

64 FLRA No. 185

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1345
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
ARMY MEDICAL DEPARTMENT AGENCY
ARMY DENTAL ACTIVITY
FORT CARSON, COLORADO
(Agency)

0-NG-3025

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

June 30, 2010

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

I. Statement of the Case

This case is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeal involves the negotiability of one proposal. The Agency filed a statement of position (SOP). The Union filed a response to the Agency's SOP (Response) and the Agency filed a reply to the Union's response (Reply).

For the reasons that follow, we find that the proposal is not within the duty to bargain.

II. Background

The Agency implemented a policy requiring all civilian health care providers who have direct contact with patients to be immunized annually against influenza (flu) as a condition of employment. SOP at 3. The policy provides exceptions for those who have documented medical or religious reasons for not wanting to be immunized. *Id.* The Agency claimed that this policy "will help to reduce potential outbreaks of influenza that could adversely affect

military preparedness and medical care." *Id.* In response, the Union offered a bargaining proposal that would allow employees to refrain from being immunized for personal reasons. The Agency rejected the proposal, claiming that it interferes with the Agency's management right to determine its internal security practices. The Union subsequently filed this petition for review.

III. Proposal and Meaning**A. Proposal**

An employee may refuse to participate in the Influenza Immunization Program due to medical, religious or personal reasons.

Record of Post-Petition Conference at 1.

B. Meaning of the Proposal

The parties agree that the proposal provides that employees who refuse to be immunized against influenza for personal reasons can opt out.¹

IV. Positions of the Parties**A. Union**

The Union claims that the proposal does not affect management's right to determine its internal security practices. *See* Response at 3-6, 10-15. In the alternative, the Union contends that the proposal is an appropriate arrangement for employees who are adversely affected by the exercise of this right. *Id.* at 4, 6, 8-9, 16.

The Union sets forth a number of reasons for arguing that the Agency does not establish a causal connection between the Agency's vaccination policy and its internal security goals. First, the Union claims that the Agency negotiated over the proposal

1. In its Response, the Union states that it intended to expand its proposal to include a provision whereby employees desiring to opt out of receiving a flu shot for personal reasons would utilize a "self-certification" procedure. Response at 4, 7, 16. However, the actual wording of the Union's proposal does not include such a procedure. Therefore, although the Authority generally adopts a union's explanation of the meaning of a proposal as long as it is not inconsistent with the proposal's plain meaning, *see, e.g., NATCA*, 64 FLRA 161, 162 (2009), in this instance, we cannot construe the proposal as including a "self-certification" procedure. In this regard, as the Union states, its intention was to propose such a procedure at some later date.

for only fifteen minutes and then left the table after invoking internal security. *Id.* at 6-7. Second, the Union contends that the Agency has always succeeded in fulfilling its mission during flu season, and that the current flu season is no different from any previous flu season. *Id.* at 9, 10. Third, the Union asserts that the Agency has not established that requiring all medical personnel to be vaccinated will prevent them from endangering patients and staff by spreading influenza. *Id.* at 10. In the Union's view, other unvaccinated people, such as military family members and other categories of hospital workers, could also spread the disease. *Id.* at 10-13. Fourth, the Union questions whether influenza vaccinations really decrease the spread of influenza, and notes that there has not been a "declared pandemic on any seasonal flu seasons that we are aware of!" *Id.* at 5.

The Union also argues that even if the Agency has established the requisite causal connection, the proposal is still negotiable as an appropriate arrangement. *Id.* at 3. The Union claims that employees will be benefitted because its intention is to establish a "self-certification" procedure to be followed by employees wishing to opt out of receiving an influenza vaccination. *Id.* at 4, 7, 16. Adverse impacts of the policy include, in the Union's view, denial of health care workers' right to determine the course of their own medical treatment, being forced to inject foreign substances into their bodies, and being exposed to the increased possibility of contracting the flu or experiencing flu-like symptoms. *Id.* at 4, 8, 9, 12.

