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In the Matter of the Arbitration between

AFSCME LOCAL 1653,

Union,

And

OPINION AND AWARD

Federal Aviation Administration (FAA)

Employer,

Grev: 202500259

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Before: Deborah M. Gaines, Arbitrator

OPINION

Pursuant to the collective bargaining agreement between the Agency and the Union, the undersigned was designated as the Arbitrator in this case. A hearing was held on June 3, 2025, at 800 Independence Avenue, Washington, DC SW. Dan Ronneberg represented the Union and Victor Smith represented the Agency.

Both parties had full opportunity to adduce evidence, call and cross-examine witnesses, and argue in support of their respective positions. The hearing was transcribed and the parties submitted written closing statements on August 1, 2025. Neither party has raised any objection to the fairness of this proceeding. Whether or not expressly referred to herein, all the evidence and arguments set forth by the parties and authorities cited by them have been fully considered in the preparation and issuance of this Opinion and Award.

Background

The Union alleges the Agency violated Article 7 of the parties' Agreement when it redesignated gender-neutral restrooms to single sex restrooms without following the procedures for mid-term bargaining in accordance with the parties' Agreement as well as 5 USC Section 7116(a)(5) for failure to bargain. The Union seeks an order for the agency to cease and desist from implementing further changes to working conditions without notification and bargaining; restoration of the status quo ante; electronic posting consistent with FLRA ULP violations; and the costs of the litigation, as provided for under the Agreement.

It is undisputed that in January 2025, the Agency redesignated certain single occupancy restrooms from "gender neutral" to single sex bathrooms. There is no dispute the Agency did not provide notice to the Union or meet to discuss any impact regarding the change.

Relevant Language:

5 USC Section 7116(a)(5):

a) For the purpose of this chapter, it shall be an unfair labor practice for an agency; …

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter; . . . .

Collective Bargaining Agreement

Article 7:

Section 1. The parties agree that personnel policies, practices, and matters affecting working conditions of bargaining unit employees not covered by this

agreement shall not be changed by the Agency without prior notice to and negotiations with the Union in accordance with applicable law. The provisions of this Article apply to substance bargaining when allowable by law and to procedures which the Agency will observe in exercising a management right, and/or appropriate arrangements for employees adversely affected by the exercise of a Management right in accordance with 5 USC Section 7106. Section 2: Should the Agency propose a change described in Section 1, thirty days written notice of the proposed change shall be provided to the Union. . .

The Position of the Union

The Union argues the Agency had an obligation to provide notice and negotiate appropriate arrangements for those bargaining unit employees adversely effected. The Union does not question so much the right of the Agency to change the designation of the bathrooms, but rather, it argues it cannot do so without first negotiating as provided for under the Agreement and in accordance with 5 USC 7116 (a) (5)

The Union maintains the contract language is clear. It argues the change from gender neutral bathrooms to single sex has an impact on the workforce and, thus, requires proper notice to and negotiation with the Union. It disputes the Agency's argument that it is a prohibited subject of bargaining. It notes the contract includes a provision pertaining to the maintenance of operational, clean and adequately stocked restrooms. [See, Article 12, Section 9 of the CBA]. It contends the Agency's redesignation of the bathrooms was not contemplated within this language and, therefore, is subject to bargaining under Article 7 of the Agreement.

The Union avers are a permissive subject of bargaining as defined by the FLRA, as they impact working conditions. It argues that, to the extent the subject

matter is bound to a subject covered by the Agreement, the FLRA has found it to be covered by the Agreement.

The Union contends the Agency's claim that there is a comprehensive regulatory that prohibits bargaining over the change to the bathrooms untrue. First, it contends this is a new argument that was not raised during the steps of the grievance process. Moreover, it notes, the Employer's witness acknowledged on cross examination that under the federal regulations, bathrooms that are occupied by no more than one person at a time, do not have to be designated as single sex rest rooms. Where the agency has discretion, they are generally required to bargaining, according to the Union.

