66 FLRA No. 33

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 3928
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
U.S. CITIZENSHIP
AND IMMIGRATION SERVICES
NATIONAL BENEFITS CENTER
LEES SUMMIT, MISSOURI
(Agency)

0-NG-3069

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

September 26, 2011

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

I. Statement of the Case

This matter 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 concerns the negotiability of one proposal, which addresses employees' seating reassignments. The Agency filed a statement of position (SOP), to which the Union filed a response (response). The Agency filed a reply (reply) to the response.

For the reasons that follow, we find that the proposal is within the duty to bargain.

II. Background

The Agency's employees process forms for immigration benefits. The employees are organized into "teams" and "divisions." Record of Post-Petition Conference (Record) at 2. A team is the smallest organizational unit and is composed of one supervisor and eight to twelve employees; a division is composed of several teams, and has approximately forty to fifty employees. *Id.*

The proposal arose in response to the Agency's announcement that it intended to realign its work force and implement a seating selection process that would allow employees to select their seating assignment only from seating assigned to their team. SOP, Attach. 1 at 3.

III. Preliminary Issues

A. The petition is timely.

As an initial matter, the Agency argues that the Union's petition should be dismissed because it was untimely filed. SOP, Attach. 1 at 3-4. In this regard, the Agency asserts that, after it provided the Union with two unsolicited allegations of non-negotiability, the Union failed to file a timely petition under §§ 2424.11(c) and § 2424.21(a) of the Authority's Regulations, which govern the procedures for filing a petition for review. *Id.* at 4-5.

A union is not required to file a negotiability petition from an agency's unsolicited allegation of non-negotiability. *See* 5 C.F.R. § 2424.11(c); *AFGE, Local 3369*, 49 FLRA 793, 794 (1994). Rather, a union may ignore the unsolicited allegation and instead elect to request a written allegation from the agency. *See AFGE, Local 3369*, 49 FLRA at 795. If a union decides to file a petition for review after the agency provides it with a solicited written allegation of non-negotiability, then it must do so within fifteen days of service of an agency's written allegation of non-negotiability. *See* 5 C.F.R. § 2424.21(a).

Here, it is undisputed that the Agency provided the Union with two unsolicited written allegations of non-negotiability. *See* Response, Attach. 1 at 2-3; SOP, Attach. 1 at 2-4. As was its right, the Union chose not to file a negotiability petition from those unsolicited allegations. *See* 5 C.F.R. § 2424.11(c); *AFGE, Local 3369*, 49 FLRA at 795. Consequently, its failure to do so did not bar the petition that was timely filed following receipt of a subsequent written allegation of nonnegotiability (that the Agency provided in connection with a settlement agreement to resolve an unfair labor practice (ULP) charge concerning the Agency's alleged failure to bargain over this matter). *See* SOP, Attach. 10 at 1. Accordingly, we find that the Union's petition is timely. *Cf. AFGE, Local* 3369, 49 FLRA at 795 (union ignored agency's unsolicited allegation of non-negotiability, and requested written allegation from which it timely filed its petition).

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

B. The proposal is not moot.

Following the post-petition conference, the Authority issued an order to the Union directing it to show cause why its petition should not be dismissed as moot. Order to Show Cause (Order) at 1.

Section 2429.10 of the Authority's Regulations states, in pertinent part, that "[t]he Authority . . . will not issue advisory opinions." 5 C.F.R. § 2429.10. Consistent with this regulation, the Authority will not resolve the negotiability of proposals that are moot. *NTEU*, *Chapter 207*, 58 FLRA 409, 410 (2003). The Authority has held that a dispute becomes moot where a proposal requires some action to occur by a date that has already passed and there is no explanation in the record as to how the proposal could be implemented. *AFGE, Nat'l Veterans Admin. Council*, 41 FLRA 73, 74 (1991) (*AFGE*).

As the Union asserts, the proposal here does not refer to any particular event, or require any action to occur by a date that has already passed. Union's Response to Order at 2. Accordingly, we find that the proposal is not moot. *Compare AFGE*, 41 FLRA at 75 (finding petition not moot where proposal did not refer to a specific event or require action by a certain date), *with NTEU*, *Chapter 207*, 58 FLRA at 410 (dismissing petition as moot where proposal required agency to take some action by a specific date that had already passed).