B. Agency

The Agency claims that the proposal affects its management right to determine its internal security practices under 5 U.S.C. § 7106(a)(1). SOP at 3.

The Agency contends that a sufficient link exists between its vaccination policy and its internal security goals. Those goals include protecting the public, and its personnel, property, and operations from the effects of influenza. *Id.* at 4. Regarding protecting the public and its personnel, the Agency points out that the bargaining unit employees affected by the policy work in various medical clinics and provide direct patient care to active duty personnel and retirees, as well as their dependents. *Id.* at 2, 4. Because flu vaccinations are effective, *id.* at 4-6 & Reply at 4,² the policy therefore safeguards not only

its own health care personnel, but also the public. *Id.* at 2, 4. In addition, the Agency claims that the policy protects its operations by reducing the spread of the virus, which will in turn reduce employee absences and potential deaths among patients. *Id.* Furthermore, the Agency asserts that by helping keep soldiers and civilians involved in national security healthy, the policy helps protect national security. *Id.*

The Agency further claims that the proposal affects its management right to determine its internal security practices because the proposal conflicts with the Agency's vaccination policy. *Id.* at 9. The Agency notes that the proposal's opt out feature abrogates the Agency's mandatory vaccination requirement. *Id.* at 7. In addition, citing studies, the Agency argues that many employees would choose not to be immunized. *Id.*

The Agency also disputes the Union's claim that the proposal is an appropriate arrangement. Noting the Union's assertion that some employees could contract the flu or experience flu-like symptoms, the Agency argues that the proposal is not sufficiently tailored. Reply at 6. Even if some employees would experience symptoms and take leave, the Agency contends, the proposal would allow all employees to opt out for any personal reason even if that reason was unrelated to concerns about experiencing flu symptoms. *Id.*

V. Analysis and Conclusions

- A. The proposal affects management's right to determine its internal security practices.

Under § 7106(a)(1) of the Statute, the right to determine internal security practices includes an agency's right to determine the policies and practices that are necessary to safeguard its personnel, physical property, or operations against internal and external risks. *AFGE, Fed. Prison Council 33*, 51 FLRA 1112, 1115 (1996) (*AFGE-FPC 33*). Internal security practices may also include safeguarding the public. *See NTEU*, 59 FLRA 978, 981 (2004).

Where management shows a link or a reasonable connection between its objective of safeguarding its

protects patients from becoming infected through exposure to infected workers." SOP at 5. In addition, the Agency notes that the American College of Physicians found that "[h]ospitalized and other vulnerable patients can have prolonged hospitalizations, severe illnesses, and can die as a result of influenza transmission from [health care workers]." *Id.* at 4-6.

2. In support, the Agency cites the Centers for Disease Control and Prevention's statement that "[o]ptimal use of immunizing agents safeguards the health of workers and

personnel, physical property, or operations, or the public, and a policy or procedure designed to implement that objective, a proposal that “conflicts with” that policy or procedure affects management’s rights under § 7106(a)(1). AFGE-FPC 33, 51 FLRA at 1115. Once a link has been established, the Authority will not review the merits of an agency’s plan in the course of resolving a negotiability dispute. AFGE, Local 2143, 48 FLRA 41, 44 (1993).

The Agency has established the requisite link between its internal security objectives and its mandatory vaccination policy. The Agency has implemented its mandatory vaccination policy to prevent the occurrence and spread of influenza among its staff and those with whom its staff comes in contact. The Agency has determined that by vaccinating all health care personnel who have direct patient contact, it will reduce the frequency with which those individuals contract influenza. This in turn will reduce employee absences and the risk of transmission of the virus to patients, including military personnel.

The Agency’s policy is reasoned and supportable. Further, there is a clear and logical connection between immunization through vaccination and the Agency’s objective of safeguarding the public, and its personnel, property, and operations. For these reasons, the Agency has established a reasonable link between its mandatory vaccination policy and its internal security objectives.

