

64 FLRA No. 98

NATIONAL WEATHER
SERVICE EMPLOYEES ORGANIZATION
(Union)

and

UNITED STATES
DEPARTMENT OF COMMERCE
NATIONAL WEATHER SERVICE
ALASKA REGION
ANCHORAGE, ALASKA
(Agency)

0-NG-2782
(61 FLRA 241 (2005))

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

March 16, 2010

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 remand from the United States Court of Appeals for the District of Columbia Circuit (the court). *Nat'l Weather Serv. v. FLRA*, 197 Fed.Appx. 1 (D.C. Cir. July 17, 2006) (*NWS v. FLRA*), *reh'g on banc denied* (Dec. 15, 2006). In *NWS v. FLRA*, the court reversed the Authority's finding that the proposal in dispute in *National Weather Service Employees Organization*, 61 FLRA 241 (2005) (Chairman Cabaniss concurring) (*NWSEO*), was outside the duty to bargain. The court remanded the case to the Authority for proceedings consistent with its opinion.

For the following reasons, applying the court's opinion in *NWS v. FLRA* as the law of the case, we find that the proposal is within the duty to bargain.

II. Background

The background is set forth fully in *NWSEO* and is only briefly summarized here. When the Agency began using a new computerized weather forecasting system — the Interactive Forecast Preparation System (IFPS) — the Union proposed that the Agency increase staffing at

its Anchorage, Alaska facility. Specifically, the Union proposed that the Agency:

Increase staff [at the Anchorage Forecast office] by 5 forecasters, 4 HMTs [hydrological meteorological technicians] and 1 IT [information technology officer] to bring it into line with the staffing level that would accompany two grid domains in the CONUS [continental United States].

NWSEO, 61 FLRA at 241.

When the Agency refused to negotiate over the proposal, the Union filed a negotiability petition with the Authority. The Authority found that the proposal excessively interfered with management's right, under § 7106(b)(1) of the Federal Service Labor-Management Relations Statute (Statute), to determine the numbers and types of positions to be filled. Accordingly, the Authority concluded that the proposal was not an appropriate arrangement under § 7106(b)(3) of the Statute, and dismissed the Union's petition.

The Union filed a petition for review of the Authority's decision with the court. On review, the court noted its own previous holding that "the determination whether a proposal is an appropriate arrangement 'depends primarily on the extent to which the interference [with management rights] hampers the ability of an agency to perform its core functions — to get its work done in an efficient and effective way.'" *NWS v. FLRA*, 197 Fed.Appx. at 2 (quoting *AFGE, Local 1923 v. FLRA*, 819 F.2d 306, 308-09 (D.C. Cir. 1987) (*AFGE v. FLRA*)). The court found that the Authority had not considered this issue, and it remanded the case to the Authority to "consider to what extent 'implementation of the [Union's proposal] would hamper the ability of the [A]gency to perform its work in an efficient and effective manner.'" *Id.* (quoting *AFGE v. FLRA*, 819 F.2d at 310). In this connection, the court stated that "if implementation of [the] proposal will directly interfere with substantive managerial rights, *but will not significantly hamper the ability of an agency to get its job done*, the proposal . . . is negotiable . . . as an appropriate arrangement." *Id.* (quoting *AFGE v. FLRA*, 819 F.2d at 309) (emphasis in *NWS v. FLRA*).

Subsequently, the Authority requested that the parties file supplemental submissions addressing "to what extent implementation of the Union's proposal would significantly hamper the Agency's ability to perform its work in an efficient and effective manner." July 20, 2007 Order at 2. The Agency and the Union filed supplemental submissions (Agency supplemental and

1. Member Beck's dissenting opinion is set forth at the end of this decision.

Union supplemental, respectively), as well as replies to each other's supplemental submissions (Agency reply and Union reply, respectively).

III. Positions of the Parties

A. Agency Supplemental

The Agency asserts that the proposal is not an appropriate arrangement because it requires specific staffing levels at the Anchorage facility that would significantly hamper the Agency's ability to perform work effectively and efficiently and to determine appropriate staffing levels based on the Agency's operational needs and budget. Agency Supplemental at 3 & 6-7. According to the Agency, the proposal would impose an "absolute staffing requirement[]" because it would leave the Agency with no discretion regarding the numbers and types of positions to fill. *Id.* at 3-4.

