

64 FLRA No. 29

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2145
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
RICHMOND, VIRGINIA
(Agency)

0-NG-2920

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

October 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 concerns the negotiability of one proposal concerning the restriction of key access to Union offices at the Agency's facility. For the reasons that follow, we find that the proposal is not within the duty to bargain.

II. Preliminary Matter

The Agency's SOP was due to be filed with the Authority on February 20, 2007.¹ See Record of Post-Petition Conference (Record) at 3. The Agency filed its SOP with the Authority on February 13. The certificate of service certified that the SOP "was served by certified mail" on the Union President. SOP at 12. The Union did not file a response to the SOP. Nevertheless, on March 19, the Agency filed a "Motion To Disregard The Union's Response" (Motion to Disregard) contending that the Union "ha[d] failed to serve" the Agency with a Response to its SOP. *Id.* at 3. The Agency argued that since the SOP was served on the Union President on February 13, the Authority should not consider any Union response. See *id.* at 2. The

Agency also asserted that the Union's failure to respond to its SOP was a concession by the Union. See *id.* at 4.

On March 27, the Union filed a Response to the Agency's Motion to Disregard and a Motion for the Authority to Grant the Union's Negotiability Appeal (Union's Motion) asserting that the Union: (1) was not served with the SOP in accordance with § 2424.2(g) of the Authority's Regulations;² (2) could not respond to the SOP as it did not receive the document; and thus the time limit for filing its response had not begun; and (3) was seeking a decision from the Authority finding the proposal within the duty to bargain. The Union further asserted that the SOP was untimely filed and should not be considered.

On April 13, the Agency filed a Reply to the Union's Motion (Agency's Reply). The Agency asserted that it complied with the service requirements set forth in § 2424.2(g) of the Authority's Regulations and included declarations that the SOP had been mailed to the Union. See Motion to Disregard, Attachments, Declarations. The Agency further argued that the Union did not substantiate its claim that it was not served with the SOP. However, the Agency asserted that a "supplemental copy" of the SOP was served on the Union with the Agency's Reply. Agency's Reply, Cover Letter. The Agency requested that the Authority deny the Union's motion requesting the Authority to grant the negotiability appeal.

On April 17, the Authority received, via facsimile transmission, an Agency request (April 17 Request) for leave to file its April 13 Reply. The Agency noted that it had intended to include this request with the April 13 Reply. As a statement of service was not attached to the April 17 Request showing service of this document on the Union, the Authority issued an Order directing the Agency to correct the procedural deficiency. The Agency filed a timely response that complied with the order.³

2. Section 2424.2 (g) of the Authority's Regulations provides as follows:

(g) *Service* means the delivery of copies of documents filed with the Authority to the other party's principal bargaining representative and, in the case of an exclusive representative, also to the head of the agency. Compliance with part 2429 of this subchapter is required.

3. With respect to the Agency's request to file its Reply to the Union's Motion, the Authority's Regulations do not provide for the filing of such document. However, § 2429.26(a) of the Authority's Regulations provides that the Authority may, in its discretion, grant leave to file other documents as it deems appropriate. Because the Agency had no opportunity to address the Union's motion, we grant its request. See, e.g., *Nat'l Assoc. of Agriculture Employees*, 61 FLRA 545, 546 n.1 (2006)

1. Unless otherwise noted, all subsequent dates refer to 2007.

The Authority's Regulations provide that a party filing a document with the Authority must serve a copy on all counsel of record or other designated representatives of other parties, and must submit a statement of service to that effect. *See* 5 C.F.R. § 2429.27(a) and (c). In addition, § 2429.27 (b) provides that service of any document shall be accomplished by certified mail, first-class mail, commercial delivery or in person. 5 C.F.R. §2427.27(b).

In this case, for the reasons expressed below, we find that the record demonstrates that the Agency's SOP was timely filed with the Authority on February 13 and properly served on the Union in accordance with §§ 2424.2(g) and 2429 of the Authority's Regulations. In this regard, as the statement of service indicates that the SOP was served on the Union by certified mail, the SOP is "presumed" to have been served on the Union. *AFGE, Local 3172*, 49 FLRA 302, 303 n.1 (1994). There was no need to question the Agency's service until the Union, in its Motion of March 27, apprised the Authority that it had not received the SOP. *Id.*

When it appears that a party has not been properly served, the Authority's usual practice is to afford the serving party an opportunity to correct the deficiency and to afford the party who has not been served an opportunity to respond. *See, e.g., NTEU*, 46 FLRA 211, 214 (1992). In this case, after receiving the Union's Motion of March 27, the Agency, on April 13, served a copy of the SOP on the Union by certified mail, which the Union received on April 17. To be considered timely, a response must be filed with the Authority within 15 days after the date the union receives a copy of the statement of position. 5 C.F.R. § 2424.25(b). Here, the Union received the SOP on April 17. Thus, in order to be timely, the Union's response had to be filed no later than May 2. The Union did not file a response.

