64 FLRA No. 135

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS 33
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
WASHINGTON, D.C.
(Agency)

0-NG-2949

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

April 30, 2010

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

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). It concerns the negotiability of one proposal. The Agency filed a statement of position (SOP). The Union filed a two-part response (Response and Supp. Response), [2] to which the Agency filed no reply. For the reasons that follow, we find that the proposal is within the duty to bargain.

II. Proposal and Meaning

The proposal's disputed language is as follows:

> During the course of an official investigation employees are to cooperate fully:
>
> . . . .
>
> • Employees will be provided a copy of his/her affidavit(s) immediately upon request[.]
>
> . . . .

Petition at 18; *see also* Record of Post-Petition Conference at 1-2. The parties agree that the proposal means that the Agency is to provide an employee whose testimony at an investigation is recorded in an affidavit with a copy of the affidavit at the time the employee testifies if the employee so requests. *Id*. at 2.

III. Positions of the Parties

A. Agency

The Agency contends that the proposal is contrary to management's right to determine its internal security practices. SOP at 4, 6. The Agency explains that it must be able to conduct administrative interviews in a manner it deems appropriate in order to preserve the safety of its prisons. *Id*. at 6. What this means, according to the Agency, is that investigators must be able to keep the content and sequence of questions confidential. *Id.* Further, the Agency contends, an investigator may need to re-interview an employee during an investigation to ensure the consistency of the employee's statements. The Agency argues that a requirement that an affidavit be released "immediately upon request" may therefore irreparably harm the investigation. *Id*. at 7. The Agency also notes that both the Supreme Court and the Authority have recognized that correctional facilities have special security concerns and that, accordingly, the Agency's determination of its internal security practices is entitled to greater than usual deference. *Id*. at 5.

The Agency claims that the proposal is not within the duty to bargain as an appropriate arrangement. *Id.* at 7. In this regard, the Agency argues that the Union makes only a bare assertion that the proposal is an appropriate arrangement. *Id*. at 7-8. In the alternative, the Agency argues that even if the Union makes a valid assertion of an appropriate arrangement, the proposal is not narrowly tailored and does not seek to address the effects caused by the exercise of a protected management right. *Id*. at 9. Finally, the Agency asserts that even if the proposal is sufficiently tailored, it excessively interferes with the exercise of the Agency's management rights. *Id*. at 9 n.1.

B. Union

The Union contends that the Agency has not shown a link, or reasonable connection, between its objective of safeguarding its personnel, physical prop-

1. Member Beck's separate opinion, concurring in the result, is set forth at the end of this decision.

2. The Union filed a supplement to its Response (Supp. Response) pursuant to an Authority Order granting it permission to do so. *See* Authority Order (November 2, 2007) at 2.

erty or operations and the Agency's investigative techniques. Supp. Response at 2-3. In this regard, the Union contends that refusing to give an employee a copy of the employee's affidavit immediately upon request would not stop the employee from telling another employee what was said in the affidavit. *Id*. at 5. The Union contends further that the Agency's concern that the proposal would harm an investigation by breaching the confidentiality of the content of, and sequence of questions in, the affidavit is unwarranted. *Id.* at 6. That concern, according to the Union, is based on an erroneous assumption that an employee would be unable to remember the content and sequence of questions he was asked unless he was given a copy of the affidavit as soon as he requested it. *Id*. at 6-7.

Further, the Union claims that the proposal is an appropriate arrangement for employees adversely affected by the exercise of the Agency's management right to determine its internal security practices. *Id.* at 8. The adverse effect, according to the Union, is that an employee would be subject to discipline, up to and including separation, for providing false or misleading information even when there was no intent to deceive. *Id.* at 9. The Union argues that an employee interviewed during the course of an investigation may have difficulty remembering what he said at a previous interview that took place months earlier and that access to the affidavit could protect the employee from making inadvertent errors or inconsistent statements. *Id*. at 10.

The Union contends that the proposal is sufficiently tailored. The Union explains that the proposal provides a benefit only to those suffering the adverse effects of the exercise of management rights because only an employee who provides an affidavit can receive a copy of it. The Union also argues that there is "no way to tailor this proposal any more finely." *Id*. at 15.

Finally, the Union takes the position that the proposal's impact on the Agency's exercise of its right to determine its internal security practices would be negligible. In the Union's view, by providing an employee a copy of his affidavit, all that the Agency is doing is revealing information to the employee that already was revealed by the employee during the interview. *Id*. at 11. By contrast, the Union contends that the adverse effects on employees of the Agency's exercise of its management right are genuine. *Id.* at 12. The Union cites as examples of adverse effects situations in which witnesses could not determine whether copies of affidavits with their signatures were the affidavits they had signed or were altered. *Id*. at 13-14.

