OFFICE OF COMPLIANCE
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Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee Petitioner, and United States Capitol Police Employing Office	)	Case No. 16-LM-04 (NG)

Before the Board of Directors: Barbara L. Camens, Chair; Alan V. Friedman, Roberta L. Holzwarth, Susan S. Robfogel, and Barbara Childs Wallace, Members.

DECISION OF THE BOARD OF DIRECTORS

This petition for review, involving one proposal, was filed by the Fraternal Order of Police, District of Columbia Lodge No. 1, U.S. Capitol Police Labor Committee (Union) after the United States Capitol Police (USCP or Department) alleged it was outside its duty to bargain. The petition for review comes before the Office of Compliance Board of Directors (the Board) pursuant to § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (FSLMRS), as applied by § 220(c)(1) of the Congressional Accountability Act, 2 U.S.C. § 1351(c)(1). The Union is the certified representative of a unit of police officers employed by the USCP. The parties are governed by a collective bargaining agreement (CBA) that was to have expired on June 9, 2013, but remains in effect until superseded by a successor CBA.

I. Statement of the Case

Article 30, Rights of Officers Under Investigation, of the parties' current CBA permits the USCP to place employees who are under investigation on emergency suspension. Emergency suspensions are governed by Directive 2033.022.[1] The petition for review in this

[1] Unlike the Board's decision in 16-LM-02, issued on this same date, this negotiability appeal involves mid-term

case was filed after the Union was notified that USCP planned to revise Directive 2033.022, and the Union submitted a demand to bargain, consistent with Article 8 of the parties' CBA.

II. Proposal In Dispute

The Union proposes that the following wording appear after page 2, line 62 of draft Directive 2033.002: "The Department has the burden of proving the validity of its continuing suspension without pay of any bargaining unit employee."

III. Positions of the Parties

A. Employing Office

First, the USCP contends that the proposal is not "clear or specific" and should be rejected "unless the [Board] can make a definite determination of what is at issue."[2] As written, the USCP contends that "the proposal could be interpreted to limit the Department's ability to place an employee on suspension without pay unless it can meet its burden" because there is nothing in the "express language" of the proposal indicating when the Department will have to make the demonstration, what entity will determine the alleged burden, and "whether the proposal prevents the Department from suspending without pay an employee with the facts known to the Department at the time of the suspension." Second, even if the Board can make a definite determination of what is at issue, the USCP asserts that the proposal "interferes with management's right to suspend employees in accordance with 5 U.S.C. § 7106(a)(2)(A)." In this regard, the Federal Labor Relations Authority (Authority) has held that proposals: (1) placing a substantive restriction on management's discretion to suspend an employee; and (2) having the effect of modifying the substantive criteria for taking disciplinary action against an employee, directly interfere with 5 U.S.C. § 7106(a)(2)(A).[3] In this case, the Union's proposal "requires the Department to demonstrate that an unpaid suspension will promote the efficiency of service and where it cannot, it may not place a bargaining unit employee on unpaid suspension." Thus, the Department would be prevented from "acting at all" in exercising its statutory right to suspend employees. The USCP also argues that the proposal "does not merely require the Department to consider options." Instead, it mandates that management, "in all instances, without regard to the infraction . . . which resulted in the suspension," bears the burden of demonstrating it would promote the efficiency of service before it can take such action against an employee. Finally, it claims that the Union has not alleged that the proposal is a procedure

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bargaining over a draft directive unrelated to the parties' current negotiations over a successor CBA.

[2] *IFPTE Local 3 and Dep't of Navy, Philadelphia Naval Shipyard, Philadelphia, Pennsylvania*, 51 F.L.R.A. 451, 459- 60 (1995) and *Nat'l Ass'n of Agric. Emp. and Dep't of Agric, APHIS, Plant Protection and Quarantine, Houston, TX*, 32 F.L.R.A. 1265 (1988), are cited by the USCP to support its claim.

[3] The USCP cites *NLRBU and NLRB, Office of the General Counsel*, 18 F.L.R.A. 320, 323 (1985) (*NLRBU*) and *AFGE, Local 1822, AFL-CIO and Veterans Admin. Med. Ctr., Waco, TX*, 9 F.L.R.A. 709, 711-12 (1982), respectively, in this connection.

or an appropriate arrangement. *See* 5 U.S.C. § 7106(b). Even if it had, however, in *NLRBU*[4] the FLRA rejected "that conclusion" where a proposal places an obligation on the agency before it acts. For these reasons, the Board should find that the Union's proposal is nonnegotiable.