C. The Union has met the other conditions for review of a negotiability appeal.

The Agency also argues that the petition should be dismissed because the Union did not submit to the Agency the version of the proposal that is set forth in the petition as required by the parties' agreement. SOP, Attach. 1 at 2-4.

Although the language of the proposal in the petition is different from the wording of the Union's original submission to the Agency, at the post-petition conference and prior to the submission of the SOP, the parties agreed that the language of the proposal that is set forth in the petition was in dispute, and the Agency declared that such language was non-negotiable. Record at 2. This is consistent with a union's right to modify the wording of disputed proposals at post-petition conferences. *See, e.g., AFGE, Local 3584, Council of Prison Locals C-33*, 64 FLRA 316, 316 & n.3 (2009) (union added wording to proposal at post-petition conference); *AFGE, Local* 1458, 63 FLRA 469, 469 (2009) (amending wording of proposal at post-petition conference). In addition, there is no evidence that the Agency was prejudiced by the different wording because the record indicates that the Agency clearly understood the intent of the proposal and fully briefed to the Authority why the language in the petition was nonnegotiable. *Cf. NTEU*, 28 FLRA 1052 (1987) (denying agency request for stay of negotiability appeal because agency was not prejudiced by union's misstatement of wording of proposal in petition). Accordingly, we reject the Agency's claim.

Moreover, to the extent this claim could be construed as raising a bargaining obligation dispute, the record demonstrates that, when the Agency allegedly failed to negotiate in good faith over the proposed change, the Union filed a ULP. In order to resolve the ULP, the parties entered into a settlement agreement, pursuant to which "the Agency agree[d] to provide the Union with a written [allegation of non-negotiability]" for the express purpose of allowing the Union to file this negotiability appeal. SOP, Attach. 10 at 1. Having entered into the settlement agreement in order to resolve the alleged ULP knowing that the outcome would be a negotiability appeal, the Agency cannot now allege before the Authority that the Union's negotiability appeal is deficient under the parties' agreement.

As all of the conditions for review of negotiability appeals have been satisfied under § 7117(c) of the Statute and §§ 2424.21 and 2424.22 of the Authority's Regulations, we find that the petition is properly before us.

IV. The Proposal

A. Wording

> Employees at the [National Business Center] will be seated in functional groups in areas delineated for that work group. The functional work groups will be based upon identified work assignments and work flow that contribute to efficient production, collaborative work groups, identification of national security issues, mentoring and employee development, and appropriate supervision.

Petition at 4.

B. Meaning

The parties agree that, under the proposal, employees would be able to select their seating location according to seniority within their assigned division, rather than only from within their assigned team. Record at 2. As set forth above, a team is the smallest organizational unit and is composed of one supervisor

and eight to twelve employees; a division is composed of several teams, and has approximately forty to fifty employees. *Id.*

C. Positions of the Parties

1. Agency

The Agency asserts that the proposal is contrary to management's rights to determine the methods and means of performing work under § 7106(b)(1) of the Statute and to determine its organization under § 7106(a)(1) of the Statute. SOP at 6, 7; SOP, Attach. 1 at 3. In this respect, the Agency claims that its mission is "to perform the necessary screening and checks to ensure each application or petition is 'decision-ready' when it is" sent to the branch of the Agency that grants or denies immigration benefits. SOP, Attach. 1 at 7. To accomplish this mission, the Agency argues, it organized employees into seven divisions, and within those divisions, a total of thirty-three teams. *Id.* The Agency also asserts that each team performs a distinct type of work; that is, each team performs a different step in the pre-screening of benefits forms. *Id.* The Agency contends that, under the proposal, if employees were to select seating anywhere within a division, then team members would not necessarily be seated close together. *Id.* at 8.

As to its right to determine the methods and means of performing work, the Agency asserts that employees' assigned teams constitute functional work groupings. In this regard, the Agency asserts that, because each team performs a different type of work, teams must be seated close together "for essential work product distribution, [t]eam mentoring, and daily interaction (between employees and between supervisors and employees)." *Id.* at 7. Specifically, as to work product distribution, the Agency contends that work product is separated and packaged according to team rather than by division, and work is distributed to teams rather than to individuals. *Id.* at 11. With regard to team mentoring, the Agency argues that employees need guidance and training unique to their team to eliminate the backlog in work product. *Id.* As to daily interaction, the Agency claims that the introduction of new types of work requires enhanced dialogue to develop work product efficiency. *Id.* The Agency also argues that teams use reference materials unique to each team. *Id.* In light of the foregoing, the Agency contends that the proposal would prevent it from seating employees by teams and accomplishing the Agency's mission. Record at 2; SOP, Attach. 1 at 7.

