64 FLRA No. 23

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Union)

and

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Agency)

0-NG-2864

DECISION AND ORDER
ON NEGOTIABLITY ISSUES

September 30, 2009

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 part 2424 of the Authority's Regulations, and concerns the negotiability of a proposal consisting of three sections. The Agency filed a statement of position, and the Union filed a response to the Agency's statement of position.

For the reasons that follow, we find that Section 12 of the proposal is within the duty to bargain and that Sections 8 and 13 of the proposal are outside the duty to bargain.

II. Proposal

> Section 8. Radios, television sets, appropriate magazines/publications, pagers/cell phones, and electronic devices will be permitted in designated non-work areas at all facilities for use at non-work times. Pagers/Cell Phones may be set on a non-audible position within work areas but their actual use in those work areas is not permitted.
>
> In facilities where pagers/cell phones interfere with NAS communications equipment due to close proximity, all such equipment shall be set in the off position when in the immediate vicinity of the operational position(s).[1]
>
> Section 12. Employees covered by this Agreement shall not have their reassignment unreasonably delayed pending employee records/files (medical, security, OPF/EPF, or other DOT/FAA files) review and/or transfer.
>
> Section 13. Employees covered by this Agreement shall not have their reassignment denied solely as a result of inter-service area budgetary constraints.

III. Meaning of the Proposal [2]

The parties agree that the disputed wording in Section 8 has the following meaning and operation: Under Section 8, employees would be permitted to carry, in work areas, pagers and cellular phones that are turned on but set to non-audible positions (either vibration or silence). Record of Post-Petition Conference (Record) at 1. Management would retain the rights to: (1) determine which electronic devices affect equipment; (2) determine which types of equipment are affected; (3) direct that an electronic device be turned off when management has determined that it affects equipment; and (4) determine the meaning of "close proximity" for purposes of ascertaining how far away from equipment an employee must be before the employee could turn on an electronic device. *Id.* at 1-2. The term "operational position(s)" refers to the location where employees are working and are using headsets; this may differ from facility to facility because of the variety of equipment in use. *Id.* at 2. As there is no dispute over the meaning of Section 8, we will adopt this meaning for purposes of our analysis. *See NATCA*, 62 FLRA 337, 338 (2008).

With respect to Section 12, the parties agree that the section would have the following meaning and operation: Section 12 would preclude management from unreasonably delaying employee reassignments from one region to another based solely on the failure to transfer and/or review the files listed in the proposal. *Id.* at 2. In this connection, "OPF" means "official personnel file," and "EPF" means a locally maintained "employee personnel file." *Id.* Under Section 12, if an employee or the Union believed that a reassignment was being delayed unreasonably, then the issue could be resolved in arbitration, and an arbitrator could direct that the employee be reassigned. *Id.*

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1. Only the underlined portion of Section 8 is in dispute.

2. The meaning we adopt for the proposal would apply in other proceedings, unless modified by the parties through subsequent agreement. *See AFGE, Local 1164*, 60 FLRA 785, 786 n.3 (2005).

Also with respect to Section 12, the parties agree that management would retain the right to determine the qualifications needed for reassignment. *Id.* However, the Agency asserts that there would be an exception under which management could be required to reassign an employee before determining whether the employee's medical and security qualifications warrant such a reassignment. *Id.* In response, the Union asserts that the term "unreasonable delay" is not intended to include situations where management has not yet had the opportunity to determine whether security reasons preclude a reassignment, and that Section 12 would not preclude the reassignment of employees before their medical files have been transferred and/or reviewed. *Id.* In addition, the Agency contends, and the Union denies, that Section 12 would apply even if management has decided not to fill a vacancy, and would require it to fill a position through reassignment even if it has decided not to fill through reassignment. *Id.* As the Union's explanation of the meaning is not inconsistent with the plain wording of Section 12, we adopt it for purposes of determining Section 12's negotiability. *See, e.g., NATCA*, 62 FLRA at 338 (where parties disputed meaning of proposal, Authority adopted union's interpretation because it was consistent with proposal's plain wording).