IV. Analysis and Conclusions

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

Under § 7106(a)(1) of the Statute, the right to determine internal security practices includes an agency's right to determine the policies and practices that are necessary to safeguard its personnel, physical property, or operations against internal and external risks. *AFGE, Fed. Prison Council 33*, 51 FLRA 1112, 1115 (1996) (citation omitted) (*AFGE-FPC 33*). Techniques aimed at obtaining truthful and reliable information from interviewees constitute internal security practices under § 7106(a)(1). *See id*. (proposal that conflicted with agency's technique of not informing interviewees not suspected of misconduct of their *Kalkines* rights affected management rights); *NFFE, Local 1300*, 18 FLRA 789, 798 (1985) (proposal barring sworn statements in certain circumstances affected management right to determine internal security practices).

The Authority has concluded that where management shows a link, or a reasonable connection, between its objective of safeguarding its personnel, physical property, or operations and an investigative technique designed to implement that objective, a proposal that "conflicts with" that investigative technique affects management's rights under § 7106(a)(1). *AFGE-FPC 33*, 51 FLRA at 1115. Once a link has been established, the Authority will not review the merits of an agency's plan in the course of resolving a negotiability dispute. *AFGE, Local 2143*, 48 FLRA 41, 44 (1993) (citations omitted). [3]

The Agency has established the requisite link between its internal security objective of maintaining the integrity of the investigatory process and its practice of not providing witnesses with copies of their affidavits. In this regard, the Agency explains that an investigator may, during the course an investigation, decide to re-interview a witness to check the consistency of the witness's statements. The Agency contends that an investigator must be able to consider the possible need to conduct such a check before being required to release a witness's affidavit, to protect the integrity of an investigation.

We find that the Agency has established a reasonable connection between its practice of not providing

3. *See also, e.g., AFGE, Local 171, Council of Prison Locals 33*, 64 FLRA 275, 277 (2009) (noting special security concerns at federal correctional facilities); *AFGE, Council of Prison Locals, Local 919*, 42 FLRA 1295, 1300 (1991) (same).

witnesses with their affidavits during the course of an investigation and the Agency's aim of obtaining reliable information from interviewees. Because the Union's proposal would conflict with the Agency's investigative technique of not releasing affidavits, we find that the proposal affects management's right to determine its internal security practices under § 7106(a)(1) of the Statute.

B. The proposal is an appropriate arrangement.

A proposal that affects management's rights under § 7106(a) of the Statute is nevertheless negotiable if it constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute. A proposal constitutes an appropriate arrangement if it is: (1) intended as an arrangement for employees adversely affected by the exercise of a management right; and (2) appropriate because it does not excessively interfere with the exercise of management's rights. *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*).

1. The proposal is an arrangement

There are two requirements that must be met to establish that a proposal satisfies the first part of the appropriate arrangement test; i.e., that the proposal is an arrangement. First, a union must identify the effects or reasonably foreseeable effects on employees that flow from the exercise of management's rights and how those effects are adverse. *Id.* Proposals that address speculative or hypothetical concerns do not constitute arrangements. *NTEU*, 55 FLRA 1174, 1187 (1999). Second, an arrangement must be sufficiently tailored to compensate or benefit employees suffering those adverse effects. *Id*.

We find that the proposal is an arrangement. As to an arrangement's first requirement, the record supports the Union's claims that the Agency's practice of withholding affidavits adversely affects employees. Addressing these adverse effects, the Union attaches to its supplemental response two uncontroverted statements from Union representatives. The first statement documents an instance in which a witness was disciplined based on a statement in an affidavit that the witness did not recall making. Moreover, the witness was uncertain whether the affidavit was the one he signed or whether it had been changed. Supp. Response, Attach. A. The Union argues that if the witness had a copy of his original affidavit, he would have been able to prove that the statement for which he was disciplined was not a statement he made. Supp. Response at 13.

The second uncontroverted statement that the Union submitted also addresses the issue of altered affidavits. According to the statement, an employee was investigated in connection with his detention by local police. The employee subsequently gave a statement to an Agency investigator. However, it was later determined that the investigator altered the employee's statement and forged the employee's signature. The Union cites this example as evidence that such alterations occur. *Id.* at 14. The Union also points out that such occurrences may affect administrative proceedings involving employees, if not detected. *Id.* We agree, and find that the proposal addresses adverse effects on employees flowing from the exercise of management's rights, and that those effects are not speculative or hypothetical.

We also find that the proposal satisfies the second "arrangement" requirement; that it be sufficiently tailored. The Authority has held that proposals "intended to eliminate the possibility of an adverse effect, may constitute appropriate arrangements negotiable under [§] 7106(b)(3)." *NTEU, Chapter 243*, 49 FLRA 176, 191 (1994). In particular, such "prophylactic" proposals will be found sufficiently tailored in situations where it is not possible to determine reliably which employees will be adversely affected by an agency action so as to draft a proposal to apply only to those employees. *Id.* An arrangement need not "target in advance the very individual employees who will be adversely affected." *U.S. Dep't of the Interior, Minerals Mgmt. Service v. FLRA*, 969 F.2d 1158, 1163 (D.C. Cir. 1992).

