

64 FLRA No. 134

NATIONAL TREASURY
EMPLOYEES UNION
CHAPTER 83
(Union)
and
UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C.
(Agency)
0-NG-2963

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

April 29, 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 proposal addresses employees' selection of office space following their relocation to a new worksite. The Agency filed a statement of position (SOP). The Union filed a response (Response) and the Agency filed a reply (Reply).¹

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

1. The Agency claims that the Authority should consider its Reply even though it was untimely filed. According to the Agency, it misunderstood the filing deadline for the Reply. The Agency incorrectly believed that the Reply's due date was stayed until the Union cured a procedural deficiency in its Response. Agency Response to Show Cause Order at 3-4. The Agency requests that the Authority waive the deadline under § 2429.23(b) of the Authority's Regulations due to extraordinary circumstances. *Id.* at 5 (citing 5 C.F.R. § 2429.23(b)). Authority precedent does not support the Agency's request. That precedent provides that a party's misinterpretation of a deficiency order does not establish extraordinary circumstances warranting the waiver of an expired filing time limit. *See AFGE Council 214*, 53 FLRA 131, 133 n.1 (1997). Accordingly, because the Agency has not demonstrated extraordinary circumstances warranting a waiver of the Reply's filing deadline, we will not consider the Reply.

II. Background

The Union presented its office space selection proposal after the Agency announced a plan to relocate certain bargaining unit employees working in Washington, D.C. The Agency's plan was to move employees out of office space on which a lease was expiring, and relocate those employees to a building commonly referred to as the Mint Building Annex. SOP, Attach. 7a at 1. The office move was to be accomplished between August and December 2007. SOP at 3.

The Agency planned to continue its practice of seating employees so that employees in the same workgroup occupied adjacent cubicles. *See id.*, Attach. 7a at 1. The Agency's process allowed employees within the same workgroup to select their cubicles by seniority from the cubicles assigned to their workgroup. SOP at 3. The Union, on the other hand, sought to change the office space selection process by allowing employees to select from all available cubicles by seniority, without regard to workgroup assignment.

III. Proposal

Employees Moved Unilaterally Prior to December 14

- CP² should vacate 311F and return to 311B
- FS should vacate 311D and enter the EOI/PSP [Exchange of Information/ Programs and Special Processing³] seating pool

Seating of EOI/PSP pool

The following employees:

- MB
- JP
- GR
- LM
- SJ
- FS
- TT
- PB
- DH
- SM
- LS

2. Employees' initials have been substituted for their names.

3. EOI/PSP are organizational units within the Agency. Union Supplemental Submission, Amended Proposal, Attach. "A".

Should select from the following seats based on EOD [entry on duty]:

Front Office Area: 336B, 336C, 336D, 336E, and 336F

EOI/PSP Area: 309E, 310C, 310F, 310G, 310H, 311D, 311A, 311E, 311F, 311G, 311H and 311I

Note: Window seats are 336B, 336C, 309E, 311D, and 311E

Union's Supplemental Submission, Amended Proposal, Attach. A.

IV. Meaning of the Proposal

The proposal addresses the process for office/cubicle selection for the identified employees relocated to the Mint Building Annex. Union's Supplemental Submission, Amended Proposal, Attach. "A". The proposal would allow employees to select from all available cubicles by seniority, without regard to workgroup assignment.

V. Positions of the Parties

A. Agency

The Agency claims that it is not required to negotiate with the Union over the proposal for three reasons.

First, the Agency contends that the proposal is non-negotiable because it affects management's right to determine the methods and means of performing work under § 7106(b)(1) and its right to assign work under § 7106(a)(2)(B) of the Statute. The Agency argues that seating employees according to their workgroups is a method and means of performing work because such seating helps employees accomplish the Agency's mission. SOP at 6. The Agency claims that seating employees by workgroup facilitates collaboration and teamwork, and enables employees to share a group file cabinet. *Id.* According to the Agency, because the proposal would affect the Agency's right to use a particular seating arrangement as a means to accomplish its mission, the proposal is non-negotiable. *Id.*

Second, the Agency argues that the proposal is outside the duty to bargain because it violates the parties' past practice. According to the Agency, the parties' past practice is to first offer vacant cubicles to employees with the most seniority within the same workgroup. In the Agency's view, the proposal's selection procedure would intermingle employees from unrelated workgroups. *Id.* at 3. Because intermingled seating does not conform to past practice, the Agency contends that the

proposal is not within its obligation to bargain. *Id.* at 3-5.