In support, the Agency relies on *American Federation of State, County & Municipal Employees, AFL-CIO, Local 2910*, 19 FLRA 1180 (1985) (*Local 2910*).[2] SOP, Attach. 1 at 7-8.

Relying on the same arguments set forth above, the Agency also argues that the proposal affects management's right to determine its organization because its plan to create teams and "establish where [t]eam members will be physically located has a direct and substantive relationship to the Agency's administrative and functional structure." SOP, Attach. 1 at 10. In this regard, the Agency asserts that the teams must be seated together because each team has a supervisor unique to that team who assigns work and appraises employee work performance. *Id.* The Agency also argues that team members rarely perform work away from their immediate cubicles. *Id.*

2. Union

The Union claims that the proposal does not affect management's right to determine the methods and means of performing work. In this regard, the Union argues that the type of work assigned to a team is not unique to the team, but rather, all teams perform partial work on a form assigned to a division for processing. Response, Attach. 1 at 7. In addition, the Union claims that the seating arrangements resulting from the implementation of the proposal would not affect either work distribution or daily interaction. According to the Union, regardless of where employees are seated within a division, work assignments for all teams within a division are delivered and distributed to individuals in one central location. *Id.* The Union also contends that, regardless of where employees are seated within a division, they can reach one another "in a matter of seconds" at most, because their seating locations are "within a few yards of each other" within the division. *Id.* at 8. With regard to reference materials, the Union asserts that, although each team may be required to use different computer programs, such computer programs are available to all employees on their individual work computers regardless of where they are seated. *Id.* at 7.

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[2] The Agency also argues that the proposal violates management's rights under Article 4, Section (A)(1) of the CBA. Under § 7117 of the Statute and § 2424.2 of the Authority's Regulations, the Authority will consider a petition for review of a negotiability dispute only when it has been established that the parties are in dispute as to whether a proposal is inconsistent with law, rule, or regulation. 5 U.S.C. § 7117; 5 C.F.R. § 2424.2. As a collective bargaining agreement is not a law, rule, or regulation, and the Agency does not raise any bargaining obligation dispute with respect to this argument, this claim is not appropriately presented to the Authority in the context of a negotiability proceeding.

The Union also claims that the proposal does not affect management's right to determine its organization. As stated above, because seating locations are "within a few yards of each other" within a division, the Union argues that employees would only have "to walk a couple of rows over" to engage in discussion with another employee, a mentor, or a supervisor. *Id.* at 8. In addition, the Union argues that most of the employees' work involves using their individual work computers and that email allows employees to communicate with each other regardless of seating location. *Id.* at 8-9.

D. Analysis and Conclusions

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

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." *E.g.*, *NTEU, Chapter 83*, 64 FLRA 723, 725 (2010) (*Chapter 83*). The Authority has construed the term "method" to refer to "'the way in which an agency performs its work.'" *Id.* (quoting *AFGE, Local 1920*, 47 FLRA 340, 343 (1993) (*Local 1920*)). 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.* (quoting *Local 1920*, 47 FLRA at 343).

If the proposal concerns a method or a means, then the Authority employs a two-part test to determine whether the proposal affects the management right. *Id.* 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. *Id.* Second, the agency must show that the proposal would directly interfere with the mission-related purpose for which the method or means was adopted. *Id.* It is well-established that an agency has the burden of providing a record to support its assertion that a proposal is outside the duty to bargain under the Statute. *See, e.g.*, *NTEU*, 61 FLRA 871, 875 (2006) (then-Member Pope writing separately as to other matters).

Under Authority precedent, agency "functional grouping" policies may concern the methods and means of performing work. *See Chapter 83,* 64 FLRA at 725. However, applying the Authority's analytical framework, we find that the proposal at issue here does not affect management's right to determine the methods and means of performing work for the following reasons.

