

64 FLRA No. 114

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R1-187
SERVICE EMPLOYEES
INTERNATIONAL UNION
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
BOSTON HEALTHCARE SYSTEM
BROCKTON, MASSACHUSETTS
(Agency)
0-NG-2981

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

March 31, 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 proposals relating to the Agency's proposed policy regarding tuberculosis. The Agency filed a statement of position (SOP), to which the Union filed a response. The Agency filed an untimely reply to the Union's response. The Agency also filed a supplemental submission.

As is explained below, we dismiss the Union's petition because the Authority lacks jurisdiction to review it.

II. Background

The Agency drafted a proposed policy that would require all Agency employees to undergo annual testing for tuberculosis. *See* SOP at 4. The Union objected to the proposed policy. Its primary objection was that the policy required mandatory testing for all employees. *See id.* Although the Agency subsequently modified the proposed policy to address some of the Union's concerns, it retained the mandatory testing requirement. *See id.* at 5-6. The Union filed an unfair labor practice

charge over the proposed policy. *See* Petition at 2. The Union withdrew the charge after the Agency agreed to bargain over the Union's proposals. *See id.* The Union consists entirely of nurses and nurse practitioners. *See* SOP at 3 n.1.

III. Preliminary Issues

Before addressing the Union's petition, we must first address whether we may consider: (1) the Agency's untimely reply and (2) its supplemental submission.

The Union filed its response to the Agency's SOP on June 19; the Agency filed its reply to the response on July 8. Under § 2424.26(b) of the Authority's Regulations, the Agency was required to file its reply within fifteen days of receiving the Union's response; accordingly, the Agency was required to file its reply by July 7.

In response to an Authority order directing the Agency to show cause why its reply should not be dismissed as untimely, the Agency stated that it believed that it had until July 8 to file its reply. *See* Agency Response to Show Cause Order at 1. The Agency, however, provides no evidence to support this assertion; indeed, the Agency concedes that it did not retain the dated envelope containing the Union's response. *See id.* The reply, therefore, is untimely. Accordingly, we will not consider the Agency's reply. *See, e.g., AFGE, Local 520,* 60 FLRA 615, 616 (2005) (Chairman Cabaniss concurring as to other matters) (then-Member Pope dissenting as to other matters) (Authority did not consider untimely reply).

The Agency submitted an additional document: a letter from the Agency Under Secretary of Health (Under Secretary) addressing whether bargaining over the Union's petition is permissible under 38 U.S.C. § 7422.¹ In its SOP, the Agency stated that it planned to submit a request to the Under Secretary to consider this issue. It also asked the Authority to place this matter in abeyance until the Secretary issued his determination, at which point the Agency would provide the Authority with a copy of that determination. *See* SOP at 6-7. The Union did not object.

Under § 2429.26 of the Authority's Regulations, the Authority may, in its discretion, grant a party leave to file other documents as it deems appropriate. Because the Agency made an unopposed request in its SOP to submit the Under Secretary's determination, we

1. The relevant statutes are set forth in the attached Appendix.

will consider the Agency's supplemental submission. *See, e.g.*, 5 C.F.R. § 2429.26; *AFGE, Local 2145*, 64 FLRA 231, 231 n.3 (2009) (Authority granted party leave under § 2429.26 to submit an additional document in a negotiability matter).

IV. Proposals

Proposal 1

The Agency will educate current employees about tuberculosis (TB) exposure on an annual basis, and also when there is a documented exposure. The Agency will maintain voluntary TB testing arrangement for current employees.

Proposal 2

The Agency shall pay for all mandated TB examinations whether conducted by the Agency's physicians, or the employee's private physician.

Record of Post-Petition Conference at 2.

A. Positions of the Parties

1. Agency

The Agency contends that the Authority lacks jurisdiction to review the Union's petition. According to the Agency, the Under Secretary, acting pursuant to authority delegated by the Agency Secretary,² determined that the Union's petition involves matters or questions that concern or arise out of the professional conduct or competence of employees listed in 38 U.S.C. § 7421(b), namely, nurses and nurse practitioners. *See* Supplemental Submission at 1 (citing § 7422). The Agency contends that this determination removes the Union's proposals from the scope of collective bargaining under the Statute. *See id.* Moreover, the Agency asserts that the Under Secretary's determination is neither negotiable nor reviewable by the Authority. *See id.* (citing *AFGE, Local 446 v. Nicholson*, 475 F.3d 341 (D.C. Cir. 2007) (*Nicholson*)). The Agency, accordingly, contends that the Authority should dismiss the Union's petition.

