

65 FLRA No. 35

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS 33
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
(Agency)

0-NG-3026

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

September 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), and concerns the negotiability of one proposal. The Agency filed a statement of position (SOP), to which the Union filed a response. The Agency filed a reply to the Union's response.

For the reasons that follow, we find that the proposal is negotiable.

II. Background

The Agency proposed procedures for providing stab-resistant vests to correctional officers. *See* Record of Post-Petition Conference (Record) at 2. The Union sought, and the parties agreed to, post-implementation bargaining. *Id.* The Union filed a petition for review (petition) regarding the proposals on which the parties could not agree. The petition was placed in abeyance while the parties utilized the Authority's Collaboration and Alternative Dispute Resolution (CADR) Program. Agency's Reply at 1. Through the assistance of CADR, the parties entered into a memorandum of understanding (MOU), which

provided, among other things, that: (1) the Agency will provide a stab-resistant vest to any correctional officer who requests one; (2) a correctional officer who requests a vest must wear it while on duty; and (3) after a six-month trial period, employees may be subject to discipline for failing to wear their vests while on duty. SOP at 10 n.1, Attach. A. The parties, however, failed to reach agreement on the proposal set forth below. Record at 2.

III. The Proposal

It is understood by the parties that the fitted "Stab-Resistant Vest" is safety equipment. The Agency will maintain the employee's fitted vest in a secure area to be issued if the employee requests a vest. The fitted vest will be issued by the Agency to the employee in accordance with the Master Agreement, Article 28, Section (b). The cleaning of the vests will be negotiated locally.

Record at 2.¹

IV. Meaning of the Proposal

The parties agree that the proposal seeks to require the Agency to: (1) consider the stab-resistant vests as safety equipment; (2) maintain the vests in a secure area for issuance to employees if they request them; (3) issue the vests in accordance with Article 28, Section (b) of the parties' Master Agreement; and (4) negotiate locally the cleaning of the vests. Record at 2.

In addition, the Agency asserts that the proposal is also intended to prevent management from

1. Article 28, Section (b) provides that:

The Employer will ensure that adequate supplies of security and safety equipment are available for issue to and/or use by employees during the routine performance of their duties. This includes, but is not limited to, whistles, key chains, key clips, belts for equipment, disposable resuscitation masks and rubber gloves, handcuffs, two-way radios, body alarms, flashlights, hand-held metal detectors, weapons, ammunition, etc. Cases or holders, whichever is appropriate, to carry such equipment will also be available for these particular items of equipment normally using such cases or holders. Employees receiving such items will be accountable for them until they are returned to the Employer.

Union's Response, Attach. 1 at 1-2.

disciplining employees who do not wear their stab-resistant vests. SOP at 10-11 (citing Record at 3). The Agency's support for such an assertion arises solely from a statement that the Record attributes to the Union that the proposal is intended "to prevent employees from being disciplined for not wearing the vest or forgetting to bring it to work from home." Record at 3. However, the Union, in its Response, expressly notes that it does not concur with this statement in the Record. According to the Union, the proposal is not intended to preempt the disciplinary provisions in the parties' MOU, but instead is intended to reduce the risk of disciplinary action by ensuring that employees would be able to store their vests at the work site. Union's Response (Response) at 5.

When parties dispute the meaning of a proposal, the Authority will examine the wording of the proposal as well as the union's statement of intent to determine the meaning of the proposal. If the union's statement of intent comports with the plain words of the proposal, then the Authority will adopt the union's interpretation of the proposal for the purpose of construing what the proposal means and, based on its meaning, deciding whether it is consistent with law. See *AFGE, Local 1917*, 55 FLRA 228, 234 (1999) (citing *AFGE, Local 1900*, 51 FLRA 133, 138-39 (1995)).

The proposal's plain wording does not prevent the Agency from disciplining employees who fail to wear their vests. Because the Union's statement of intent comports with the plain wording of the proposal, we adopt the Union's interpretation. See *AFGE, Local 12*, 60 FLRA 533, 537 (2004).

