



BILLING CODE 6727-01-P

**FEDERAL LABOR RELATIONS AUTHORITY**

**5 CFR Part 2427**

**[FLRA Docket No. 0-PS-46]**

**Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Agency-Head Review of Agreements that Continue in Force Until New Agreements Are Reached**

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Proposed issuance of a general statement of policy or guidance.

**SUMMARY:** The Federal Labor Relations Authority (Authority) solicits written comments on a request from the U.S. Department of Agriculture (USDA) for a general statement of policy or guidance (general statement) concerning expiring collective-bargaining agreements that state that they will remain in force until the parties reach new agreements. USDA asks for a general statement holding that, if an expiring agreement continues in force during renegotiations, then an agency head may review the legality of the expiring agreement as early as the agency head could review an expiring agreement that was renewed automatically for a fixed term. Comments are solicited on whether the Authority should issue a general statement, and, if so, what the Authority's policy or guidance should be.

**DATES:** To be considered, comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

**ADDRESSES:** You may send comments, which must include the caption "USDA (Petitioner), Case No. 0-PS-46," by one of the following methods:

- E-mail: FedRegComments@flra.gov. Include “USDA (Petitioner), Case No. 0-PS-46” in the subject line of the message.
- Mail or Hand Delivery: Emily Sloop, Chief, Case Intake and Publication, Federal Labor Relations Authority, Docket Room, Suite 200, 1400 K Street NW, Washington, DC 20424-0001.

*Instructions:* Do not mail or hand deliver written comments if they have been submitted via email. Interested persons who mail or hand deliver written comments must submit an original and 4 copies of each written comment, with any enclosures, on 8½ x 11 inch paper.

**FOR FURTHER INFORMATION CONTACT:** Emily Sloop, Chief, Case Intake and Publication, Federal Labor Relations Authority, (202) 218-7740.

**SUPPLEMENTARY INFORMATION:** In Case No. 0-PS-46, USDA requests that the Authority issue a general statement concerning agency-head review of expiring collective-bargaining agreements that state that they will remain in force until the parties reach new agreements. Interested persons are invited to express their views in writing as to whether the Authority should issue a general statement and, if it does, what the Authority’s policy or guidance should be.

**Proposed Guidance**

To Heads of Agencies, Presidents of Labor Organizations, and Other Interested Persons:

USDA has requested, under Section 2427.2(a) of the Authority’s rules and regulations (5 CFR 2427.2(a)), that the Authority issue a general statement of policy or guidance addressing when an agency head may, under Section 7114(c) of the Federal Service Labor-Management Relations Statute (the Statute), review the legality of an expiring collective-bargaining agreement that continues in force during renegotiations. Section 7114(c)(1) of the Statute states that “[a]n

agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency,” and Section 7114(c)(2) states, in pertinent part, that “[t]he head of the agency shall approve the agreement within [thirty] days from the date the agreement is executed if the agreement is in accordance with the provisions of [the Statute] and any other applicable law, rule, or regulation.”

A different provision of the Statute – Section 7116(a)(7) – makes it an unfair labor practice for an agency “to enforce any rule or regulation (other than a rule or regulation implementing” 5 USC § 2302, which concerns prohibited personnel practices) that “is in conflict with any applicable collective[-]bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed.” In other words, in most cases, if rules or regulations change while an agreement is in effect, and the changes conflict with that agreement, then Section 7116(a)(7) forbids an agency from enforcing those changes until the agreement is no longer in effect. But if such changes concern rules or regulations that implement the ban on prohibited personnel practices, then an agency may enforce those changes immediately, even if they conflict with a preexisting agreement.

The Authority has previously addressed how to apply Sections 7114(c) and 7116(a)(7) in cases where parties specify that, unless one or both of them request to renegotiate an expiring agreement, the agreement will be automatically renewed (or rolled over) for another term at the end of its current term. In such cases, the Authority has held that an automatically renewed agreement is subject to agency-head review under Section 7114(c), and that the automatically renewed agreement must comply with any government-wide rules or regulations that changed during the agreement’s previous term. *Kan. Army Nat’l Guard, Topeka, Kan.*, 47 FLRA 937, 942 (1993). The Authority has also clarified that, in the context of automatically renewed

agreements, the thirty-day period for agency-head review under Section 7114(c) begins “the day after the expiration of the contractual window period for requesting renegotiation of the expiring agreement.” *Id.* at 943.

USDA asks that the Authority clarify when an agency head may review the legality of an expiring agreement that includes a provision stating that, where renegotiations are requested, the existing agreement continues in force until the parties reach a new one (a continuance provision). Citing the Authority’s decision in *U.S. Department of the Army, Headquarters III Corps & Fort Hood, Fort Hood, Texas*, 40 FLRA 636 (1991) (*Ford Hood*), USDA asserts that some arbitrators interpret continuance provisions to mean that, once renegotiations are requested, the existing agreement does not expire until renegotiations are complete, even if the agreement specifies an expiration date that passes during renegotiations. According to USDA, the consequence of such an interpretation is that, under § 7116(a)(7) of the Statute, for as long as the parties’ renegotiations take, an agency may not enforce rule or regulation changes that occurred during the agreement’s originally specified term. USDA asserts that a continuance provision that is interpreted in this manner is unjust because an agency that allows automatic renewal can enforce rule and regulation changes much earlier than an agency that requests renegotiations.

By contrast, citing the Authority’s decision in *U.S. Department of Commerce, Patent & Trademark Office*, 65 FLRA 817 (2011) (*Commerce*), USDA asserts that other arbitrators interpret continuance provisions to mean that, even when renegotiations are requested, an agreement expires on the date that the parties originally specified, but the continuance provision causes the expired agreement to renew automatically for an additional term that lasts as long as the parties’ renegotiations take. According to USDA, this interpretation allows an agency to enforce rule or regulation changes that occurred during the agreement’s originally specified term

throughout most, if not all, of the parties' renegotiations without violating Section 7116(a)(7) of the Statute. But USDA contends that an agency cannot know in advance whether an arbitrator will interpret a continuance provision in the manner discussed in *Ford Hood* or *Commerce*.

USDA contends that, in order to avoid violating Section 7116(a)(7), an agency must assume that a continuance provision will be interpreted like the one in *Fort Hood*, thereby preventing the agency from enforcing rule and regulation changes for an indefinite and unknowable period of time during renegotiations.

In its request, USDA asks the Authority to issue a general statement holding that:

1. When a party requests to renegotiate an expiring agreement that contains a provision stating that the agreement remains in force until a new agreement is reached, an agency head may review the legality of the expiring agreement as early as Section 7114(c) of the Statute would allow the agency head to do so if the expiring agreement were automatically renewed; and
2. An expiring agreement that remains in force until the parties reach a new agreement is effectively renewed automatically every day, so, for as long as the expiring agreement continues in force during renegotiations, a new agency-head-review period begins each day.

Regarding the matters raised by USDA, the Authority invites written comments on whether issuance of a general statement of policy or guidance is warranted, under the standards set forth in Section 2427.5 of the Authority's rules and regulations (5 CFR 2427.5), and, if so, what the Authority's policy or guidance should be. Written comments must contain separate, numbered headings for each issue covered.

Dated: January 16, 2020.

**Noah Peters**

Solicitor

Federal Labor Relations Authority

[FR Doc. 2020-01007 Filed: 1/22/2020 8:45 am; Publication Date: 1/23/2020]