

Proposed Rules

Federal Register

Vol. 85, No. 62

Tuesday, March 31, 2020

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

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 April 30, 2020.

ADDRESSES: You may send comments, which must include the caption “OPM (Petitioner), Case No. 0–PS–38,” by one of the following methods:

- *Email:* 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 3-30-20; 8:45 am]

BILLING CODE 6727-01-P

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 956

[Doc. No. AMS-SC-19-0115; SC20-956-1 PR]

Sweet Onions Grown in the Walla Walla Valley of Southeast Washington and Northeast Oregon; Increased Assessment Rate

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Proposed rule.

SUMMARY: This proposed rule would implement a recommendation from the Walla Walla Sweet Onion Marketing Committee (Committee) to increase the assessment rate established for the 2020 and subsequent fiscal periods. The proposed assessment rate would remain in effect indefinitely unless modified, suspended, or terminated.

DATES: Comments must be received by June 1, 2020.

ADDRESSES: Interested persons are invited to submit written comments concerning this proposed rule. Comments must be sent to the Docket Clerk, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence

Avenue SW, STOP 0237, Washington, DC 20250-0237; Fax: (202) 720-8938; or internet: <http://www.regulations.gov>.

Comments should reference the document number and the date and page number of this issue of the **Federal Register** and will be available for public inspection in the Office of the Docket Clerk during regular business hours, or can be viewed at:

<http://www.regulations.gov>. All comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the identity of the individuals or entities submitting the comments will be made public on the internet at the address provided above.

FOR FURTHER INFORMATION CONTACT: Dale Novotny, Marketing Specialist, or Gary Olson, Regional Director, Northwest Marketing Field Office, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA; Telephone: (503) 326-2724 or Email: DaleJ.Novotny@usda.gov or GaryD.Olson@usda.gov.

Small businesses may request information on complying with this regulation by contacting Richard Lower, Marketing Order and Agreement Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, Fax: (202) 720-8938, or Email: Richard.Lower@usda.gov.

SUPPLEMENTARY INFORMATION: This action, pursuant to 5 U.S.C. 553, proposes to amend regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This proposed rule is issued under Marketing Agreement and Order No. 956, as amended (7 CFR part 956), regulating the handling of sweet onions grown in the Walla Walla Valley of southeast Washington and northeast Oregon. Part 956 (referred to as the "Order") is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Committee locally administers the Order and is comprised of producers and handlers of Walla Walla sweet onions operating within the production area, and a public member.

The Department of Agriculture (USDA) is issuing this proposed rule in conformance with Executive Orders 13563 and 13175. This proposed rule falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review. Additionally, because this proposed rule does not meet the definition of a significant regulatory action, it does not

trigger the requirements contained in Executive Order 13771. See OMB's Memorandum titled "Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017, titled 'Reducing Regulation and Controlling Regulatory Costs'" (February 2, 2017).

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform. Under the Order now in effect, Walla Walla sweet onion handlers are subject to assessments. Funds to administer the Order are derived from such assessments. It is intended that the assessment rate would be applicable to all assessable Walla Walla sweet onions for the 2020 fiscal period and continue until amended, suspended, or terminated.

The Act provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. Such handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed no later than 20 days after the date of the entry of the ruling.

This proposed rule would increase the assessment rate from \$0.10 per 50-pound bag or equivalent of Walla Walla sweet onions handled, the rate that was established for the 2017 and subsequent fiscal periods, to \$0.15 per 50-pound bag or equivalent of Walla Walla sweet onions handled for the 2020 and subsequent fiscal periods.

The Order provides authority for the Committee, with the approval of USDA, to formulate an annual budget of expenses and collect assessments from handlers to administer the program. The members are familiar with the Committee's needs and with the costs of goods and services in their local area and are in a position to formulate an appropriate budget and assessment rate. The assessment rate is formulated and discussed in a public meeting. Thus, all directly affected persons have an opportunity to participate and provide input.

For the 2017 and subsequent fiscal periods, the Committee recommended, and USDA approved, an assessment rate