Third, the Agency asserts that the proposal is non-negotiable because it directly affects the terms and conditions of employment of non-bargaining unit (NBU) employees. *Id.* at 6-7 (citing *AFGE, Local 1985*, 55 FLRA 1145 (1999) (*Local 1985*)). The Agency claims that the proposal would require three NBU employees to vacate the cubicles they currently occupy. *Id.* at 7.

For these reasons, the Agency requests that the Authority find the proposal non-negotiable.

B. Union

The Union contends that the Agency's arguments should be rejected for three reasons.

First, the Union claims that the proposal does not affect management's right to determine the methods and means of performing work. The Union argues that the Agency has failed to establish that there is a "direct and integral relationship" between seating employees according to their workgroups and accomplishing the Agency's mission. Response at 1. Moreover, the Union claims that the seating arrangement resulting from the proposal would not preclude employees' collaboration. According to the Union, regardless of where employees are seated, they can reach one another in the time it takes to walk across the room, "a matter of seconds." *Id.* at 2. In any event, the Union claims, much of employees' communication is not in person but via phone and email. Consequently, the Union contends that employees' seating assignments do not "directly interfere" with the "mission-related purpose" of grouping certain employees together. *Id.*

Second, the Union argues that the Agency fails to support its assertion that the proposal affects management's right to assign work. *Id.* at 2-3.

Third, the Union claims that the argument that the proposal is non-negotiable because it impermissibly affects NBU employees is erroneous. The Union argues that the mere possibility that the proposal might affect a NBU employee does not render it non-negotiable. *Id.* at 4. Instead, the Union claims that its proposal is negotiable because it "vitally affects" the working conditions of unit employees. *Id.* at 7. In addition, the Union notes that the NBU employees in this case are not supervisory or represented by another union. *Id.* at 3. Accordingly, the Union requests that the Authority find the proposal negotiable.

VI. Analysis and Conclusions

We reject the Agency's arguments and find that the proposal is negotiable for the reasons that follow.

A. The proposal does not affect management's rights

1. The proposal does not affect management's right to determine the methods and means of performing work under § 7106(b)(1).

The Agency fails to demonstrate that the proposal affects management's right to determine the methods and means of performing work under § 7106(b)(1) of the Statute. According to the Agency, the proposal would prevent the Agency from seating employees according to their workgroups, which is one of the Agency's chosen methods and means of accomplishing its mission. It is undisputed that the proposal could result in employees being seated outside of their assigned workgroups.

The applicable legal framework is well established. In deciding whether a proposal affects management's right to determine the methods and means of performing work, the Authority initially examines whether the proposal concerns a "method" or a "means." *NFFE, Local 2192*, 59 FLRA 868 (2004) (Chairman Cabaniss dissenting). The Authority has construed the term "method" to refer to "the way in which an agency performs its work." *AFGE, Local 1920*, 47 FLRA 340, 343 (1993). The Authority has defined the term "means" to refer to "any instrumentality, including an agent, tool, device, measure, plan, or policy used by an agency for the accomplishment or [the] furtherance of the performance of its work." *Id.* The legislative history of the Statute indicates that the term "methods" was intended to mean "how" work is performed; the term "means" was intended to mean "with what." See *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, U.S.C.C.A.N. 2830, 2831; see also *GSA*, 54 FLRA 1582, 1590 n.6 (1998).

If the proposal concerns a method or a means, the Authority employs a two-part test to determine whether the proposal affects the management right. First, an agency must show that there is a direct and integral relationship between the particular method and means the agency has chosen and accomplishment of the agency's mission. Second, the agency must show that the proposal would directly interfere with the mission-related purpose for which the method or means was adopted. See, e.g., *NTEU*, 64 FLRA 395, 396 (2010) (citations omitted) (Member Beck dissenting as to the application

of the methods and means test); *AFGE, Council of GSA Locals, Council 236*, 55 FLRA 449, 452 (1999), *petition for review denied*, Case No. 99-1244 (D.C. Cir. 2000).

Under Authority precedent, Agency "functional grouping" policies may concern the methods and means of performing work. See, e.g., *AFGE, Nat'l Border Patrol Council, Local 2544*, 46 FLRA 930, 944 (1992); *NTEU, Chapter 83*, 35 FLRA 398, 408 (1990); *NAGE, Local R14-89*, 32 FLRA 392, 401 (1988). However, applying the Authority's analytical framework, we conclude that the proposal does not affect management's right to determine the methods and means of performing work.