V. Positions of the Parties

A. Agency's SOP

The Agency asserts that the proposal violates management's right to determine its internal security practices under § 7106(a)(1) of the Statute. See SOP at 4-5. The Agency contends that the proposal, by its plain meaning, would require the Agency to maintain an employee's stab-resistant vest -- which is specifically fitted and provided to each employee who requests one -- in a secure area of the prison when the employee is not on duty. *Id.* According to the Agency, "[d]etermining what items will be kept in a secure area and who will have access to the secure area" is inherently an internal security decision. *Id.* at 6. The Agency notes that the Authority has held that the need to control access to an agency's facilities or areas in its facilities is

encompassed by management's right to determine its internal security practices. *Id.* at 6 (citing *Patent Office Prof'l Ass'n*, 41 FLRA 795, 837 (1991)). The Agency also notes that both the Supreme Court and the Authority have recognized that federal correctional institutions have more significant security concerns than other work environments and that, therefore, prison administrators are entitled to greater deference on the issue of internal security. SOP at 4-5.

The Agency argues that storing the stab-resistant vests in the secure area would impose the following burdens: (1) it would require more people to have access to the area to facilitate the collection, storage and distribution of the vests; (2) if every officer of the hundreds of officers at most correctional institutions requested a stab-resistant vest, then the institutions would not have the capacity to store those vests for each off-duty officer; and (3) because stab-resistant vests are worn under an employee's uniform, the Agency would be required to set up an area in the secure area where employees could remove their uniforms and don their vests and would have to account for this time in scheduling. *Id.* at 6-8.

The Agency disagrees with the Union's contention that stab-resistant vests should be treated in the same manner as bullet-proof vests in Article 28, Sections (b) and (d) of the parties' agreement. *Id.* at 7.² The Agency explains that, while bullet-proof vests are situational, given to relatively few employees, returned at the end of a shift and shared among officers, a stab-resistant vest is given to and fitted for each individual employee who requests one, and the employee is required to wear it at all times on any post to which he or she is assigned. *Id.* at 7-8. Therefore, according to the Agency, while it is necessary for the Agency to maintain bullet-proof vests, it is impractical to maintain each individual's stab-resistant vest. *Id.* Moreover, the Agency contends that the proposal's requirement that stab-

2. Article 28, Section (d) of the parties' agreement provides that:

On armed posts, if the wearing of a bullet-proof vest is mandated or requested, there will be a sufficient supply of such vests provided by the Employer. The Employer will ensure that adequate numbers and sizes of such vests are available, including vests sized for female employees. The cleaning of these vests may be negotiated locally.

Union's Response, Attach. 1 at 2.

resistant vests be issued in accordance with Article 28, Section (b) means only that the Agency ensure that an adequate supply of equipment is available for issue and use, not that the Agency maintain all of the equipment. *Id.* at 9.

In addition, the Agency argues that the proposal is not an appropriate arrangement. *Id.* at 12. The Agency contends that, because the Union fails to address how the proposal is sufficiently tailored to specific, identified adverse effects on bargaining unit employees, the Union fails to assert that the proposal is an appropriate arrangement. *Id.* The Agency also argues that the Union fails to explain how the benefits of the proposal outweigh the broad, significant constraints the proposal places on the Agency's ability to determine its own internal security practices. *Id.* at 12 (citing *NTEU*, 53 FLRA 539, 541-42 (1997) (where a union offers no argument or authority to support a bare assertion that a provision is within the duty to bargain, the Authority will not consider such an assertion)).

The Agency also argues that the proposal violates management's right to discipline its employees because it is intended to prevent management from disciplining employees who do not wear their stab-resistant vests. *Id.* at 10-11 (citing Record at 3). According to the Agency, the Authority has held that provisions preventing management from disciplining employees for specified conduct are contrary to § 7106(a)(2)(A) of the Statute. *Id.* at 11 (citing *AFGE, Local 1345*, 48 FLRA 168, 202 (1993)). The Agency further alleges that this intended purpose also violates the MOU, in which the parties agreed that employees could be disciplined for failing to wear their vests. *Id.* at 11, Attach. A.