The Agency also asserts that the proposal applies a simple solution — increased staffing — to the complex problems facing the entire Alaska region and, thus, fails to take into account the actual needs of, and the true issues confronting, that region. *Id.* at 5-6 & Exhs. 1 (Statement of Need and Case for change to Strengthen the NWS Alaska Region, July 2007 (Statement of Need)); & 2 (Statement from its Deputy Regional Director) at paragraph 5. According to the Agency, the proposal, if implemented, could force the Agency to reallocate resources, and/or close two or more facilities, within the Alaska region. *Id.* The Agency asserts that those facilities serve an important public function and that closing or reducing the hours of those facilities would "result in degradation of essential services and significantly hamper [its] ability to get its job done efficiently and effectively."² *Id.* at 5-6.

B. Union Reply

The Union asserts that its proposed staffing increase is: (1) consistent with the staffing needs suggested by the Meteorologist-in-charge of the Anchorage facility and indicated in the Agency's statement of need, an Agency document that sets forth recommendations to improve services within the Alaska region; and (2) necessary in order for the Agency to provide a basic level of services. *See* Union Reply at 2-3. The Union also asserts that the proposal remedies one of the primary

problems caused by implementation of the IFPS: an increased workload at the Anchorage facility and attendant adverse impacts on employees. *Id.* at 4, 7. In addition, the Union contends that the proposal is not absolute insofar as it does not preclude the Agency from hiring additional employees in Anchorage or elsewhere in Alaska, and that the Agency has not demonstrated that budget constraints would prohibit it from hiring additional employees. *Id.* at 4-6.

C. Union Supplemental

The Union asserts that the proposal would not hamper the Agency's ability to perform its work in an efficient and effective manner. Union Supplemental at 1. The Union asserts that the Agency's documents demonstrate that the proposal is based on management's own determination regarding the actual needs of the Anchorage facility, and that the Agency conceded in its statement of need that the Alaska region cannot provide the basic services required by customers without the staffing increase proposed by the Union. *Id.* at 11-15.

The Union also asserts that the proposal would not negatively affect the provision of other Agency services. *Id.* at 16. The Union claims that the Agency's budget has increased significantly in recent years and that "there is every indication that it will continue to grow." *Id.* at 16-17. In addition, the Union asserts that the proposal "preserves broad discretion" regarding how the Agency would fill the new full-time equivalent (FTE) positions for the Anchorage facility, including how to reallocate current personnel. *Id.* at 16. The Union further contends that the proposal's impact on Agency staffing elsewhere would be *de minimis*.³ *Id.*

D. Agency Reply

The Agency disputes the Union's reliance on the Agency's statement of need as proof that the Union's proposal is required. Agency Reply at 2. The Agency maintains that the statement of need's recommendation regarding additional staff is part of the Agency's strategy regarding the entire Alaska region. *Id.* The Agency also disputes the Union's claim that, because the Agency has received recent increases in its budget, the proposal will not harm other Agency programs. *Id.* at 2-3. Further, the Agency contends that, by mandating the

2. The Agency also claims that by proposing specific staffing, the Union is "effectively" requiring it to bargain over management's § 7106(a)(1) rights. Agency Supplemental at 6 n.7. This contention was not raised in *NWSEO* or mentioned in the court's remand. As this contention was not raised previously, we do not address it further.

3. In addition, the Union renews the severance request that it made, and that the Authority rejected, in *NWSEO*, 61 FLRA at 242. The Agency opposes the severance request. *See* Agency Reply at 2. As the Authority's rejection of the severance request in *NWSEO* was not challenged on appeal and is not part of the court's remand, we do not revisit that issue here.

composition of employees at the Anchorage facility, the Union's proposal would: (1) require the Agency to hire "exactly" the number of position set forth in the proposal and thereby "paralyze the Agency from making any other staffing determinations[.]" and (2) force the Agency to maintain specific staffing levels without regard to the impact such staffing levels may have on the Agency's ability to do its work. *Id.* at 3 (emphasis in original).

