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OUR FAVORITE APPROPRIATE ARRANGEMENT PROPOSALS (Pt. 1)

Agency managers are free to change anything in an employee's working conditions they choose (and whenever they choose) so long as they are exercising a 7106 management right. They can assign an employee new duties overnight, move him to another building in the commuting area, double the number of factors on which the employee will be evaluated, add five new conduct rules, abolish his formal training programs, and even reassign him from the day shift to the night shift. The only thing standing in an agency's way of instantly making an employee's working conditions intolerable is a union and its right to negotiate "appropriate arrangements" to lessen the adverse impact of the change. Without a union highly skilled in these negotiations federal employees are the proverbial sitting ducks.

FEDSMILL has written extensively about the process of midterm appropriate arrangement's bargaining (which we will refer to as AA bargaining below to conserve our typing strength). We started with the agency's obligation to give the union specific notice of the details of the proposed change (See Inadequate Agency Notice Gives Union a Big Bargaining Bonus (Pt. 2)), moved to the union's right to information (See Particularized Need Made Clearer), added our thoughts on the bargaining process (See 20+ FLRA Precedents Union Negotiators Must Know), and even touched on impasse resolution (See Interest Arbitration's 'Angelo Angle.')).

But we have not devoted any time to the one part of the midterm AA process where the agency has its best chance to trip up the union and win back the right to unilaterally implement without any bargaining. We are referring to when the union fails to make negotiable AA proposals. Because we have learned that the more negotiable AA proposals a union makes the harder management has to work to get a deal with the union, now is the time to deal with the issue.

While we plan to list dozens of AA proposals unions can make in response to a wide variety of management rights changes, it will be helpful to review at the outset FLRA's latest thoughts on what makes an AA proposal negotiable. Here is an excerpt from AFGE*, Council of Prison Locals, Coleman, Fla*., 66 FLRA 819 (2012)

When considering whether a proposal is within the duty to bargain under §7106(b)(3) of the Statute, the Authority applies the analysis set forth in National Association of Government Employees, Local R14-87, 21 FLRA 24 (1986) (KANG). Under this analysis, the Authority first determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. . . . . To establish that a proposal is an arrangement, a union must identify the effects or reasonably foreseeable effects on employees that flow from the exercise of management's rights and how those effects are adverse. . . .The claimed arrangement must also be sufficiently tailored to compensate employees suffering adverse effects

attributable to the exercise of management's rights. . . . However, the Authority has held that proposals "intended to eliminate the possibility of an adverse effect, may constitute appropriate arrangements negotiable under [§]7106(b)(3)." . . . .In particular, such prophylactic proposals will be found sufficiently tailored in situations where it is not possible to draft a proposal targeting only those employees who will be adversely affected by an agency action. See AFGE, Local 1770, 64 FLRA 953, 959-60 (2010) (Local 1770) ("prophylactic" provisions that would eliminate anticipated adverse effects for all employees negotiable where agency "failed to establish how the provisions could be tailored more narrowly").

In other words, the union's AA proposal must be 1) presented as an appropriate arrangements proposal, 2) linked to identifiable impact on unit employees that flow from the management proposed change, 3) based on known or reasonably foreseeable effects from the change, not wildly speculative ones, 4) sufficiently or narrowly tailored to those employees actually impacted, although others can benefit as well and 5) designed to compensate for, lessen, or even eliminate the adverse effects of management's proposal.

Now let's turn to some AA proposals that are relevant to almost any management rights change the union can bargain over under its AA rights of 5 USC 7106(b)(3). The description of each kind of proposal is followed by the language of a related contract clause and the FLRA case in which it was held negotiable.

The union can propose that the agency–

1. give it information about the proposed change before it is implemented as well as data about the impact of the change as it rolls out.

*Management will provide the Union President with all the completed evaluation materials upon the conclusion of the 13 week trial period. . . .Management agrees to provide the Union President all documentation collected and documented during any "Spot Checks" on any bargaining unit Rangers. (**NFFE**, 59 FLRA 951 and 61 FLRA 459 (2006))*

2.apply the procedures, policies or other details of the change to employees in a "fair and consistent manner" and ensure "equitable treatment" and related protections.