B. Union's Response

The Union contends that the proposal does not affect management's right to determine its internal security practices and that the cases cited by the Agency in support of its contention are inapposite. Union's Response (Response) at 1-4. The Union also argues that the Agency does not adequately explain how the storage of stab-resistant vests in a secure area differs from the storage of bullet-proof vests in accordance with Article 28, Section (d) of the parties' agreement. *Id.* at 4.

The Union next argues that the proposal is an appropriate arrangement that mitigates the adverse effects on employees flowing from management's practice of not only issuing stab-resistant vests to

employees who request them, but also conditioning the issuance on mandatory daily use subject to discipline for noncompliance. *Id.* at 6-7. The Union identifies the adverse effects of the Agency's procedure as: (1) placing a great burden on employees to wear or carry the vest to work each day or face discipline such that employees could become discouraged from use and retention of the vest even though use of the vest would protect them from "clear and demonstrable dangers"; (2) creating a potential danger for a corrections officer who may be seen displaying the vest outside the corrections facility; (3) creating the risk of the vests being stolen; (4) creating an unnecessary possibility or likelihood of being disciplined for neglecting to bring the vest to work on a particular day; (5) creating the risk of exposing the employee to heat exhaustion or irritations associated with wearing the vest to and from work on hot and humid days; and (6) burdening the employee in a non-paid status with the cleaning and maintenance of the vest. *Id.* at 7-8.

The Union argues that the proposal at issue is similar to other proposals involving internal security that the Authority has determined to be negotiable. *Id.* at 9-12 (citations omitted). Moreover, the Union asserts that the storage of stab-resistant vests in secured areas when bullet-proof vests are already stored in those areas would be less of a burden and imposition on the Agency than the storage of weapons determined to be negotiable in other Authority cases. *Id.* at 8-12 (citing *NTEU*, 62 FLRA 321 (2007)).

In addition, the Union asserts that the Agency fails to argue that the portion of the proposal providing that "cleaning of the stab-resistant vests [will] be bargained locally" is not negotiable. *Id.* at 13. According to the Union, the Agency's assertion that bullet-proof vests are situational, whereas stab-resistant vests are not, is immaterial to the negotiability of the proposal regarding the storage and cleaning of the vests. *Id.* In addition, the Union alleges that the already existing procedure outlined in Article 28, Section (b) of the parties' agreement has not been shown to affect the authority of the Agency to determine its internal security practices. *Id.*

Regarding the right to discipline, as stated previously, the Union disagrees with the statement on page 3 of the Record that "[t]he Union explained that the proposal is intended to *prevent* employees from being disciplined" Response at 5 (quoting Record at 3) (emphasis added). The Union explains that the proposal is not intended to preempt the disciplinary provisions in the MOU. Instead, the

Union explains, the proposal is intended to “reduce the risk of disciplinary action.” *Id.*

C. Agency’s Reply

In reply to the Union’s Response, the Agency contends that, even if the proposal constitutes an arrangement, it does not constitute an appropriate arrangement because it excessively interferes with management’s rights. Agency’s Reply (Reply) at 4. The Agency argues that the burdens on employees that the proposal is designed to address -- having to remember to wear the vest each day or having to wear it on hot days -- are minimal compared with the burden that the proposal would impose on the Agency. In this regard, the Agency asserts that its correctional institutions, each of which employs as many as 500-600 correctional officers, do not have the capability to store as many stab-resistant vests as the proposal would require. *Id.* at 6. The Agency alleges that the proposal, which would apply to every bargaining unit employee who requests such a vest, is not sufficiently tailored to mitigate the adverse effects that employees might experience. *Id.* at 7. According to the Agency, it has already addressed the potential adverse effects by not making use of the vests mandatory. *Id.* at 7-8.

VI. Preliminary Matter

The Union requests a hearing to resolve certain issues in this case. Record at 3, Petition at 5. Under 5 C.F.R. § 2424.31 of the Authority’s Regulations, a hearing is appropriate “[w]hen necessary to resolve disputed issues of material fact” Here, the Union has not set forth any disputed issues of material fact for the Authority to consider at a hearing. Therefore, we deny the Union’s request for a hearing. See *NFFE, Local 1998, IAMAW, Fed. Dist. 1*, 60 FLRA 141, 143 (2004); *Prof’l Airways Sys. Specialists*, 59 FLRA 25, 25 n.2 (2003).