In an earlier motion, the Union moved to dismiss the SOP arguing that the document was untimely filed and was not properly served on the Union in accordance with § 2424.2(g) of the Authority's Regulations. Contrary to the Union's assertion, the record shows that the Agency's initial SOP was timely filed with the Authority. Moreover, even if service to the Union was not perfected at the time that the Agency filed the SOP, the deficiency was cured and the Union had an opportunity to file a timely response. Under such circumstances, the Union has not demonstrated a sufficient basis to dismiss the Agency's SOP. Accordingly, the Union's motion for the Authority to dismiss and not consider the SOP is denied.

III. Proposal

The proposal, as modified at the Post-Petition Conference, provides as follows:

AFGE Local 2145 President will serve as the Chief for determining the essential need for each key to the exterior door (1M-121-500) and the three (3) interior doors of the Union offices. The Union will take full accountability for issuance and re-issuance of keys. Management will have access to the Union offices in emergency situations, as authorized by the Union. AFGE Local 2145 offices, including the exterior door (1M-121-500) and the three (3) interior office doors, will be keyed off the Great Grand Master.

Record at 2.

IV. Positions of the Parties

A. Agency

The Agency contends that the proposal violates management's right to determine its internal security practices under § 7106(a)(1) of the Statute. According to the Agency, it issued Memorandum MCM-07-4 (MCM-07-4), entitled "Control of Keys and Locks," in order "to establish a uniform policy for the control and issuance of keys and replacement locks on its premises."⁴ SOP at 2, 6. The Agency asserts that the purpose of this policy is to "restrict access to the premises by unauthorized individuals, to ensure the security of the Agency's premises, to prevent loss of government property, and to maintain the personal safety of the Agency's employees and patients." *Id.* at 6. The Agency contends that the Union's proposal would "restrict the Agency's access to the Union's offices[.]" *Id.* The Agency asserts that an agency's determination of when and how employees gain access to agency facilities is within an agency's right to determine its internal security practices under § 7106(a)(1) of the Statute, if the determination is supported by a reasonable connection to internal security considerations. *Patent Office Prof'l Ass'n*, 41 FLRA 795, 837 (1991) (*POPA*). The Agency argues that "[t]here is a reasonable connection between the issuance of MCM-07-4 and [its] desire to prevent breaches of its internal and external security." SOP at 6.

In this regard, the Agency asserts that the second sentence of the proposal "eliminates the Agency's right to determine who issues and reissues keys to its pre-

4. The relevant text of MCM- 07-04 is set forth in the Appendix to this decision.

mises and the fourth sentence requires the Agency to ‘key off’ the Union offices from the Great Grand Master Key.” *Id.* at 6-7. The Agency further asserts that the third sentence of the proposal “only provides [it] with conditional access to the Union offices in emergency situations, subject to Union approval.” *Id.* at 7. The Agency thus contends that the proposal interferes with its “security plan to safeguard its patients, personnel, and property[,]” because it “absolutely precludes management access except in emergencies and with Union approval.” *Id.* The Agency asserts that, even in emergency situations, such as a fire in the Union offices, the Agency would have to obtain permission from the Union before taking affirmative steps to safeguard its personnel and patients. The Agency states that even though the Union offices have “panic alarms,” there is no guarantee that a Union official will be present if an emergency occurs or there is a security breach in the Union offices. *Id.*

The Agency also contends that the proposal affects its right to assign work because, under the proposal, the Union President, not the Chief of Police, determines who receives a key. *Id.* at 11.

The Agency asserts that the proposal does not constitute an appropriate arrangement under § 7106(b)(3) of the Statute. According to the Agency, “there is no evidence that the issuance of MCM-07-4 has adversely affected Union employees’ working conditions or that the Union cannot safeguard its files in a way that does not restrict management’s rights.” *Id.* at 9. Moreover, the Agency argues that the proposal’s burden on the exercise of its rights outweighs the benefits to employees flowing from the proposal. The Agency asserts that the Union has “merely suggested that it is concerned that employee[s]’ files will be improperly accessed by Agency management” *Id.* The Agency contends that there is no evidence that it has improperly accessed Union employees’ files and that Union offices are equipped with lockable file cabinets that secure files from unauthorized access. *See id.* at 9-10.

