



BILLING CODE 6727-01-P

FEDERAL LABOR RELATIONS AUTHORITY

5 CFR Part 2427

[FLRA Docket No. 0-PS-38]

Notice of Opportunity to Comment on a Request for a General Statement of Policy or Guidance on Whether “Zipper Clauses” Are Mandatory Subjects of Bargaining.

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. Office of Personnel Management (OPM) for a general statement of policy or guidance (general statement) holding that “zipper clauses”—which are provisions that would foreclose or limit mid-term bargaining during the term of a collective-bargaining agreement (CBA)—are a mandatory subject of bargaining. 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 “OPM (Petitioner), Case No. 0-PS-38,” by one of the following methods:

- E-mail: FedRegComments@flra.gov. Include “OPM (Petitioner), Case No. 0-PS-38” in the subject line of the message.

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

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-38, OPM requests that the Authority issue a general statement concerning zipper clause provisions and whether such provisions are mandatory subjects of bargaining. 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:

OPM 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 the negotiability of zipper clause provisions and whether such provisions are mandatory subjects of bargaining. OPM asserts that the Authority's precedent supports considering zipper clauses to be mandatory subjects of bargaining because such proposals clearly involve the parties' mid-term bargaining rights and obligations, which have been found to be mandatory subjects of bargaining. The Authority has held that mandatory subjects of bargaining are topics that are

within the required scope of bargaining. *FDIC, Headquarters*, 18 FLRA 768, 771 (1985).

Furthermore, any party may bargain to impasse over mandatory topics. *Id.*

Previously, judges of the D.C. Circuit have written separately to recognize the validity of zipper clauses. *FLRA v. IRS, Dep't of the Treasury*, 838 F.2d 567, 569-70 (D.C. Cir. 1988) (Edwards, J. and Silberman, J., concurring in denial of reh'g) (*IRS II*). They noted that the Authority's precedent established that "a union may contractually agree to waive its right to initiate bargaining in general by a 'zipper clause,'" *id.* at 570 (quoting *IRS*, 29 FLRA 162, 166 (1987)), and rejected an argument that the Authority's precedent established that zipper clauses are a permissive subject of bargaining. *Id.* In *NTEU v. FLRA*, the court found that "all conditions of employment are presumed to be mandatory subjects of bargaining. . . unless the Act explicitly or by unambiguous implication vests in a party an unqualified right." 399 F.3d 334, 340 (D.C. Cir. 2005) (internal quotation marks omitted). Citing *IRS*, the court stated:

[w]hile two members of this court have expressed their opinion that bargaining over a zipper clause may be mandatory, neither the FLRA nor our court has squarely addressed this issue. *See FLRA v. Internal Revenue Serv.*, 838 F.2d 567 (D.C. Cir.1988)(Edwards, J. and Silberman, J., concurring in denial of reh'g)(disputing that FLRA precedent established zipper clause as permissive subject of bargaining); *See also Interior*, 56 F.L.R.A. at 54 (declining to address negotiability of zipper clause).

Id. at 343.

On remand, in *NTEU*, 64 FLRA 156, 157-59 (2009), the Authority found that "reopener clauses"—which are provisions that specify the conditions where a party may seek to negotiate over a term that is "covered by" a CBA—are a mandatory subject of bargaining because they relate to conditions of employment and seek to define the parties' mid-term bargaining rights and obligations.

Because the Authority has only recognized reopener clauses as mandatory subjects of bargaining, OPM contends that it is prevented from utilizing the Federal Service Impasses Panel (the Panel) when a union elects to not agree to zipper clauses during term negotiations for a new CBA. As support, OPM cites to *U.S. Department of HHS and NTEU*, 18 FSIP 077 (2019). In that case, the Panel declined to exercise jurisdiction over a zipper clause because the Union “raised colorable questions” regarding whether such clauses concern a permissive topic of bargaining.

OPM contends that the Authority’s precedent regarding zipper and reopener clauses have created an inequality where only reopener clauses can be bargained to impasse. Therefore, parties seeking to include a zipper clause are disadvantaged during term bargaining and the Panel is precluded from considering the totality of the circumstances when deciding to limit or broaden mid-term bargaining. Therefore, OPM concludes that parties should be able to bargain zipper clauses to impasse. Furthermore, OPM argues that finding zipper clauses to be mandatory will avoid disputes during mid-term bargaining and reduce the number of unfair-labor-practice charges regarding actions taken pursuant to such clauses.

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

1. Zipper clauses are a mandatory topic of bargaining and, therefore, parties may bargain to impasse regarding both reopener and zipper clauses.

Regarding the matters raised by OPM, 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: March 24, 2020.

Rebecca J. Osborne

Federal Register Liaison and Deputy Solicitor

[FR Doc. 2020-06456 Filed: 3/30/2020 8:45 am; Publication Date: 3/31/2020]