VII. Analysis and Conclusions

A. The proposal does not affect management’s right to discipline employees.

Management’s right to discipline employees under § 7106(a)(2)(A) of the Statute extends to both performance-related and nonperformance-related conduct. See *AFGE, Local 1709*, 56 FLRA 549, 553 (2000). Proposals that preclude management from taking disciplinary action against employees for a particular offense affect management’s right to discipline under § 7106(a)(2)(A) of the Statute. See, e.g., *AFGE, Local 1692*, 40 FLRA 868, 873 (1991);

Int’l Org. of Masters, Mates, & Pilots, Panama Canal Pilots Branch, 32 FLRA 269, 275 (1988).

Although the Authority has held that provisions preventing management from disciplining employees for specified conduct are contrary to § 7106(a)(2)(A) of the Statute, the plain language of the proposal contains no restrictions on management’s right to take disciplinary actions against employees. SOP at 11 (citing *AFGE, Local 1345*, 48 FLRA 168, 202 (1993)). As previously noted, the proposal is intended only to reduce the likelihood that an employee will fail to wear the vest at work, not to restrict management’s right to take disciplinary action when such action occurs.³ Accordingly, we find that the proposal does not affect management’s right to discipline employees.

B. Assuming the proposal affects management’s right to determine its internal security practices, the proposal is an appropriate arrangement.

The right to determine internal security practices includes the authority to determine the policies and practices that are part of an agency’s plan to secure or safeguard its personnel, physical property or operations against internal and external risks. *AFGE, Fed. Prison Council 33*, 51 FLRA 1112, 1115 (1996) (*AFGE, FPC*). Furthermore, a federal correctional facility has special security concerns that may not be present at other work locations. See *AFGE, AFL-CIO, Local 683*, 30 FLRA 497, 500 (1987) (citing *AFGE, AFL-CIO, Council of Prison Locals, Local 1661*, 29 FLRA 990 (1987)).

For purposes of this decision, we assume without deciding that the proposal affects management’s right to determine its internal security practices within the meaning of § 7106(a)(1) of the Statute, and, for the following reasons, we conclude that it is within the duty to bargain as an appropriate arrangement under § 7106(b)(3).

3. To the extent that the Agency asserts that the proposal violates the parties’ MOU because the proposal is intended to prevent employees from being disciplined for failing to wear their vests, such argument is without merit. For the reasons stated above, the proposal is not intended to prevent management from disciplining employees for failing to wear their vests, but rather, to reduce the risk of disciplinary action against employees for such failure.

i. The proposal is an arrangement.

In determining whether a proposal or provision constitutes an appropriate arrangement within the meaning of § 7106(b)(3), the Authority applies the analytical framework articulated in *NAGE, Local RI4-87*, 21 FLRA 24, (1986) (*KANG*). Under this framework, the Authority initially determines whether the proposal is intended to be an “arrangement” for employees adversely affected by the exercise of a management right. *See id.* at 33. In this regard, the Authority considers whether the proposal is “tailored” to compensate or benefit employees who are adversely affected by the exercise of a management right. *See, e.g., AFGE, Local 1687*, 52 FLRA 521, 523 (1996).

The Authority has held that proposals “intended to eliminate the possibility of an adverse effect, may constitute appropriate arrangements negotiable under [§] 7106(b)(3)[.]” *NTEU, Chapter 243*, 49 FLRA 176, 191 (1994). In particular, such “prophylactic” proposals will be found sufficiently tailored in situations where it is not possible to determine reliably which employees will be adversely affected by an agency action so as to draft a proposal to apply only to those employees. *Id.* An arrangement need not “target in advance the very individual employees who will be adversely affected.” *U.S. Dep’t of the Interior, Minerals Mgmt. Serv. v. FLRA*, 969 F.2d 1158, 1163 (D.C. Cir. 1992).