In this regard, the Authority previously has held with respect to a similar proposal that the agency had failed to establish a direct and integral relationship between seating employees according to their workgroups and accomplishing the Agency's mission. *See Chapter 83*, 64 FLRA at 725. In *Chapter 83*, the Authority found that the Agency failed to describe or discuss why seating employees by workgroup facilitated collaboration and teamwork, and enabled employees to share a file cabinet. *Id.* In addition, the Authority relied on the union's showing, which the Authority noted was without contradiction, that employees would still be located a very short distance from one another and supervisors. *Id.* Similarly, in *NTEU*, 41 FLRA 1283, 1290 (1991), the Authority found unpersuasive an agency's assertion that seating employees within workgroups would allow for better communication and development of an informal mentor system, and would 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.

Here, as to the Agency's claim regarding work product distribution, the Agency asserts that seating employees in teams accomplishes the Agency's mission because each team performs a distinct type of work and such work is packaged and distributed to teams, rather than to individuals. SOP, Attach. 1 at 11. The Agency also claims that seating employees in teams facilitates "[t]eam mentoring and daily interaction (between employees and between supervisors and employees)" and use of reference materials unique to their team. *Id.* at 7. Apart from these generalized claims, the Agency does not describe or discuss the nature of the employees' duties, or why work product distribution, team mentoring and daily interaction, and use of reference materials is directly and integrally related to accomplishment of the Agency's mission. *See Chapter 83*, 64 FLRA at 725.

Contrary to the Agency's claims, the Union asserts, without contradiction, that regardless of where employees sit within a division, work for all teams is delivered to and distributed in one central location. Response, Attach. 1 at 7. Individuals within the division retrieve work designated for their team from that central location and return to their seats. *Id.* In addition, based on the floor plans submitted by the Union, which the Agency does not challenge, all of the seating locations for employees within each division identified in the proposal are in the same geographic area covering several rows of contiguous cubicles. *Id*. The floor plan also supports the Union's claim that the seating locations are "within a few yards of" and "a matter of seconds" away from each

other. *Id.* at 8. Likewise, it is undisputed that the distance between employees' seating locations and their supervisor would only require an individual "to walk a couple of rows over." *Id.*

Moreover, we find the Agency's reliance on *Local 2910* to be misplaced. In *Local 2910*, the Authority found that the agency had established that a proposal concerning preference of seating assignments was directly and integrally related to the agency's operations. Based on the record evidence and arguments set forth above, the Agency has made no such showing here.

Based on the foregoing, under the proposal, employees wishing to interact with one another or their supervisor may have to walk, at most, an additional few steps. Response, Attach. 1 at 6, 8. It is also undisputed that employees largely perform work at their seating location and communicate via email using their individual work computers. Response, Attach. 1 at 7. Therefore, this case is similar to *Chapter 83* and *NTEU* because the Agency fails to demonstrate how locating employees by team is directly and integrally related to accomplishing the Agency's mission. *See NTEU*, 64 FLRA at 726; *Chapter 83*, 41 FLRA at 1290.[3]

Accordingly, we find that the Agency has failed to establish that the proposal affects its right to determine the methods and means of performing work.[4]

2. The proposal does not affect management's right to determine its organization under § 7106(a)(1) of the Statute.

The exercise of management's right to determine its organization encompasses the right to determine the administrative and functional structure of an agency, including the relationship of personnel through lines of authority and the distribution of responsibilities for delegated and assigned duties. *U.S. Dep't of Transp., FAA*, 58 FLRA 175, 178 (2002) (*FAA*); *U.S. Dep't of Veterans Affairs, Conn. Healthcare Sys., Newington, Conn.*, 57 FLRA 47, 48 (2001). The right also includes the authority to determine how an agency will structure itself to accomplish its mission and functions. *FAA*, 58 FLRA at 178. This determination includes such matters as where organizationally certain functions shall be established and where the duty stations of the positions providing those functions shall be maintained. *See AFGE*, *Local 3529*, 55 FLRA 830, 832 (1999) (citing *NTEU, Atlanta, Ga.*, 32 FLRA 886, 889-90 (1988)). In order for its seating location requirements to come within the scope of the right to determine the organization of an agency, an agency must establish that the "duty station" of employees -- that is, where they are physically located -- "has a direct and substantive relationship to an agency's administrative and functional structure." *Chapter 83*, 41 FLRA at 1287.