IV. Analysis and Conclusion

We adopt the court's opinion in *NWS v. FLRA* as the law of the case. See, e.g., *NAGE, Local R14-143*, 57 FLRA 879, 879 (2002) (Chairman Cabaniss concurring); *Dep't of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 23 FLRA 376, 379 (1986). Under the standard set forth by the court, "if implementation of [the] proposal will directly interfere with substantive managerial rights, but will not significantly hamper the ability of an agency to get its job done, the proposal . . . is negotiable . . . as an appropriate arrangement." 197 Fed.Appx. at 2 (emphasis in original).

Applying that standard here, the proposal would require the Agency to increase by ten the number of specific types of FTEs at its Anchorage facility. We find it significant that the Agency's own statement of need asserts that the Agency's Alaska region "cannot provide all of the basic services required by customers[.]" and suggests that "a total of 16 FTE" – including "9 FTE at [the] Anchorage" facility – is "needed to set [the Alaska region] on [a] path to success." Statement of Need at 1, 10-11 (emphasis in original). The Agency does not explain how adding the ten FTEs specified in the proposal would hamper – let alone "significantly" hamper, as the court requires – the ability of the Agency to "get its job done[.]"⁴ 197 Fed.Appx. at 2 (emphasis removed).

In addition, the Union asserts, and the undisputed evidence shows, that — apart from the unencumbered FTEs in the Alaska region — there are numerous, additional unencumbered FTEs within the Agency. See Union Reply at 5 & Attachment 3. In other words, the Agency has budgeted for, but not filled, numerous additional FTEs. Thus, there is no basis for finding that requiring the Agency to add ten FTEs to the Anchorage

facility would significantly hamper the Agency's ability to get its job done elsewhere, let alone lead to the need to close two or more weather service offices, as the Agency alleges. See Agency Supplemental at 5.

Finally, with regard to the Agency's claim that the proposal would require the Agency to add "exactly" the numbers set forth in the proposal, Agency Reply at 3, the proposal sets forth only minimum, not maximum, numbers of additional FTEs.⁵ Thus, to the extent that the Agency is contending that it would be prohibited from hiring additional FTEs if necessary, the Agency's claim is unfounded.

For the foregoing reasons, we find that the Agency has not met its burden to demonstrate that the proposal would significantly hamper its ability to get its job done. Thus, under the standard set forth by the court in *NWS v. FLRA* and adopted here as the law of the case, we find that the proposal is an appropriate arrangement and, thus, is within the duty to bargain.

V. Order

The proposal is within the duty to bargain, and the Agency shall, upon request, or as otherwise agreed to by the parties, negotiate with the Union over that proposal.⁶

4. The Agency makes no claim that, in the long term, the Agency will require fewer incumbents in the Alaska Region than the number set forth in the statement of need. Therefore, we find unpersuasive the dissent's speculation that the Agency's "needs could change over time[.]" Dissent at 2.

5. The dissent interprets the proposal as requiring a maximum number of the specified types of employees. Dissent at 1. This is inconsistent with the well-established principle that, "[w]hen parties dispute the meaning of a proposal, . . . [i]f the union's statement of intent comports with the plain word[ing] of the proposal, then the Authority will adopt the union's interpretation[.]" *AFGE, Local 12*, 60 FLRA 533, 537 (2004) (Member Armendariz concurring) (citations omitted). The plain wording of the proposal requires the Agency to "[i]ncrease staff . . . by 5 forecasters, 4 HMTs [hydrological meteorological technicians] and 1 IT [information technology officer,]" 61 FLRA at 241 – not to increase staff *only* by those numbers. Further, the Union expressly asserts that the proposal does not preclude the Agency from hiring additional employees, and this explanation comports with the proposal's plain wording. See Union Reply at 4.

6. In finding the proposal to be within the duty to bargain, we make no judgments as to its merits.

Member Beck, Dissenting:

For the following reasons, I disagree with my colleagues that the proposal is within the duty to bargain. Applying the standard set forth by the court, I would find that the proposal does not constitute an appropriate arrangement under § 7106(b)(3) of the Statute because it would significantly hamper the Agency's ability to perform its work in an efficient and effective manner.

