64 FLRA No. 63

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND
BORDER PROTECTION
WASHINGTON, D.C.
(Agency)

0-NG-2809
(62 FLRA 267 (2007))
(63 FLRA 309 (2009))

DECISION AND ORDER
ON MOTION FOR RECONSIDERATION

January 15, 2010

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This case is before the Authority on the Agency's motion for reconsideration of the Authority's decision in *NTEU*, 63 FLRA 309 (2009) (*NTEU II*). The Union did not file an opposition to the motion.

The Authority's Regulations permit a party that can establish extraordinary circumstances to request reconsideration of an Authority decision. 5 C.F.R. § 2429.17. For the following reasons, we find that the Agency has established that extraordinary circumstances exist warranting reconsideration of the Authority's decision in *NTEU II*, and we grant the motion for reconsideration. However, for the following reasons, we reaffirm our decision in *NTEU II* that the disputed portion of the Union's proposal, Proposal 6, is within the duty to bargain.

II. Decision in *NTEU II*

In *NTEU II*, the Authority, on a remand from the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit) in *NTEU v. FLRA*, 550 F.3d 1148 (D.C. Cir. 2008), determined, based on the record evidence, that a portion of Proposal 6 is an appropriate arrangement under §7106(b)(3) of the Federal Service Labor-Management Relations Statute (the Statute). [2] The disputed portion of Proposal 6 is intended to modify the Agency's grooming-standards policy by permitting officers to wear facial hair but requiring them to shave, to the extent necessary, if they are required to use a respirator or other safety device in the performance of their job duties.

Applying the framework set forth in *NAGE, Local R14-87*, 21 FLRA 24 (1986) (*KANG*), the Authority first determined that the Union met its burden of establishing that its proposal was intended to be an arrangement for employees adversely affected by the exercise of a management right. 63 FLRA at 311. Specifically, the Authority found that the Union met its burden under *KANG* to articulate an adverse effect on employees from the exercise of a management right, *i.e.*, interference with the freedom of employees to make personal grooming decisions. *Id.* The Authority also found that the Agency failed to respond to the Union's articulation of adverse effect and, thus, conceded it. *Id.* Moreover, the Authority found that the Agency did not meet its burden of supporting its argument that the proposal excessively interferes with its management right to determine internal security practices. *Id.* In this regard, the Authority considered e-mails submitted by the Union in support of its assertion that officers had not been provided with or required to use respirators. *Id.* at 310. The Authority found that the Agency neither submitted any evidence rebutting these e-mails nor specified any inaccuracies therein. *Id.* at 311.

III. Agency's Motion for Reconsideration

The Agency argues that the Authority erred because it: (a) decided the case without holding a hearing in order to obtain necessary information; (b) did not afford the Agency's evidence the same weight as the Union's evidence; (c) made its factual findings based on

1. Member Beck's dissenting opinion is set forth at the end of this decision.

2. Specifically, this portion of Proposal 6 ("Facial Hair") provides as follows:

> Beards and other facial hair shall be permitted except where there is a reasonable likelihood that an officer will need to use a respirator or other device in the performance of his job duties and the device requires a cleanly shaven face. The parties agree that for the overwhelming majority of [Agency] officers, there is not a reasonable likelihood that the officer will need to use such a device. Mustaches and beards will be neatly trimmed and groomed, clean, and will not be of excessive length, i.e., no longer than ½ inch to one inch in length.

NTEU II, 63 FLRA at 309.

an incomplete record containing "only unsworn and untested allegations"; and (d) did not evaluate whether the proposal affects the Agency's rights under § 7106(b)(1) of the Statute to determine the methods and means of performing work. [3] Motion for Reconsideration at 6; 13-14.