Regarding the first part of the test, the Agency fails to establish a direct and integral relationship between seating employees according to their workgroups and accomplishing the Agency's mission. The Agency relies, without elaboration, on the claim that seating employees by workgroup facilitates collaboration and teamwork, and enables employees to share a file cabinet. SOP at 6.

Although there is clearly value as a general matter to collaboration and teamwork, and to sharing resources, the Agency's position on the negotiability issue is unsupported. The Agency does not describe or discuss the nature of the employees' duties, or why collaboration, teamwork, or access to a group file cabinet is directly and integrally related to accomplishment of the Agency's mission. See SOP at 6; cf. *NTEU*, 41 FLRA 1195, 1204 (1991) (agency did not satisfy the first part of the Authority's methods and means test where it failed to describe nature of employees' duties or how locating employees by branch was directly and integrally related to the accomplishment of the agency's mission).

The Agency also fails to establish that the proposal is non-negotiable under the second part of the Authority's methods and means test. As was the case with respect to the first part of the methods and means test, the Agency's claims — that the proposal would prevent collaboration, teamwork, and sharing a file cabinet — are unexplained.

Moreover, the Union's Response rebuts the Agency's claims. The Union notes, without contradiction, that all of the cubicles identified in the proposal are located on the same floor, "within a few yards of" and "a matter of seconds" away from each other. Response at 2. Thus, employees wishing to collaborate with one another in person, or work as a team, may have to walk, at most, an additional few steps to another employee's

desk. *Cf. NTEU*, 41 FLRA 1283, 1290 (1991) (finding unpersuasive agency's assertions that seating employees within workgroups would allow for better communication, development of an informal mentor system, and permit supervisors to better monitor employees because office floor plans showed that employees would still be located within a very short distance from one another and supervisors). It also remains undisputed that employees largely communicate via email and telephone. Response at 2.

Finally, the Agency's claims regarding use of a shared file cabinet and the possible distance between a manager and a secretary are similarly unsupported. The Agency fails to show how the proposal would impede use of the file cabinet, or prevent the manager and secretary from effectively interacting.

Consequently, we find that the Agency has failed to establish that the proposal affects its right to determine the methods and means of performing work.

2. The proposal does not affect management's right to assign work under § 7106(a)(2)(B).

The Agency fails to demonstrate that the proposal affects management's right to assign work under the Statute. The Agency does not address how the seating selection process would affect its management right. When an agency does not support its § 7106(a) claim with an explanation of how management's rights are affected, the Authority rejects the argument. *See NTEU*, 60 FLRA 367, 380 (2004) (Authority declined consideration of an argument where agency presented "no explanation of how [the proposal] would affect its right to assign work") (Chairman Cabaniss and Member Pope dissenting on other grounds), *petition for review granted, remanded in part, rev'd in part*, 437 F.3d 1248 (D.C. Cir. 2006)). Accordingly, we find that the Agency has failed to establish that the proposal would affect its right to assign work.

B. Past practice principles have no bearing on the proposal's negotiability.

The Agency's claim that the proposal is outside the duty to bargain because it violates a past practice is also erroneous. Past practice principles have no applicability as a potential bar to a proposal's negotiability. The general rule pertaining to past practice is well established: management may not change a past practice without first notifying the bargaining representative and affording it an opportunity to bargain. *Dep't of the Air Force, Scott Air Force Base, Ill.*, 5 FLRA 9 (1981); *see also Dep't of the Navy N. Div., Naval Facilities Eng'g Command*, 19 FLRA 705, 716 (1985). Here, there is no

claim that the Agency has changed a past practice without first notifying the Union. The dispute between the parties is whether the Agency has a duty to bargain over the Union's proposal – not whether it has changed a past practice. Accordingly, we reject the Agency's argument that it has no duty to bargain with the Union over the proposal because it fails to conform to past practice.

C. The proposal is not outside the duty to bargain because of its effect on the terms and conditions of employment of NBU employees.

