long-standing Authority and D.C. Circuit precedent.

The Union contends that the Authority has not previously considered a proposal similar to the one at issue here and, thus, has not had the opportunity to address certain arguments that support the proposal’s negotiability. But the Union’s additional arguments do not provide a basis for finding the proposal to be within the duty to bargain. First, the Union argues that the proposal does not add any “procedural or substantive hurdles for the employer to clear before” separating a probationary employee, Response at 8; but neither did the

⁷ We need not address the Union’s argument concerning the President’s probationary-employment authority under 5 U.S.C. § 3321 because the proposal’s inconsistency with 5 C.F.R. § 315.806 fully establishes that the proposal is outside the duty to bargain, regardless of whether it conflicts with § 3321.

proposal found nonnegotiable in *Bremerton*, see 32 FLRA at 661-62. Second, the Union argues that an arbitrator deciding a grievance under the proposal would serve the same function as a federal administrative or judicial decision-maker; but that is still inconsistent with “Congress[’s] determin[ation] . . . that . . . a negotiated grievance procedure . . . would remain unavailable to probation[ary employees].” *NTEU II*, 848 F.2d at 1277. Third, the Union claims that the proposal is negotiable because it “reflect[s]” 5 C.F.R. part 771, Response at 8; but the only regulation within that part is 5 C.F.R. § 771.101, and the Union does not explain its relevance to the proposal.⁸ Fourth, the Union claims that finding the proposal nonnegotiable would be inconsistent with the Authority’s holding that collective-bargaining agreements may cover probationary employees. *Id.* at 18-19. However, while permitting agreements to cover probationary employees for some purposes is not inconsistent with law or regulation, as discussed at length above, allowing probationary employees to grieve and arbitrate separation disputes is inconsistent with 5 C.F.R. part 315, subpart H – including 5 C.F.R. § 315.806.⁹

For all the foregoing reasons, and consistent with every Authority and D.C. Circuit decision addressing these issues since *INS* in 1983, we find that the proposal is outside the duty to bargain.

IV. Order

We dismiss the petition for review.

⁸ Title 5, § 771.101 of the C.F.R. states that “[e]ach administrative grievance system in operation as of October 11, 1995, that has been established under former regulations under this part must remain in effect until the system is either modified by the agency or replaced with another dispute resolution process.”

⁹ We note the Union’s contention that the proposal does not interfere with management’s right to hire under § 7106(a)(2)(A) of the Statute, Response at 14, and that even if it did affect that right, it would nevertheless be negotiable under § 7106(a)(2), (b)(2), and (b)(3), *id.* at 19-22. We find it unnecessary to address the Union’s contention because the Agency does not allege an effect on its management rights. See *id.* at 19 (Union’s acknowledgment that Agency does not allege such an effect). We note further that, even if the Agency had alleged such an effect, a proposal that is contrary to law or government-wide regulation remains nonnegotiable regardless of whether it is a procedure or an appropriate arrangement. See *NTEU*, 55 FLRA 1174, 1181 (1999).

APPENDIX

Title 5, part 315, subpart H of the Code of Federal Regulations states, in pertinent part:

§ 315.803 Agency action during probationary period (general).

(a) The agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment.

(b) Termination of an individual serving a probationary period must be taken in accordance with subpart D of part 752 of this chapter if the individual has completed one year of current continuous service under other than a temporary appointment limited to 1 year or less and is not otherwise excluded by the provisions of that subpart.

§ 315.804 Termination of probationers for unsatisfactory performance or conduct.

(a) Subject to § 315.803(b), when an agency decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action. The information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct.

(b) Probation ends when the employee completes his or her scheduled tour of duty on the day before the anniversary date of the employee's appointment. For example, when the last workday is a Friday and the anniversary date is the following Monday, the

probationer must be separated before the end of the tour of duty on Friday since Friday would be the last day the employee actually has to demonstrate fitness for further employment.

§ 315.805 Termination of probationers for conditions arising before appointment.

Subject to § 315.803(b), when an agency proposes to terminate an employee serving a probationary or trial period for reasons based in whole or in part on conditions arising before his appointment, the employee is entitled to the following:

(a) Notice of proposed adverse action. The employee is entitled to an advance written notice stating the reasons, specifically and in detail, for the proposed action.

(b) Employee's answer. The employee is entitled to a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. If the employee answers, the agency shall consider the answer in reaching its decision.

(c) Notice of adverse decision. The employee is entitled to be notified of the agency's decision at the earliest practicable date. The agency shall deliver the decision to the employee at or before the time the action will be made effective. The notice shall be in writing, inform the employee of the reasons for the action, inform the employee of his right of appeal to the Merit Systems Protection Board (MSPB), and inform him of the time limit within which the appeal must be submitted as provided in § 315.806(d).

§ 315.806 Appeal rights to the Merit Systems Protection Board.

(a) Right of appeal. An employee may appeal to the Merit Systems Protection Board in writing an

agency's decision to terminate him under § 315.804 or § 315.805 only as provided in paragraphs (b) and (c) of this section. The Merit Systems Protection Board review is confined to the issues stated in paragraphs (b) and (c) of this section.

(b) On discrimination. An employee may appeal under this paragraph a termination not required by statute which he or she alleges was based on partisan political reasons or marital status.

(c) On improper procedure. A probationer whose termination is subject to § 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

(d) An employee may appeal to the Board under this section a termination which the employee alleges was based on discrimination because of race, color, religion, sex, or national origin; or age (provided that at the time of the alleged discriminatory action the employee was at least 40 years of age); or handicapping condition if the individual meets the definition of "handicapped person" as set forth in regulations of the Equal Employment Opportunity Commission at 29 CFR [§] 1613.702(a). An appeal alleging a discriminatory termination may be filed under this subsection only if such discrimination is raised in addition to one of the issues stated in paragraph (b) or (c) of this section.