IV. Analysis and Conclusion

Section 2429.17 of the Authority's Regulations permits a party that can establish extraordinary circumstances to request reconsideration of an Authority decision. The Authority has emphasized that a party seeking reconsideration bears the heavy burden of establishing that extraordinary circumstances exist to justify this unusual action. *See, e.g., U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 56 FLRA 935 (2000). The Authority has identified a limited number of situations in which extraordinary circumstances have been found to exist. These include situations: (1) where an intervening court decision or change in the law affected dispositive issues; (2) where evidence, information, or issues crucial to the decision had not been presented to the Authority; (3) where the Authority erred in its remedial order, process, conclusion of law, or factual finding; and (4) where the moving party has not been given an opportunity to address an issue raised *sua sponte* by the Authority. *See U.S. Dep't of the Air Force, 375th Combat Support Group, Scott Air Force Base, Ill.*, 50 FLRA 84, 85-87 (1995) (*Scott AFB*).

The Agency correctly states that the Authority did not address, either in its original decision or on remand from the D.C. Circuit: (1) the Agency's argument that the proposal affects its right to determine the means of performing work; or (2) the issue of whether the proposal constitutes an appropriate arrangement for employees adversely affected by the exercise of that right. *See* Motion for Reconsideration at 5. The Agency also correctly states that it is necessary for the Authority to address these issues because if the proposal excessively interferes with the right to determine the means of performing work, it is outside the duty to bargain regardless of whether it is an appropriate arrangement for the exercise of management's right to assign work, as the authority found in *NTEU II*. *See id.* at 13; *see also NTEU*, 62 FLRA 321, 323-26 (2007) (Chairman Cabaniss dissenting) (after finding proposal was an appropriate arrangement for the right to determine internal security practices, Authority assessed whether the proposal was outside the duty to bargain because it affected the rights to determine technology, methods and means of performing work). Thus, the Agency has established that the Authority erred in its process and conclusions and that, as a result, extraordinary circumstances exist to warrant reconsideration of *NTEU II*. Accordingly, we address whether the proposal affects management's right to determine the means of performing work.

In deciding whether a proposal affects management's right to determine the means of performing work, the Authority first examines whether the proposal concerns a "means." *NTEU*, 62 FLRA 267, 273 (2007) (*NTEU I*). In this regard, the term "means" refers to "any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or furtherance of the performance of its work." *IFPTE, Local 49*, 52 FLRA 813, 818 (1996). Second, it must be shown that: (1) there is a direct and integral relationship between the means the agency has chosen and the accomplishment of the agency's mission; and (2) the proposal would directly interfere with the mission-related purpose for which the means was adopted. *NTEU I*, 62 FLRA at 273. Consistent with this framework, the Authority has held that an agency's determination that "uniformed officers must adhere to grooming standards to ensure that such officers are readily recognized" constitutes a determination regarding the means of performing work. *Id.* (quoting *U.S. DOJ, INS*, 31 FLRA 1123, 1136 (1988) (*DOJ*)).

However, not all proposals to modify an agency's determination regarding grooming standards affect the right to determine the means of performing work. In this regard, the D.C. Circuit and the Authority have determined that proposals providing grooming standards that vary from an agency's standards do not affect the right to determine the means of performing work if the proposals do not impede the public's recognition of an agency's uniformed officers. *See Dep't of HHS, Indian Health Serv., Okla. City v. FLRA*, 885 F.2d 911, 916-17 (D.C. Cir. 1989) (*DHHS*); *DOJ*, 31 FLRA at 1136. In *DHHS*, the court found that assessing whether a proposal affects that management right depends on "the degree of departure from agency policy implicit in [the] particular union proposal, the type of agency involved, and the agency's specific needs and requirements."

3. The Agency previously argued that the proposal affects its right to determine the *means* of performing work under § 7106(b)(1) of the Statute but raises the argument concerning the *methods* of performing work for the first time in its motion for reconsideration. *See* Agency Statement of Position (SOP) at 13; Agency Reply at 10. As the Agency could have raised the latter argument in the first instance, the argument is untimely and provides no basis for reconsideration. *See U.S. Dep't of HHS, Office of the Asst. Sec'y for Mgmt. & Budget, Office of Grant and Contract Fin. Mgmt., Div. of Audit Resolution*, 51 FLRA 982, 984 (1996) (citing *U.S. Dep't of HHS, SSA, Kan. City, Mo.*, 38 FLRA 1480, 1483-84 (1991)).