The Union identifies the adverse effects of the Agency’s procedure as: (1) placing a great burden on employees to wear or carry the vest to work each day or face discipline such that employees could become discouraged from use and retention of the vest even though use of the vest would protect them from “clear and demonstrable dangers”; (2) creating a potential danger for a corrections officer who may be seen displaying the vest outside the corrections facility; (3) creating the risk of the vests being stolen; (4) creating and unnecessary possibility or likelihood of being disciplined for neglecting to bring the vest to work on a particular day; (5) creating the risk of exposing the employee to heat exhaustion or irritations associated with wearing the vest to and from work on hot and humid days; and (6) burdening the employee in a non-paid status with the cleaning and maintenance of the vest. Response at 7-8. The instant proposal is prophylactic in that it would eliminate the possibility that any of these adverse effects would occur. Moreover, the proposal is tailored to the extent possible. The proposal only applies to those bargaining unit employee who request a stab-resistant vest -- i.e., the very

employees who would suffer the adverse effects of the Agency’s practice. In this regard, the fact that employees are not required to wear stab-resistant vests does not, as the Agency argues, eliminate the adverse effects on those employees who request such vests; that fact merely precludes adverse effects on those employees who do not request a stab-resistant vest.

Therefore, we conclude that this proposal is sufficiently tailored and that the proposal is an arrangement. *See, e.g., AFGE, Local 171*, 64 FLRA 275, 277 (2009) (proposal applying only to those employees who are affected by the management right to determine internal security practice is an arrangement); *AFGE, Local 1770*, 64 FLRA 953, 959 (2010) (proposal applying to mitigate the adverse effects flowing from the exercise of management’s right is an arrangement).

ii. The arrangement is appropriate.

If the proposal is an arrangement, then the Authority determines whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes with management’s rights. *See KANG*, 21 FLRA at 31. In making this determination, the Authority balances the proposal’s benefits to employees against its burdens on management. *AFGE, Local 171*, 64 FLRA at 277.

The Union asserts that the proposal would benefit employees by relieving them of the burdens of wearing or carrying the vests to work each day and cleaning and maintaining the vests. According to the Union, the proposal also would benefit employees by reducing: (1) the potential dangers to correctional officers who may be seen wearing the vests outside the facility; (2) the possibility of employees being disciplined for failing to wear the vests; (3) the possibility of the vests being stolen; and (4) employees’ exposure to heat exhaustion or other irritations from wearing the vests on hot or humid days. Response at 6-8.

The Agency contends that the proposal would affect its internal security because it would have to provide access to the secure area for each officer who requests a vest and for additional individuals to facilitate the collection, storage and distribution of the vests. SOP at 6. However, the proposal does not state that employees who receive the vests must be granted access to the secure area where the vests would be stored, or provide any indication as to how many (if any) additional employees would need access to such areas in order to collect, store and

distribute the vests. Moreover, the Agency does not provide any basis for finding that the fact that stab-resistant vests are different from bullet-proof vests affects its internal security practice regarding access to storage areas.

The Agency also contends that no institution currently has the capability to store the number of vests that may be issued to correctional officers. Reply at 6-7. However, the Agency fails to provide sufficient information to support this assertion. Although the Agency has provided the number of employees at its facilities, it has failed to provide any evidence regarding the number of employees who have requested vests since the implementation of the plan -- i.e., the number of employees to whom the proposal would likely apply. The Agency also fails to support its assertion that the proposal would require the Agency to create a changing area in an area that is secure, as opposed to some other area.

In weighing the benefits to employees against the burdens placed upon the Agency's right to determine its internal security practices, the record establishes that the proposal would benefit employees. In contrast, the Agency has failed to support its claims that the proposal would significantly burden the Agency's right to determine its internal security practices. As such, we find that the proposal's benefits to employees outweigh its burdens on management's right to determine its internal security practices. *See, e.g., NTEU*, 62 FLRA 321 (benefits of proposal outweigh the burdens placed on management where Agency fails to establish that the proposal constitutes a significant burden on its right to determine internal security practices).

Accordingly, we find that the proposal is within the duty to bargain as an appropriate arrangement under § 7106(b)(3) of the Statute.

VIII. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, negotiate over the proposal.⁴

4. In finding the proposal to be within the duty to bargain, we make no judgment as to its merits.