*In implementing any rules, regulation or policies affecting personnel policies or procedures which involve the exercise of management rights under 5 U.S.C. section 7106(a) and (b)(1), the Employer will apply such rules, regulations, or policies fairly and consistently so as to avoid adverse impact on the working conditions of unit employees. (**NTEU**, 61 FLRA 871 (2006))*

and

When scheduling overtime and/or compensatory time, the parties agree that overtime and/or compensatory time will be distributed in a fair and equitable manner among

*employees by position title and duty location at [Fort Bragg Schools]. (**AFGE**, 64 FLRA 953 (2010))*

and
*Every effort shall be made to insure uniformity in assignment of personnel to inspectional activities and tours of duty. (**NTEU**, 21 FLRA 1116(1986))*

and

*To the extent possible, work will be distributed equitably among personnel within job classifications. (**NAGE**, 40 FLRA 657 (1991))*

and

*Performance standards shall be fairly, equitably, objectively, and uniformly applied for like duties in like circumstances and shall be reasonably related to the duties set forth in the position description. (**UPTO**, 44 FLRA 1145 (1992))*

FEDSMILL devoted an entire posting to using this kind of clause in one entitled, "The Resuscitated 'Fair & Equitable' Clause."

3. grant employees time to transition from their current work situations to the new or changed one.

*At the time of initial action on the examiner's first reexamination application, each examiner will be given three hours of non-examining time to review and become familiar with the reexamination procedures. (**POPA**, 47 FLRA 10 (1993))*

and

*Employees will be given at least 2 hours of nonmeasured work time to set up their desks and adjust work patterns in accordance with these new instructions, including employees who have already done so. (**AFGE**, 26 FLRA 612 (1987))*

4. guarantee that employees will not be disadvantaged by the change.

*To the extent feasible, the Employer shall insure that employees are not statistically advantaged or disadvantaged by the assignment of downtime. (**AFGE**, 38 FLRA 110 (1990))*

5. clarify in writing certain aspects of the change it proposes.

*Management will define, in writing, what it describes as GS-12 "Complex Cases" in order that lower Graded LSCEs will know when they are performing what Management defines as higher graded work. (**AFGE**, 55 FLRA 582 (1999))*

6. provide a briefing of the impacted employees on the details of the change before it is implemented.

*Representatives of both parties at the local level will arrange for joint briefings, to be conducted on official time, for all employees regarding the specific terms of the agreement. The date, time and location of the briefing will be communicated to employees in writing. Employees will be provided an opportunity to ask questions during this joint briefing. (**NTEU**, 39 FLRA 1532 (1991))*

7. establish a joint labor-management committee to review the rollout of the change and discuss problems.

*DODDS shall establish a review committee in each region where unit employees are employed for the purpose of reviewing and evaluating the procedural requirements incorporated in the Compensatory Education Manual. . . . Each review committee will report findings to the OEA and DODDS in Washington for the purpose of finalizing negotiations. After implementation of the manual the review committee will continue to monitor and evaluate the manual procedural requirements for one year. After the one year the committee will report findings to the OEA and DODDS in Washington for the purpose of determining whether changes are necessary in the manual. If changes are necessary then the parties shall renegotiate on the manual. . . .The regional review committees shall consist of at least four members equally divided between the OEA and DODDS. Although each party is free to choose members to the committees it is recommended that some of the participants be compensatory education teachers. (**OEA**, 28 FLRA 700 (1987))*

8. agree to let the union reopen the midterm agreement related to the change a short time after implementation of the change and once it has more certain data about its impact.

*The parties would "meet to reopen the agreement to review and identify concerns surrounding the impact and implementation of CHIP." (**AFGE**, 58 FLRA 341 (2003))*

A union should never be at a loss for potential AA proposals. This is only the first in a series of postings with this title. Follow the series to see the more than two dozen AA proposals ***FEDSMILL*** recommends.