885 F.2d at 917. In particular, the court stated that proposals providing grooming standards that "differ in details from the methods and means adopted by that agency[,]" but that do not eliminate them or make them optional "are not beyond the scope of collective bargaining[.]" *Id*. at 916-17. As the court observed in another decision concerning the uniforms worn by prison guards, the appropriate inquiry is "whether a union counter-proposal permits the accomplishment of the agency's mission-related purpose while modifying some particulars of its policy." *AFGE, AFL-CIO, Local 2441 v. FLRA*, 864 F.2d 178, 187 (D.C. Cir. 1988) (*Local 2441 v. FLRA*).

The Agency states that its mission is "preventing terrorists and terrorists[']' weapons from entering the United States[.]" SOP at 7. This mission supports the Agency's decision to implement a grooming standards policy designed to ensure that its officers are readily identifiable to the public and effectively employ law enforcement techniques. *See id*. at 7-8. However, as discussed below, nothing in Proposal 6 is of such a "degree of departure" from the Agency's policy so as to affect the Agency's right to determine the means of performing work.

It is important to examine the wording of the proposal. Consistent with that wording, officers would not be permitted to wear facial hair when there is a "reasonable likelihood" that they would need to use a respirator or other device "in the performance of . . . job duties and the device requires a cleanly shaven face." *NTEU II*, 63 FLRA at 309. Thus, if the proposal were adopted, then the Agency would be permitted to direct an employee to shave on the ground that there was the requisite "reasonable likelihood." [4] As such, the proposal neither "completely eliminates" nor "makes optional" the Agency's grooming standards policy of not allowing facial hair in order to ensure that officers are able to employ such safety equipment effectively. *See DHHS*, 885 F.2d at 916-17; *AFGE, Local 2441 v. FLRA*, 864 F.2d at 184. In this regard, *DHHS* makes clear that where, as here, the proposal only "provid[es] for grooming standards which vary" from those adopted by the agency, the proposal does not "completely eliminate" the agency's policy and, thus, does not affect management's right. *DHHS*, 885 F.2d at 916-17.

As for the portion of the proposal providing that the "overwhelming majority of [Agency] officers" have no such reasonable likelihood, the Agency has not provided evidence — in response to evidence offered by the Union — establishing that the statement is inaccurate. *NTEU II*, 63 FLRA at 311. Moreover, the statement, even if inaccurate, does not require the Agency to take, or refrain from taking, any specific action. Thus, it does not affect management's right to determine the means of performing work. At most, if adopted, it creates an expectation regarding the numbers of employees who may be required to be clean shaven. [5]

Based on the foregoing, we conclude that the proposal does not affect the Agency's right to determine the means of performing work.

None of the remaining arguments in the Agency's motion provide a basis for reconsideration. In particular, the Authority did not err in declining to hold a hearing, as nothing in the Agency's motion or in the record raises a factual issue that needs to be resolved in order to determine the negotiability issues presented. [6] *See* 5 C.F.R. § 2424.31 (a hearing is appropriate "[w]hen necessary to resolve disputed issues of material fact"). As for the Agency's arguments that the Authority did not afford equal weight to the parties' evidence and based its decision on "unsworn and untested allegations," the Authority has held that such an assertion — challenging the Authority's weighing of evidence — is insufficient to satisfy the extraordinary circumstances required for reconsideration. *See Scott AFB*, 50 FLRA at 87.

V. Order

The disputed portion of Proposal 6 is within the duty to bargain, and the Agency shall, upon request, or as otherwise agreed to by the parties, negotiate with the Union over that disputed portion. [7]

4. An employee or the Union could, of course, grieve such direction – after the fact – on the ground that there was no requisite reasonable likelihood. However, that a proposal, if adopted, would be subject to arbitral review provides no basis for finding the proposal outside the duty to bargain. *See, e.g., U.S. DHS, U.S. Customs & Border Prot.*, 63 FLRA 505, 509 (2009); *AFGE, AFL-CIO, Dep't of Educ. Council of AFGE Locals*, 42 FLRA 1351, 1358 (1991).