With regard to Section 13, there is no dispute that it would operate as follows: After management has decided to reassign an employee from one region to another, it could not decline to reassign the employee based solely on the budget of one of the regions. Report at 2. For example, if the region to which an employee is to be reassigned has insufficient funds to pay the employee, then the Agency would be required to transfer funds from the budget of the employee's original region to the region to which the employee is reassigned. *Id.* at 2-3. As there is no dispute over the meaning of Section 8, we will adopt this meaning for purposes of our analysis. *See NATCA*, 62 FLRA at 338.

IV. Preliminary Matter

The Union requests that the Authority sever and consider separately the three sections of the proposal, and that the Authority also sever the first sentence of Section 8 from the remainder of Section 8. The Agency opposes severance of Section 12 from Section 13 because, according to the Agency, those sections are interrelated in purpose and operation.

Under § 2424.22(c) of the Authority's Regulations, a union must support its severance request with "an explanation of how each severed portion of the proposal . . . may stand alone, and how such severed portion would operate." *See, e.g., Tidewater Va. Fed. Employees Metal Trades Council*, 58 FLRA 561, 562 (2003). If the severance request meets the Authority's regulatory requirements, then the Authority severs the proposal and rules on the negotiability of its separate components. *AFGE, Local 3354*, 54 FLRA 807, 811 (1998). Generally, the Authority will grant a severance request if the request provides an explanation of how each severed portion may stand alone and operate independently. *See NATCA*, 61 FLRA 341, 343 (2005).

The Union has demonstrated that the individual sections of the proposal can stand alone and operate independently. Accordingly, we grant the Union's request to sever the sections of the proposal, and the first sentence of Section 8 from the rest of that section. *See id.*

V. Section 8

A. Positions of the Parties

1. Union

The Union contends that Section 8 does not affect the Agency's broad discretion to determine what electronic devices are banned from work areas. In this regard, the Union asserts that Section 8 merely allows the use of pagers and cell phones, in a non-audible position, when the Agency has determined that they do not pose a threat to the Agency's equipment. Union Response (Response) at 2. Additionally, the Union argues that Section 8 constitutes an appropriate arrangement. In this connection, the Union asserts that the proposal does not excessively interfere with management's right to determine internal security practices because it: (1) benefits employees by allowing them to have a record of who has called them, while not being intrusive; (2) allows the use of electronic devices only where management has determined that they do not interfere with the Agency's equipment; and (3) does not preclude management from disciplining an employee who uses a cell phone or pager while in a work area. *Id.* at 3-4.

2. Agency

The Agency contends that Section 8 conflicts with its right to determine internal security practices under § 7106(a)(1) of the Statute. Agency Statement of Position (SOP) at 3. The Agency maintains that its mission of controlling air traffic requires a workplace free from devices that could interfere with the Agency's communication with the aircraft and that could distract employees from their duties. According to the Agency, wireless devices can cause audio interference to air traffic controller headsets, thereby possibly seriously affecting

radio frequency transmissions, and they also can interfere with the air traffic control communication systems that are used to sequence and separate aircraft. Further, the Agency argues that permitting air traffic controllers to carry such devices while on duty would preclude the Agency from ensuring that controllers will be able to concentrate on the mission-critical job of separating aircraft without being distracted by personal matters. *Id.* at 3-4. Finally, the Agency contends that the proposal does not constitute an appropriate arrangement. *Id.* at 4-5.

B. Analysis and Conclusions

1. The proposal affects management's right to determine internal security practices.

The right to determine internal security practices under § 7106(a)(1) of the Statute includes the right to determine the policies and practices that are a part of an agency's plan to secure or safeguard its personnel, physical property, or operations against internal or external risks. *See, e.g., AFGE, Local 1920*, 47 FLRA 340, 348 (1993) (*Local 1920*). Where an agency shows a link, or reasonable connection, between its objectives of securing or safeguarding its personnel, property, or operations and the policy or practice designed to implement that objective, a proposal that conflicts with the policy or practice affects management's internal security rights under § 7106(a)(1) of the Statute. *See, e.g., NTEU*, 55 FLRA 1174, 1186 (1999). Upon finding such a link, the Authority "will not examine the extent to which the practices adopted by management to achieve its security objectives actually facilitate the accomplishment of those objectives." *AFSCME, Locals 2910 & 2477*, 49 FLRA 834, 839 (1993).