The Agency also asserts that the Union's petition is untimely. *See* SOP at 7-10. In addition, the Agency argues that the proposals are contrary to management's

2. The Under Secretary states that the Secretary has delegated final authority to him to decide whether a matter concerns or arises out of professional conduct or competence under § 7422(b). *See* Supplemental Submission, Attach. at 8. The Union does not dispute this assertion.

right to determine internal security practices and to assign work. *See id.* at 11-14. Moreover, the Agency contends that Proposal 2 is inconsistent with a government-wide regulation. *See id.* at 10-11.

2. Union

The Union disputes the Under Secretary's determination that the Union's petition concerns questions or matters of professional conduct or competence under § 7422. *See* Response at 5. Moreover, the Union argues that the Authority has jurisdiction to review the Union's petition because the parties previously have negotiated over tuberculosis testing. *See id.*

The Union also disagrees with the Agency's assertion that the petition is untimely. *See id.* at 5-8. Moreover, the Union rejects the Agency's arguments that the proposals interfere with management's right to determine its internal security or its right to assign work. *See id.* at 9-13. Finally, the Union disagrees that Proposal 2 is contrary to a government-wide regulation. *See id.* at 8-9.

V. Analysis and Conclusions

The authority of the Secretary to prescribe, by regulation, the hours and conditions of employment of Agency employees referenced under § 7421(b) is subject to their right to engage in collective bargaining in accordance with the Statute. *See* 38 U.S.C. § 7422(a). Such collective bargaining, however, "may not cover or have any applicability to, any matter or question concerning or arising out of . . . professional conduct or competence." 38 U.S.C. § 7422(b). Whether a matter or question concerns or arises out of professional conduct or competence "shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency." 38 U.S.C. § 7422(d). Accordingly, once the Secretary or his or her designee has made a determination under § 7422(d) that a matter or question concerns or arises out of professional conduct or competence, and, thus, is not subject to collective bargaining under the Statute, the Authority is deprived of jurisdiction over the matter or question at issue. *See, e.g., Nicholson*, 475 F.3d at 347; *U.S. Dep't of Veterans Affairs, Veterans Affairs Med. Ctr, Asheville, N.C.*, 57 FLRA 681, 683 (2002) (Authority dismissed unfair labor practice complaint after Under Secretary determined that § 7422(d) removed matter from scope of collective bargaining) (*VAMC*); *Wis. Fed'n of Nurses & Health Professionals Veterans Admin., Staff Nurses Council, Local*, 5032, 47 FLRA 910, 914 (1993) (Authority dismissed negotiability peti-

tion after Secretary determined that § 7422(d) removed matter from scope of collective bargaining) (*SNCL*).

As stated above, the Under Secretary determined that the Union's petition involves matters or questions concerning or arising out of professional conduct or competence of employees listed under § 7421(b). The Under Secretary's determination, which is unreviewable, removes the Union's proposals from the scope of collective bargaining under the Statute. *See* 38 U.S.C. § 7422(b) and (d); *see also, e.g.*, *Nicholson*, 475 F.3d at 347; *VAMC*, 57 FLRA at 683. The Authority, accordingly, lacks jurisdiction to review the Union's petition. *See, e.g., SNCL*, 47 FLRA at 914. We, therefore, dismiss the petition.³ *See id.*

VI. Order

The Union's petition is dismissed.

APPENDIX

38 U.S.C. § 7421 provides, in relevant part:

(a) Notwithstanding any law, Executive order, or regulation, the Secretary shall prescribe by regulation the hours and conditions of employment and leaves of absence of employees appointed under any provision of this chapter in positions in the Veterans Health Administration listed in subsection (b).

(b) Subsection (a) refers to the following positions:

....

(5) Registered nurses.

....

38 U.S.C. § 7422 provides, in relevant part:

(a) Except as otherwise specifically provided in this title, the authority of the Secretary to prescribe regulations under [38 U.S.C. §] 7421 is subject to the right of Federal employees to engage in collective bargaining with respect to conditions of employment through representatives chosen by them in accordance with [the Statute].

(b) Such collective bargaining (and any grievance procedures provided under a collective bargaining agreement) in the case of employees described in [§] 7421(b) of this title may not cover, or have any applicability to, any matter or question concerning or arising out of (1) professional conduct or competence, (2) peer review, or (3) the establishment, determination, or adjustment of employee compensation under this title.

....

(d) An issue of whether a matter or question concerns or arises out of (1) professional conduct or competence . . . shall be decided by the Secretary and is not itself subject to collective bargaining and may not be reviewed by any other agency.

3. Based on this conclusion, we do not address the Agency's remaining arguments.