The proposal would require the Agency to hire specific types and numbers of employees for the Anchorage facility. If implemented, this very specific contractual limitation would restrict the Agency's ability to alter staffing numbers or reallocate personnel as needed.

The Majority contends that the proposal requires the Agency to hire only a minimum, not a maximum, number of additional employees. Nothing in the proposal supports this contention, however. The proposal mandates — without qualification — that the Agency “[i]ncrease staff [at the Anchorage Forecast office] by 5 forecasters, 4 HMTs [hydrological meteorological technicians] and 1 IT [information technology officer][.]” *Nat'l Weather Serv. Employees Org.*, 61 FLRA 241, 241 (2005). Even under the Majority's interpretation, however, the proposal would still preclude the Agency from hiring fewer than the specified numbers of employees, if it were to determine that its operations require fewer employees. This is a significant restriction on the Agency that, in my view, would significantly hamper its ability to perform its work efficiently and effectively. Moreover, the proposal further ties the hands of Agency management by requiring not only a certain number of employees, but also specific types.

Additionally, because the Agency would be locked into this number and these types of employees at least during the length of the parties' agreement, the proposal would prevent the Agency from exercising its discretion to alter staffing numbers or reallocate personnel to address necessary changes in service requirements. *See* Agency's Reply at 3 (“[T]he Agency would be forced to maintain the staffing levels without regard to its effect on the Agency's ability to do its work.”). In particular, the proposal would require the Agency to hire and maintain a specific type and numbers of employees to perform functions that the Agency may determine are not necessary. *See* Agency's Supplemental at 4. As a result, the Agency could not adjust staffing levels during the term of the agreement even if it determined that a different composition of employees would perform the Agency's work more effectively and efficiently. Indeed, under the proposal, even if the Agency determined that

it needed to adjust staffing levels simply to provide basic services to its customers, it would not be able to do so.

The Majority gives great weight to the notion that the proposal is similar to the Agency's statement of need (Statement). As the Agency itself explains, however, the Statement involves the needs of the entire Alaska region, not simply the Anchorage facility. *See* Agency's Supplemental at 4-5 (noting that the Statement makes clear that the issues confronting the Alaska Region involve more than the lack of personnel at one office); Agency's Reply at 2. Because the Agency operates on a fixed budget, requiring the Agency to hire a specific type and number of employees for the Anchorage facility may prevent it from addressing other needs listed in the Statement. *See* Agency's Supplemental at 3-7; Agency's Reply at 2-3.

Indeed, according to the Agency, it is currently “FTE neutral” because of budget constraints. *See* Agency's Supplemental, Ex. 2 (Declaration of Christopher S. Strager) at 2. Thus, if the Agency were required to hire the type and number of employees specified in the proposal for the Anchorage facility, the Agency would be unable to add additional FTEs, and would need to transfer current employees from other offices. *See id.* This, in turn, could result in the closure of two or more facilities. *See id.* (stating that reallocating personnel to the Anchorage facility may require Agency to close two or more facilities). *

Moreover, the Statement only addresses the Agency's “short term requirements[.]” *See* Agency's Supplemental, Ex. 1 (Statement) at 10. As noted above, the Agency's needs could change over time; yet the proposal, if implemented, would lock the Agency into a specific number and specific types of employees during the length of the parties' agreement.

The proposal impairs the Agency's exercise of its discretion and judgment regarding its staffing and personnel. As a result, if implemented, the proposal would significantly hamper the Agency's ability to perform its work in an effective and efficient manner. Consequently, I would find that the proposal does not constitute an appropriate arrangement under § 7106(b)(3).

Accordingly, I dissent.

*. Although the Majority notes that the National Weather Service as a whole has numerous unencumbered FTEs, it fails to mention that the Alaska Region does not. According to the same documents referenced by the Majority, the Alaska Region has only nine unencumbered FTEs — one fewer than the Union's proposal would require. *See* Union Reply at 5 (noting that, in the Alaska region, 232 of 241 planned FTEs are encumbered) and Attachment 3 (same).