We find that the Agency has established a reasonable link between its objectives of securing or safeguarding its personnel, property, or operations and its practice of prohibiting employees from carrying wireless communication devices while on duty in operational areas. Specifically, we find that the Agency has established that prohibiting employees from carrying and using such devices in operational areas may prevent those devices from disrupting air traffic communications, and may decrease the risk that the air traffic controllers will be distracted from their duties in handling the safe and efficient sequencing and separation of aircraft. *See, e.g., AFGE, Local 1030*, 57 FLRA 901, 902 (2002) (proposals permitting guards to use outside shelters equipped with various amenities affected right to determine its internal security practices by increasing risk that guards would be distracted from their duties). As such, the proposal affects management's right to determine its internal security practices. *See id.*

2. The proposal is not an appropriate arrangement.

To determine whether a proposal constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute, the Authority applies the test set forth in *NAGE, Local R14-87*, 21 FLRA 24, 31-33 (1986) (*KANG*). Under this test, 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 31. 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). 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. *See NTEU*, 62 FLRA 267, 272 (2007) (Chairman Cabaniss dissenting in part).

Applying that test, the Agency's current internal-security practice prohibits employees from carrying personal wireless communication devices while on duty in an operational work area. The proposal would benefit employees by allowing them to carry such devices in such areas under certain circumstances. Accordingly, it is tailored to benefit those employees who are adversely affected by management's exercise of its right to determine internal security. Thus, it is an arrangement. *See, e.g., AFGE Local 1156*, 63 FLRA 340, 342 (2009).

With regard to whether the arrangement is appropriate, by permitting employees to carry personal wireless communication devices (in an "on" but non-audible position) in operational areas, employees would be able, when they checked the devices at appropriate times, to determine who was attempting to contact them. However, employees could not "actual[ly] use" the devices while in the operational area. Petition at 3. Thus, even under the proposal, employees could not review a device's call log until they leave the operational area. This is something that employees are already entitled to do. As such, the only benefit to employees articulated by the Union is either minimal or nonexistent.

With regard to the burdens on management, the Agency has identified several concerns associated with

allowing these devices in operational areas, even when the devices are set to non-audible positions. Specifically, the Agency cites audio interference to air traffic controller headsets that "seriously affect[s] radio frequency transmissions[;]" interference with "air traffic control communication systems used in sequencing and separating aircraft[;]" and distraction to air traffic controllers performing the mission-critical job of separating aircraft. SOP at 3-4. Thus, the Agency cites significant, specific concerns regarding how the proposal would interfere with its internal security practice of prohibiting such devices. The burdens on management would be lessened to some extent by the fact that, under the proposal, the Agency would retain the rights to determine which devices affect Agency equipment and which equipment is affected, and to direct that a device be turned off when management has determined that it affects equipment. Nevertheless, it is undisputed that the proposal would impose burdens involving important security matters.

Balancing the minimal or nonexistent benefit that the proposal would have to employees against the specified burdens on management, we find that the burdens on management outweigh the purported benefit to employees. Accordingly, on balance, we find that the proposal excessively interferes with management's right to determine its internal security practices and, thus, is not an appropriate arrangement. *See, e.g., NTEU,* 59 FLRA 844, 847-48 (2004) (proposal allowing employees to carry personal wireless communication devices while on duty in inspection areas was not an appropriate arrangement).

For the foregoing reasons, we find that Section 8 is outside the duty to bargain.

VI. Section 12

A. Positions of the Parties

1. Union

The Union contends that Section 12 is intended to protect against substantial delays that are administrative in nature, not delays that are related to the Agency's substantive review of medical or security documents. Response at 4. According to the Union, Section 12 constitutes an appropriate arrangement for employees who are adversely affected by management's exercise of its rights to reassign employees and to determine internal security practices with respect to reviewing employees' documents related to security clearances and medical standards. In this connection, the Union asserts that the proposal is intended to benefit employees who have been accepted for reassignment but who are awaiting the necessary paperwork, and that it applies where there is no reason for the delay. *Id.* at 4-6. The Union also asserts that the burden on management is slight because the Agency would "only need[] a rational reason for the delay[]" and would retain broad discretion to properly review files and, if necessary, cancel the reassignment. *Id.* at 5.