The Agency's final contention, that the proposal is outside the duty to bargain because of its effect on non-bargaining unit employees, is no more substantial than the Agency's other claims.⁴

The Authority's rule is well established. With exceptions described immediately below, a proposal that directly affects the conditions of employment of certain categories of NBU employees is outside the duty to bargain unless the proposal addresses matters that "vitally affect" conditions of employment of unit employees. *See AFGE, Local 32*, 51 FLRA 491, 502 (1995) (*AFGE, Local 32*) (citation omitted); *U.S. Dep't of the Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA*, 952 F.2d 1434, 1442 (D.C. Cir. 1992) (*Cherry Point*); *AFGE v. FLRA*, 110 F.3d 810, 813 (D.C. Cir. 1997)). In particular, the vitally affects test does not apply in circumstances where a union seeks to bargain over the conditions of employment of employees in other bargaining units or of supervisory, management, or other personnel who are excluded by the Statute from membership in any bargaining unit. *AFGE, Local 1923*, 44 FLRA 1405, 1417, 1422-23 (1992) (citing *Cherry Point*, 952 F.2d at 1441).⁵

Under the vitally affects test, the Authority will find a proposal negotiable if it (1) vitally affects the working conditions of unit employees, and (2) is consistent with applicable law and regulations. *AFGE, Local*

4. The Union does not dispute that the proposal would affect the conditions of employment of at least one NBU employee. *See Response at 4 n.1.*

5. Consistent with *Cherry Point*, NBU employees fall into four categories: (1) employees in other bargaining units; (2) supervisory, management, and other personnel who are excluded by the Statute from membership in any bargaining unit; (3) non-supervisory personnel who are not in any bargaining unit; and (4) non-employees. *See Cherry Point*, 952 F.2d at 1441-42. As indicated in *Cherry Point*, the vitally affects test does not apply when a union seeks to bargain over the conditions of employment of either of the first two categories. However, under *Cherry Point*, the test does apply when the interests of individuals in either of the last two categories are directly implicated. *See id.*

32, 51 FLRA at 503. In determining whether or not a proposal vitally affects bargaining unit employees, the Authority looks to whether “the effect of that proposal upon unit employees’ conditions of employment is significant and material, as opposed to indirect or incidental.” *AFGE, Local 1827*, 58 FLRA 344, 348 (2003) (citation omitted).

The Union’s proposal vitally affects unit employees’ conditions of employment. The proposal’s effect is significant and material. The Authority has held that the location at which employees perform their duties concerns matters “at the very heart of the traditional meaning of ‘conditions of employment.’” *U.S. Dep’t of HHS, SSA, Balt., Md.*, 36 FLRA 655, 668 (1990) (holding that a change in employees’ seating assignments gives rise to a bargaining obligation) (quoting *Library of Cong. v. FLRA*, 699 F.2d 1280, 1286 (D.C. Cir. 1983)). The Authority has further concluded that proposals that affect the location at which employees perform their duties “present the sort of questions collective bargaining is intended to resolve.” *Dep’t of HHS, Region IV, Office of Civil Rights, Atlanta, Ga.*, 46 FLRA 396, 418 (1992) (citation omitted) (upholding ALJ’s rejection of agency’s argument that employees’ work location did not have a direct effect on their working conditions or a “significant and material” effect on unit employees). Accordingly, we conclude that part one of the vitally affects test is met.

Authority case law upon which the Agency relies is inapposite. The Agency cites *Local 1985*, 55 FLRA 1145, to support its argument that the proposal is non-negotiable because it affects NBU employees. In that case, the employees who were affected by the union’s proposal were part of another bargaining unit represented by a different exclusive representative. An agency is not required under the Statute to bargain with one exclusive representative about conditions of employment in a unit represented by another union because “such a requirement would run afoul of the principle of exclusive recognition.” *AFGE, Nat'l Council of HUD Locals 222*, 54 FLRA 1267, 1276, n.11 (1998) (Member Wasserman dissenting as to other matters) (citing *Cherry Point*, 952 F.2d at 1442). Here, it is undisputed that the NBU employees are not represented by a separate union. Response at 3. Therefore, *Local 1985* does not apply. The Agency makes no other claim that would preclude application of the vitally affects test. Accordingly, we proceed to part two of the test.

As the Agency does not claim that the proposal is inconsistent with a law, rule, or regulation other than the management’s rights contentions rejected above, we find that part two of the vitally affects test is met. Con-

sequently, we conclude that the proposal “vitally affects” unit employees’ conditions of employment and hold that the proposal is not non-negotiable based on its effect on NBUs.

VII. Order

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 the proposal.⁶

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