The Union also maintains the Agency's claim that the impact is *de minimus* is irrelevant to any issues under Article 7.

Position of the Agency:

The Agency, on the other hand, contends it does not have a duty to bargain over the redesignation of restrooms. It notes the issue of gender-neutral bathrooms arose in the aftermath of the Supreme Court's 2020 decision in ***Bostock v. Clayton County***, in which the Supreme Court found Title VII protects employee from discrimination based on sexual orientation and gender identity. To that end, the Administration in 2021 issued Executive Order (EO) 13988 which led many government agencies to designate a number of single-sex restrooms as gender-neutral.

It notes that the current Administration issued EO 14168 which mandates federal agencies to enforce sex-based rights in a binary manner. It argues the

DOT then directed its federal facilities to redesignate all gender-neutral restrooms to be single sex.

The Agency argues in this case, the subject of bathrooms is not negotiable as they are governed by law. It notes that OSHA regulations provide for restrooms and, under the FLRA and Executive order, there is a legal framework that precludes the negotiation of this issue.

Decision

After carefully considering the entire record before me, including the credibility of witnesses and the probative value of evidence, I find the Agency violated Article 7 of the parties' Agreement when it failed to provide notice and allow the Union to request bargaining on the implementation of the changes to the restroom designations. My reasons follow.

At the outset, I this case is not about the Agency's right to redesignate the restrooms consistent with federal law. Rather, at issue, is its obligation under the Agreement to comply with Article 7's requirement to provide notice and allow input from the Union on the impact of these changes, if any, and to have the right to appeal to the FLRA.

Likewise, I do not find my authority extends, as the Union requested, to review whether the Agency committed an unfair labor practice as defined under 5 USC 7116 (a)(5). The parties have not provided sufficient information to determine that I have any jurisdiction. Thus, my decision is limited to the parties' Agreement.

Article 7 of the Agreement expressly states the parties agree that matters affecting working conditions of bargaining unit members not covered by this agreement shall not be changed without notice and negotiation. Generally, bathrooms would be part of offices spaces and considered part of working conditions. While the Agency seems to argue the subject is prohibited by law, I do not find their argument persuasive as it pertains to Section 7 of the Agreement. Section 7 requires the agency to provide prior notice of changes to working conditions and to allow the Union to negotiate over the impact of the change.

Certainly, to the extent EO 14168 requires what had previously been considered gender neutral bathrooms to be single sex bathrooms, the undersigned does not find a duty to bargain. Rather, Section 7 requires notice of the change and negotiation over any impacts it may have upon employees in the unit. It may be, as the Agency contends, that there is no impact. However, that is part of the negotiated process for the parties to discuss.

Likewise, in finding a violation, I make no finding that allows the Union to negotiate on behalf or on conditions affecting other employees. Rather, the Agency must comply with the requirement under the Agreement. Thus, to the extent that they disagree on what is covered, it can be adjusted through the proper process under the FLRA who will ultimately make decisions about what is a proper subject of bargaining.

Since the redesignation has already been made and the restrooms appear to comply with federal regulations and EO 14168, restoring the previous arrangement is not suitable in this case.

Therefore, based on the foregoing, I made the following

AWARD:

The Grievance is sustained in part and denied in part.

The Administration violated 7 of the parties' Agreement by failing to notify the Union of and opportunity to bargain regarding the redesignation of the bathrooms on the 10th floor.

The Agency is directed to provide the Union with notice of the change and opportunity to negotiate over the implementation procedures and arrangement for bargaining unit members affected by the change, in accordance with Article 7 of the parties' CBA.

Pursuant to Article 9, Section 10 of the CBA, the arbitration fees and expenses shall be borne equally by the parties, as the grievance was sustained in part but not in full.

The undersigned shall retain jurisdiction for 60 days from the date of this Award solely for purposes of the implementation of the remedy described herein.

Dated: September 8, 2025

Deborah M. Gaines

AFFIRMATION

State of New York }
County of New York}

I, Deborah M. Gaines, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Opinion and Award.

Deborah M. Gaines