2. Agency

The Agency asserts that Section 12 conflicts with management's rights to assign employees under § 7106(a)(2)(A) and to assign work under § 7106(a)(2)(B) of the Statute because it would require management to implement reassignments within specified periods of time, would subject the exercise of management rights to arbitral scrutiny, and would place a substantive restriction on management's rights. SOP at 7-9. The Agency also asserts that Section 12 is not an appropriate arrangement because it excessively interferes with the rights to assign employees and assign work insofar as it would interfere with management's right to cancel planned reassignments. *Id.* at 9-10.

B. Analysis and Conclusions

Under the meaning of Section 12 as adopted above, management would retain the right to determine employees' medical and security qualifications before they are reassigned, as well as the right to cancel any reassignment. In addition, Section 12 would not require management to effectuate reassignments within specified periods; it would merely preclude management from unreasonably delaying employee reassignments from one region to another based solely on the failure to transfer and/or review the files listed in the proposal. As such, the Agency has not demonstrated that the proposal places any substantive limitations on the exercise of management's rights. *See, e.g., AFGE, Local 1923*, 44 FLRA 1405, 1522 (1992) (proposal regarding avoiding delay in providing employee reasonable accommodation negotiable); *cf. AFGE, AFL-CIO, Local 1738*, 27 FLRA 52, 59-60 (1987) (proposal requiring reassignment to be made within 2 weeks interfered with management's right to determine when to assign work). Further, the fact that the proposal could submit management's decisions to arbitral scrutiny does not provide a basis for finding the proposal outside the duty to bargain. *See Patent Office Prof'l Ass'n*, 47 FLRA 10, 19 (1993) (citing *NFFE, Council of GSA Locals*, 41 FLRA 728, 744 (1991)). Accordingly, we find that the Agency has not demonstrated that the proposal is outside the duty to bargain.

VII. Section 13

A. Positions of the Parties

1. Union

The Union contends that Section 13 applies where the Agency already has selected employees for reassignment, and that it mitigates the effects of management's rights to assign employees because it precludes the Agency from denying reassignments based solely on artificial budgetary allocations across service areas. Response at 6. The Union also contends that the proposal permits the Agency to determine qualifications and to decide not to fill a vacancy. *Id.* at 7.

2. Agency

The Agency asserts that Section 13 conflicts with managements' right to assign employees under § 7106(a)(2)(A) of the Statute because it precludes it from denying reassignments based solely on inter-service area budgetary constraints. SOP at 11-12. The Agency also asserts that Section 13 conflicts with management's right to assign work under § 7106(a)(2)(B) because it interferes with management's discretion to determine when work will be performed. *Id.* at 12. In addition, the Agency contends that Section 13 excessively interferes with these management rights and, thus, does not constitute an appropriate arrangement. *Id.* at 13-14.

B. Analysis and Conclusions

Management's right to assign employees under § 7106(a)(2)(A) of the Statute includes the right to make initial assignments to positions, to reassign employees to different positions, and to make temporary assignments or details. *See United States Dep't of the Navy, Naval Undersea Warfare Ctr., Div. Newport, Newport, R.I.*, 63 FLRA 222, 225 (2009). The right to assign employees includes the right to refrain from assigning employees. *See United States DOJ, Fed. Bureau of Prisons, Metropolitan Detention Ctr., Guaynabo, Puerto Rico*, 57 FLRA 331, 332 (2001) (Chairman Cabaniss dissenting).

Section 13 would require the Agency to reassign employees when the Agency has decided, for budgetary reasons, that it does not want to do so. Thus, the proposal requires management to exercise its right to assign employees and thereby affects that right.

The parties dispute whether the proposal constitutes an appropriate arrangement under § 7106(b)(3) of the Statute. Even assuming that Section 13 constitutes an arrangement, we find that it is not appropriate because it excessively interferes with management's right to refrain from assigning employees. In this regard, the proposal would benefit employees by preventing management from canceling reassignments that are based solely on lack of funding. However, by providing management no latitude in determining whether reassignments should be canceled based on funding considerations, the proposal imposes a significant burden on the Agency. In these circumstances, we find that the burdens on management outweigh the benefits to employees and that, consequently, the proposal excessively interferes with management's right to assign employees. Thus, the proposal is outside the duty to bargain.

VIII. Order

Sections 8 and 13 of the proposal are outside the duty to bargain, and we dismiss the petition with regard to those sections. Section 12 of the proposal 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 section. [3]

3. In finding Section 12 to be within the duty to bargain, we make no judgments as to its merits.