

72 FLRA No. 149

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

0-NG-3586

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

April 28, 2022

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

I. Statement of the Case

The Union filed a petition seeking review of one proposal concerning noncompetitive temporary promotions and details that exceed 120 days. Because the proposal is contrary to government-wide regulation, we find that the proposal is outside the duty to bargain. Accordingly, we dismiss the Union's petition.

II. Background

During negotiations over a successor collective-bargaining agreement, the parties disputed the negotiability of one proposal. The Union requested a written allegation of non-negotiability, which the Agency provided. On October 11, 2021, the Union timely filed its petition. The Agency filed a statement of position (statement), and the Union filed a response to the statement (response). An Authority representative conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority's Regulations.¹ After the PPC, the Agency filed a reply to the Union's response.

III. The Proposal

A. Wording

Article 16, Section 2.A

1. An employee who is detailed to a position of a higher grade for one (1) full pay period or more will be temporarily promoted, if eligible, and receive the rate of pay for the position to which temporarily promoted[.]

2. If an employee is not detailed to a position of a higher grade, but performs higher graded duties for twenty-five percent (25%) or more of his or her direct time, the Employer will temporarily promote the employee retroactive to the first full pay period if the employee meets the criteria below:

(a) the employee performed such higher graded duties at least at a level of skill and responsibility properly expected,

(b) the employee meets minimum OPM qualifications for the promotion to the next higher grade; and

(c) the employee meets time-in-grade requirements for promotion to the next higher grade.

Article 16, Section 2.B.

The length of time the employee is entitled to a retroactive temporary promotion will be determined as follows:

1. determine the length of time on a pay period by pay period basis the employee was detailed to the position or assigned the higher-graded duties of the position;

2 determine the percentage of direct time spent performing higher-graded duties during the period in question;

3. If the direct time spent performing higher graded duties during the period equals or exceeds 25% of total direct time for one pay period or more, the employee will receive a

¹ 5 C.F.R. § 2424.23.

temporary promotion for each such pay period.²

B. Meaning

The parties agree that the purpose of the proposal is to “eliminate” the 120-day “cap” on remedial backpay for employees who perform the work of a higher-graded position for more than 120 days “without being competitively selected.”³

C. Analysis and Conclusion: The proposal is contrary to law.

The Agency argues that the proposal is contrary to 5 C.F.R. § 335.103(c), the Office of Personnel Management (OPM) guidance interpreting that regulation, and Authority precedent.⁴ The Authority will find that a proposal is outside the duty to bargain when it is contrary to law.⁵

Section 335.103(c) states, in relevant part, that “competitive procedures . . . apply to all promotions . . . for more than 120 days to higher graded positions . . . [and d]etails for more than 120 days to a higher grade position or to a position with higher promotion potential.”⁶ OPM has interpreted this regulation to impose a “regulatory cap of 120 days” on retroactive pay for noncompetitive temporary promotions and details.⁷ The Union acknowledges that its proposal is contrary to OPM’s interpretation, and Authority precedent deferring to that interpretation, but it requests that the Authority reexamine its deference to OPM’s interpretation.⁸

It is well established that the Authority defers to OPM’s interpretation of its own regulations, unless that interpretation is plainly erroneous or inconsistent with the regulation.⁹ Although the Union asks us to reconsider the Authority’s deference to OPM’s interpretation of 5 C.F.R. § 335.103(c), it provides no compelling reason¹⁰ for us to discard our precedent addressing this matter.¹¹ On this point, the Authority has previously rejected arguments that OPM’s interpretation is

² Pet. at 3. Because the original formatting of the proposal was not preserved in the petition, we have used the formatting of the proposal’s subsections as shown in the allegation of nonnegotiability provided with the petition. See Pet., Attach. at 1-2.

³ Pet. at 3. We note that the parties’ negotiability arguments concern only Sec. 2.B. Statement at 5-6, 5 n.2 (noting that the negotiability of Art. 16, Sec. 2.B is the language at issue and “assum[ing]” that the Union provided Sec. 2.A for “context”); Resp. at 2, 3-4 (stating that the “criteria” for a retroactive promotion set forth in Art. 16, Sec. 2A(2) is “not in dispute in this negotiability appeal”). However, the Union did not request to sever the proposal into these respective sections. Pet. at 3; PPC Record at 1. Thus, the negotiability of the entire proposal rises or falls on the basis of the parties’ arguments about Sec. 2.B and the Authority makes no findings concerning the negotiability of the wording in Sec. 2.A.

⁴ Statement at 13.

⁵ *AFGE, Council 119*, 72 FLRA 63, 65 (2021) (Member Abbott dissenting in part); *NTEU*, 71 FLRA 307, 309-10 (2019) (*NTEU*) (then-Member DuBester concurring).

⁶ 5 C.F.R. § 335.103(c)(i)-(ii).

⁷ *U.S. Dep’t of VA, Ralph H. Johnson Med. Ctr., Charleston, S.C.*, 60 FLRA 46, 47 (2004) (*VA Johnson*) (Chairman Cabaniss concurring; Member Pope concurring).

⁸ Resp. at 4, 29; see also Pet. at 3.

⁹ E.g., *U.S. Dep’t of the Navy, Commander, Navy Region Mid-Atl., Naval Weapons Station Earle*, 72 FLRA 533, 534-35 (2021) (*Navy*) (Chairman DuBester concurring on other grounds) (citing *SSA, Port St. Lucie Dist., Port St. Lucie, Fla.*, 64 FLRA 552, 554 (2010) (*SSA, Port St. Lucie*); *U.S. Dep’t of the Treasury, IRS*, 61 FLRA 667, 669-70 (2006) (*IRS*); *VA Johnson*, 60 FLRA at 49; *U.S. Dep’t of Transp., FAA*, 55 FLRA 797, 802 (1999) (stating that an “agency’s interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation” (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994))).

¹⁰ The Union recites the “history” of temporary promotions, regulations and case law predating the regulation at issue in this case, and cases in which the parties disputed whether an employee performed higher-graded duties. Resp. at 7-25.

¹¹ *Navy*, 72 FLRA at 534-35; *NTEU*, 68 FLRA 334, 338-40 (2015); *IRS*, 61 FLRA at 670; *VA Johnson*, 60 FLRA at 49.

“clearly erroneous”¹² and other requests to reconsider its deference regarding § 335.103(c).¹³ Because we decline to reconsider this precedent, we find that the proposal conflicts with § 335.103(c), and is therefore outside the duty to bargain. Accordingly, we dismiss the petition.

IV. Order

We dismiss the Union’s petition.

¹² *IRS*, 61 FLRA at 670 (rejecting union’s argument that OPM’s interpretation of § 335.103(c) is “inconsistent” with other OPM regulations).

¹³ *SSA, Port St. Lucie*, 64 FLRA at 554 (declining the union’s request that the Authority reconsider *VA Johnson*).