In *Chapter 83*, the Authority found that a proposal allowing employees to select their seating location from anywhere within floor space designated for three groups of employees, rather than being seated by group, did not have a direct and substantive relationship to the agency's administrative and functional structure. *Id.*; *see also NTEU*, 41 FLRA 1195, 1200 (1991).

Here, the Agency argues that the proposal affects management's right to determine its organization because its plan to create teams and "establish where [t]eam members will be physically located has a direct and substantive relationship to the Agency's administrative and functional structure." SOP, Attach. 1 at 10. However, nothing in the proposal or the Union's explanation of it would affect the Agency's ability to create teams or organize employees into teams. In this regard, it would simply allow employees to select their seating location by division, rather than by team. As such, the proposal would not have a direct and substantive relationship to the Agency's functional structure. *See Chapter 83*, 41 FLRA at 1287; *NTEU*, 41 FLRA at 1200.

Accordingly, we find that the proposal does not affect the Agency's right to determine its organization.[5]

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[3] The dissent's argument to the contrary is unsupported because it does not explain how the Agency met its burden of establishing that the proposal involved direct and integral relationships or directly interfered with mission-related purposes. *See* Dissent at 10-11. The dissent's reliance on *Chapter 83* and *AFGE, National Border Patrol Council, Local 2544*, 46 FLRA 930, 944 (1992) (*Border Patrol Council*) is misplaced because, in those decisions, the Authority found that the agencies had *failed* to demonstrate that the proposals affected management's right to determine the methods and means of performing work. *Chapter 83*, 64 FLRA at 725; *Border Patrol Council*, 46 FLRA at 944.

[4] As the Agency has failed to establish 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, it is unnecessary to examine the second prong of the methods and means test. *See AFGE, Council of GSA Locals, Council 236*, 55 FLRA 449, 453 n.10 (1999).

[5] In view of our finding that the Agency has not shown that the proposal concerns its rights to determine the methods or means of performing work under § 7106(b)(1) or its organization under § 7106(a)(1) of the Statute, it is unnecessary to address the Agency's arguments that the proposal does not constitute an appropriate arrangement under § 7106(b)(3) or a procedure under § 7106(b)(2).

V. 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]

Member Beck, Dissenting:

I disagree with my colleagues that the Agency fails to establish that the proposal directly affects the methods of performing work.

The Authority determined in *AFGE, National Border Patrol Council, Local 2544*, 46 FLRA 930, 944 (1992), that a "functional grouping" of employees constitutes a method of performing work when the grouping "is designed to enhance the ability of the agency to accomplish its work in a more efficient and effective manner."

In this case, the Agency establishes the nature of the employees' duties and how those duties are integrally related to the accomplishment of the Agency's mission. *See NFFE, Fed. Dist. 1*, *Local 1998, IAMAW,* 66 FLRA 124, 136 (2011) (Dissenting Opinion of Member Beck); *cf. NTEU, Chapter 83*, 64 FLRA 723, 725 (2010) (agency does not establish a direct and integral relationship when it fails to elaborate on claim that seating by work group facilitates collaboration and teamwork).

The Agency notes that its primary mission is to screen applications (for immigration benefits) and ensure that they are "decision-ready" for final decision by the appropriate immigration office. Statement of Position (SOP) at 7. Customer service is a "high priority" because the mission is "funded entirely from fees paid by applicants." *Id.*

To that end, the Agency determined that the most efficient method to perform its mission is to arrange work teams together and with each team in close proximity to its supervisor. The Agency cites the following factors (none of which is disputed by the Union) in support of that decision:

- Teams are structured to perform "distinct work functions" that are differentiated by the particular forms that are processed, unique requirements that are presented by individual applications, or specialized services that are provided to identified "target groups."
- Work products are distributed according to these "distinct work functions."
- The demand for training, mentoring, oversight, and technical supervision of new and inexperienced employees intensified (in the three years preceding this petition) when NBC experienced an increase in its workforce from 270 to 400 employees.

SOP at 7-8.

The Agency sufficiently supports its argument that to allow employees to select seating randomly anywhere within a division (as proposed by the Union) would directly interfere with the method by which it has chosen to accomplish its mission. *Id.* at 8.

Accordingly, the proposal is subject to bargaining only at the election of the Agency. 5 U.S.C. § 7106(b)(1).

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