5. Of course, we do not encourage parties to include wording in contracts that creates false impressions. However, this is a matter concerning the merits of the proposal that the parties should resolve either bilaterally or, if necessary, with the assistance of the Federal Service Impasses Panel. It is important to note, in this regard, that requiring negotiations over a proposal does not require agreement.

6. The Agency suggests that a hearing is necessary because certain safety considerations have arisen since this matter was first before the Authority. *See* Motion for Reconsideration at 10-12. These additional safety considerations can, and should, be addressed during negotiations between the parties.

7. In finding the disputed portion of the proposal to be within the duty to bargain, we make no judgments as to its merits.

Member Beck, Dissenting Opinion:

I disagree with my colleagues' determination that the Union's proposal is negotiable. I conclude that the proposal, read in its entirety, affects the means of performing work under 5 U.S.C. § 7106(b)(1) and is therefore negotiable only at the election of the Agency.

I disagree with the manner in which the Majority applies *Dep't of HHS, Indian Health Serv., Okla. City v. FLRA*, 885 F.2d 911 (D.C. Cir. 1989) (*DHHS*) to this proposal. The court in *DHHS* determined that we should consider "the degree of departure from agency policy" in balancing whether a proposal affects the right to determine the means of performing work. 885 F.2d at 917. In that case, the degree of departure from the agency's policy was quite limited. Here, in contrast, the Union's proposal is a significant departure from the Agency's policy and directly affects the Agency's means of performing work in support of its mission.

In *DHHS*, the court determined that a proposal is not negotiable if it effectively makes an agency requirement "optional." *DHHS*, 885 F.2d at 916. In that case, the agency's objective was two-fold: (1) to protect patients from secondary smoke and (2) to prevent patients and visitors from observing employees smoking. The court noted that the Union's proposals for the agency to provide well-ventilated rooms for employee smoke breaks (that preserved management's right to determine the number, size, and locations of the rooms as well as the length and frequency of the breaks) were, in fact, more effective in achieving the goal of preventing patients and visitors from seeing employees smoking than the agency's policy that required employees to smoke outside. *Id.* at 918. Accordingly, the court determined that the union's proposals did not affect the agency's means of performing work because the proposals did not make the agency's objectives "optional." Therefore, the court determined that the proposals were negotiable.

The circumstances of this case are different. Respirators are indisputably a "means of performing work" within the meaning of § 7106(b)(1). *IFPTE, Local 49*, 52 FLRA 813, 818 (1996) (means of performing work include any tool or device used by an agency in the performance of its work). The record demonstrates that Agency officers must sometimes use respirators in the course of performing their duties. In its original SOP, the Agency identified many duties that require the routine use of respirators — confined space entry training, confined space entry, narcotics seizures, and other emergency situations where the use of respirators saves officers' lives and the lives of others — to "ensure that all officers have the ability to perform the full range of duties assigned to them." *NTEU II*, 63 FLRA 309, 310 92009) (citing Agency SOP, at 13. *

The Union's proposal here can fairly be paraphrased as follows:

> Beards and other facial hair shall be permitted . . . for the overwhelming majority of [Agency] officers[.]

As a direct result, the Agency will be unable to require the "overwhelming majority" of its officers to use respirators because the equipment is not "effective" with facial hair. *Id.* (citing Statement of Position at 13 and Agency Reply at 10).

Consequently, the effect of the proposal is to make "optional" the use of respirators by telling the "overwhelming majority" of Agency officers that they will not be required to use respirators. By extension, the proposal also makes the "overwhelming majority" of Agency officers ineligible to perform any of the aforementioned duties for which respirators are needed.

In these circumstances, I must conclude that the Union's proposal affects the means of performing the Agency's work and is negotiable only at the election of the Agency. 5 U.S.C. § 7106(b)(1).

*. The Agency notes in its Motion for Reconsideration that, in the four years since the proposal was first raised, the use of respirator equipment has "significantly expanded" and it has fulfilled its respirator program goals to deploy respirators "to all CBP locations for use by employees in response to and in anticipation of further proliferation of the H1N1 virus." Motion for Reconsideration at 10-11.