The Union’s claims challenging the efficacy of the Agency’s vaccination policy do not require a different result. For example, the Union questions whether vaccinations would prevent the spread of influenza or would interfere with the Agency’s performance of its work. As indicated above, the Authority does not review the merits of an agency’s plan once a reasonable link has been established between an agency’s policy and its internal security objectives. AFGE-FPC 33, 51 FLRA at 1115. Therefore, the Union’s claims, addressing the merits of the Agency’s vaccination policy, are not apposite.

Finally, it is undisputed that the Union’s proposal conflicts with the Agency’s mandatory vaccination policy by making the policy optional for all affected employees. Therefore, we find that the proposal affects management’s right to determine its internal security practices under § 7106(a)(1) of the Statute.

B. The proposal is not an appropriate arrangement under § 7106(b)(3) of the Statute.

A proposal that affects management rights under § 7106(a) of the Statute is nevertheless negotiable if it constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute. A proposal constitutes an appropriate arrangement if it is: (1) intended as an arrangement for employees adversely affected by the exercise of a management right; and (2) appropriate because it does not excessively interfere with the exercise of management rights. NAGE, Local R14-87, 21 FLRA 24, 31 (1986) (KANG). The Authority determines whether a proposal excessively interferes with the exercise of a management right by weighing the benefits afforded employees under the proposed arrangement against the burden on the exercise of the right. *NTEU*, 59 FLRA at 981.

As argued by the Union, the proposal affords unit employees a number of benefits. With respect to influenza vaccinations, the proposal would reinforce employees’ right to make decisions regarding their health and determine which invasive medical procedures they will subject their bodies to. *See* Response at 8-9. In addition, by providing employees with the right to opt out of the Agency’s mandatory vaccination program, employees would be able to eliminate any risk of an adverse reaction to a flu shot, such as contracting influenza or experiencing flu-like symptoms. *See id.* at 4.

However, the extent and character of these benefits is uncertain. The Agency’s policy already provides an “opt out” opportunity for employees with medical or religious objections. The Union does not supply any information concerning the proportion or number of employees not covered by these exclusions who might opt out for other unspecified personal reasons. Furthermore, the record does not disclose any information regarding the process employees would use to opt out or how (or whether) frivolous employee claims would be screened out.³

3. As stated earlier, the Union claims that, although not part of this proposal, it envisions using a “self-certification” process. However, the Union does not provide any details regarding how this process would work. In its Response, the Union makes a passing reference to self-certification being “[d]eniable by the Agency” in the sick leave context, but again, the Union fails to provide any explanation of how the sick leave self-certification process works or how (or even if) it envisions adapting this process for use in the flu shot context. Response at 16.

In these circumstances, the weight attributable to the proposal's benefits is diminished to the extent that the benefits are vague and generalized, rather than clearly and precisely substantiated.

The proposal's burden on the exercise of management's internal security right is significant. The proposal would prevent the Agency from implementing a plan to deal with the risk of serious harm to its staff and patients as a result of the influenza virus. The Agency's plan is specific and targeted, applying to health care workers with direct patient care responsibilities. That the proposal affects actions at a health care facility only reinforces the significance of the proposal's burden on management's rights. Similarly significant are the studies the Agency cites regarding the benefits of immunization of health care workers for both the patients and the workers. *Id.* at 4-6; Reply at 4.

In these circumstances, the proposal's burden on the Agency's exercise of its management right to determine its internal security practices outweighs the proposal's uncertain benefit to employees. Accordingly, the proposal excessively interferes with management's right to determine its internal security, and is not an appropriate arrangement. *Cf. NAGE, Fed. Union of Scientists & Eng'rs, Local R1-144*, 42 FLRA 730, 737 (1991) (in finding that a union proposal to ameliorate effect of mandatory drug testing was unduly burdensome, the Authority "recognize[ed] that employees' personal convictions are important to them[.]" but found that, "if management were required, without exception, to accommodate employees' personal beliefs in determining assignments to positions, the effective and efficient operation of the Agency could be severely handicapped").

VI. Order

The petition for review is dismissed.