B. Union

Preliminarily, the Union states in its response that "when a federal agency seeks to suspend an employee without pay before they have been disciplined, the burden of demonstrating the appropriateness of that action falls to the employer."[5] Therefore, as its proposal merely restates an employee's rights under the law, the proposal is plainly negotiable pursuant to the precedent established by the Authority in, for example, *Prof Airways Sys. Specialists and U.S. Dept. of Trans., FAA*, 64 F.L.R.A. 474, 478 (2010). Turning to the USCP's nonnegotiability arguments, the Union disagrees with the Department's initial contention that the proposal is unclear or vague. The Union further states the proposal must be read as part of a larger policy that allows employees to challenge emergency suspensions either through the grievance procedure or a written appeal to the Chief of Police. Thus, the Union's proposal "would address the parameters for an Arbitrator or the Chief of Police to decide" any challenges to the Chief's actions. Finally, the Union disagrees with the USCP's claim that the proposal improperly places a substantive restriction on management's discretion to suspend an employee. Rather, the Union claims, it "simply states that if the Department exercises its discretion to place an employee on an emergency suspension *without pay*, then the Department must defend its action." As such, it places no burden on the employer "before it acts," but places the burden on the employer of proving it acted in accordance with the policy and applicable law "after the fact." For the reasons specified above, the Union concludes that the Department has not demonstrated that its proposal is nonnegotiable.

IV. Analysis and Conclusions

The USCP argues, among other things, that the Board should find the proposal nonnegotiable because it is unclear, *i.e.*, it can be interpreted to require the Department to demonstrate the "validity" of an employee's suspension without pay *before* the suspension can be effectuated.[6] Contrary to the USCP's assertion, however, the proposal expressly refers to the Department's *continuing* suspension of an employee without pay. As such, it can *only* be interpreted to operate *after* the Department has already suspended an employee without pay. In addition, in both its petition for review and its response to the USCP, the Union states that the

[4] *NLRBU and NLRB, Office of the General Counsel*, 18 F.L.R.A. 320, 323 (1985).

[5] In support of this proposition, the Union cites *Gonzalez v. Dept. of Homeland Security*, 114 M.S.P.R. 318 (2010). *Sanchez v. Dept. of Energy*, 117 M.S.P.R. 155 (2011).

[6] When deciding negotiability issues, we have been guided by cases decided by the Authority, which is the executive branch agency responsible for resolving issues arising under the FSLMRS. See, *e.g.*, *Plumbers Local 5, United Ass'n of Journeymen & Apprentices and Office of the Architect of the Capitol*, 2002 WL 34661693, 02-LMR-03,-04,-05 & -06 (CAOC 10/7/2002); *Int'l Brotherh'd of Electrical Workers, Local 26 and Office of the Architect of the Capitol*, 2001 WL 36175211, 01-LMR-02 (CAOC 11/23/01).

proposal is "designed to ensure that it is clear an emergency suspension is a situation where the Department must prove its *on-going* entitlement to suspend an employee indefinitely without pay" (emphasis added). In this regard, for purposes of a negotiability analysis, the Authority adopts a union's explanation of the meaning of a proposal where it is consistent with the plain wording of the proposal.[7]

Here, the Union's explanation is consistent with the plain wording of the proposal. Hence, there is no merit to the USCP's claim that the proposal is nonnegotiable because its meaning is unclear. Since the USCP's other arguments concerning the proposal's alleged interference with management's right to suspend employees depend upon its erroneous interpretation of the meaning of the proposal, they too are inapposite. Accordingly, we conclude that the proposal is negotiable.

V. ORDER

The USCP shall, upon request, or as otherwise agreed to by the parties, bargain over the Union's proposal.[8]

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[7] *See, e.g.*, *Amer. Fed. of State, County, and Muni. Employees, Local 2830 and U.S. Dep't of Jus., Office of Jus. Programs*, 60 F.L.R.A. 671 (2005).

[8] In finding the proposal to be negotiable, we make no judgment as to its merits.