B. Union

The Union explains that three representatives perform Union duties on 100% official time. Record at 2. The Union further explains that the “purpose of this proposal is to restrict access to [its] offices . . . in order to safeguard information pertaining to bargaining unit employees and Union files.” *Id.* Specifically, the Union states that, under the proposal, “Agency officials would not have access to the Union offices . . . and that the Agency would have access only in emergency situations, when authorized by the Union.” *Id.* In this

regard, the Union asserts that the proposal “would give [it] full control over who has keys to the Union offices and would remove this control from the Agency’s Chief of Police, as provided for” in MCM-07-4. *Id.* The Union also explains that the “‘Great Grand Master’ is a universal master key that accesses all doors at the Agency’s facility, including the four doors to the Union offices” *Id.* The Union states, that under the proposal, the Agency “would be required to change the locks on the doors to the Union offices to locks that cannot be unlocked with the ‘Great Grand Master’ key.” *Id.* In this respect, the Union claims that the Agency “already allows locks that are ‘keyed off the Great Grand Master’ key for other union offices in other locations.” *Id.*

In the Union’s Motion, the Union states that it “has not conceded to . . . arguments” set forth in the Agency’s SOP because the Union had not received the SOP. *Id.* at 4 (emphasis in original).

V. Analysis and Conclusions

A. Meaning of the proposal

According to the Union, the proposal would give it full control over who has keys to the Union offices and would remove such control from Agency management, which would only have access to Union offices in emergency situations, when authorized by the Union. Record at 2. The Union also explains that the “Great Grand Master” is a universal master key that accesses all doors at the Agency’s facility, including the doors to the Union offices and that the Agency “would be required to change the locks on the doors to the Union offices to locks that cannot be unlocked with the ‘Grand Master’ key.” *Id.* The Agency does not dispute the Union’s explanation of the meaning of the proposal. Accordingly, based on the proposal’s terms and the Union’s interpretation, which is consistent with the plain wording of the proposal, we adopt the Union’s interpretation that the proposal would require the Agency to give the Union full control over who has keys to Union offices. Agency management would only have access to these offices in emergency situations, when authorized by the Union.

B. The proposal is not within the duty to bargain

As interpreted, the proposal would give the Union full control over who has keys to the Union offices and would remove such control from management, who would only have access to these offices in emergency situations, when authorized by the Union.

As discussed above, the Union did not file a response to the Agency's SOP. Under the Authority's Regulations, a union "has the burden of raising and supporting arguments that the proposal . . . is within the duty to bargain[.]" 5 C.F.R. § 2424.32(a); *see AFGE, Local 1858*, 56 FLRA 1115, 1117 (2001). The Union does not argue in its petition for review that the proposal is within the duty to bargain as an exception to management's rights. However, the Union does argue, in its Motion, that it "has not conceded" to management's arguments because it had not received the Agency's SOP. Union Motion at 4 (emphasis omitted). As set forth above, the record demonstrates that the Union was properly served. Thus, the Union's assertion does not demonstrate that the Union sufficiently raised an exception to management's rights.

The Authority has held that proposals and provisions "dealing with locked doors in the workplace [affect] management's right to determine its internal security practices." *AFGE, Local 1712*, 62 FLRA 15, 17 (2007) (a proposal that a door to a certain office remain closed during business hours, in effect, permitted employees to work behind a locked door, which affected management's right to determine its internal security practices); *POPA*, 41 FLRA at 837-38 (provision, which sought to maintain the practice whereby employees had locks on their office doors to which the employee and management had keys, affected management's right to determine its internal security practices). Here the proposal would give the Union full control over who has keys to the Union offices and would remove such control from Agency management, who would be required to obtain Union authorization to access the offices, even in emergency situations, such as a fire in the Union offices. By giving the Union full control over who has keys to the Union offices and restricting the Agency's access to these offices, the proposal affects management's right to determine its internal security practices for safeguarding its patients, personnel, and property. Thus, the proposal affects management's right to determine its internal security practices.⁵

VI. Order

The petition for review is dismissed.

APPENDIX

MCM-07-04 provides, in pertinent part, as follows:

CONTROL OF KEYS AND LOCKS

1. **PURPOSE:** To establish McGuire VA Medical Center policy for the control and issuing of keys and replacement of locks for buildings, rooms and vaults.

2. **POLICY:** All doors in this facility will be locked when the rooms are unoccupied. Keys will be issued to those VA employees whose duties or responsibilities require that they have unrestricted access to the area involved. The number of keys requested and issued will be kept to a minimum consistent with efficient and secure operations. . . .

3. **RESPONSIBILITY:**

a. The Chief, Police Services, or designee will complete issuance of all keys and requests for lock changes. The Medical Center Director must approve all exceptions to this policy.

. . . .

4. **PROCEDURES:**

a. Requests for issuance of keys will be submitted to the Chief, Police Service

. . . .

d. The Chief, Police Service, will approve or disapprove all requests for keys except for special keyed areas, such as the Great Grand Master. A Great Grand Master key will be issued only to the Medical Center Director, Associate Director, Chief of Staff, Facility Management Service, and Chief, Police Service. Under no circumstances will the Great Grand Master be duplicated without written approval of the Director.

Agency's SOP, Attachment 1.

5. In view of this determination, it is unnecessary to address the Agency's contention that the proposal affects its right to assign work.