The instant proposal is prophylactic in that it would eliminate the possibility that employees will be adversely affected by being disciplined based on affidavits that may have been altered or forged. Moreover, the proposal is tailored to the extent possible. It is only operative where employees have given affidavits as part of an investigation. In addition, the Agency does not argue that the proposal could be more narrowly focused on employees who would later be faced with the need to be able to confirm prior testimony recorded in an affidavit. Therefore, we conclude that this proposal is sufficiently tailored and that the proposal is an arrangement.

2. The arrangement is appropriate

If the Authority finds that a proposal is an arrangement, then the Authority determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with management's rights. *See NTEU*, 59 FLRA 978, 981 (2004). The Authority does this by weighing the benefits afforded employees under the arrangement against the intrusion on the exercise of management's rights. *See id.*

We find that the proposal does not excessively interfere with management's rights. The proposal

would benefit employees by providing assurance that where disciplinary action is proposed based on an employee's affidavit, that the affidavit is not altered or forged.

With regard to the burden on management's rights, the Agency makes only the general claim that the proposal excessively interferes. SOP at 9 n.1. *See* 5 C.F.R. § 2424.32(b) (The agency has the burden of raising and supporting arguments that the proposal or provision is outside the duty to bargain). Moreover, as the Union argues (Supp. Response at 9-12), the Agency retains complete control of investigations in virtually all respects. The only information the proposal requires the Agency to release is information provided by employees and then only to the particular employee who provided the information. Further, the Agency retains complete authority over all other aspects of the investigative process, including who will be interviewed, when interviews and re-interviews will take place, what the scope of interviews will be, and what materials, including a copy of a prior affidavit, a witness would be prohibited from bringing to an interview or re-interview.

Weighing the benefits and burdens, we find that the benefits to employees of the protection the proposal would provide are significant. By contrast, the burden the proposal places on management's rights, which the Agency does not explain in any detail, is relatively insignificant. [4] We therefore conclude that the proposal's benefits outweigh its burdens, and that the proposal constitutes an appropriate arrangement under § 7106(b)(3) of the Statute. [5]

V. Order

The proposal is within the duty to bargain. The Agency shall, upon request or as otherwise agreed to by the parties, negotiate over the proposal. [6]

Member Beck, concurring:

While I agree with my colleagues' ultimate conclusion that the proposal is negotiable, I part company with them on the threshold question of whether the proposal interferes with management's right to determine internal security practices. I believe that it does not. Therefore, I conclude that we need not reach the question of whether the proposal reflects an appropriate arrangement.

In asserting that the proposal interferes with its right to determine internal security practices, the crux of the Agency's argument seems to be this: For an investigation to be effective, "investigators, at certain times, must be able to keep the content and sequence of the questions as secret as possible." Agency SOP at 6. This argument might justify rejection of a proposal that required, for example, "During an investigation, all prospective witnesses must be gathered together in the same room and questioned as a group rather than individually." However, the argument does not hold water when the proposal merely requires that a witness be given a copy of his own affidavit after he has executed it. First, a witness already knows what questions he has been asked and what answers he has given. As a consequence, although he might not be able to recall his affidavit verbatim, he would undoubtedly be able to reveal to others, if he wished to do so, the gist of the questions and his responses. Second, nothing in the record establishes that the affidavits in question reflect "the content and the sequence of questions." *Id.* Affidavits are not verbatim transcripts of interviews. Typically, an affidavit is a narrative distillation of the most salient points derived from the investigator's interview of the witness. It would not be uncommon for the results of an intense, hour-long interview to be reduced to a one- or two-page affidavit. Nothing in this record gives me reason to believe that the information in the affidavit would reveal either the content or the particular sequence of the questions that elicited the information.

Consequently, to the extent the Agency's concern is that a subsequent witness's testimony might be tainted by a previous witness's revelation of his own testimony, this is a problem that exists regardless of whether the previous witness has a copy of his affidavit. To the extent the Agency's concern is that releasing an affidavit is tantamount to disclosing the specific content and sequence of investigative questions, this is a concern that is incompatible with the basic nature of affidavits. Therefore, I conclude that the Agency fails to demonstrate the requisite "link" between its objectives and its rights under § 7106(a)(1). *AFGE, Fed. Prison Council 33*, 51 FLRA 1112, 1115 (1996).

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4. *Cf. AFGE, Local 171,* 64 FLRA 275, 276-78 (acknowledging that special security concerns exist at Federal correctional facilities, but nevertheless determining, where the agency had made unsupported assertions concerning a proposal's appropriateness, that a proposal affecting the agency's management right to determine internal security practices was negotiable as an appropriate arrangement).

5. The Union requests that the Authority sever the word "immediately" from the proposal so that, in the event the Authority finds that providing an employee with a copy of his affidavit "immediately" interferes with management's rights, the remainder of the proposal could be found to be within the scope of bargaining. Supp. Response at 16. In light of our determination that the proposal is negotiable, we find it unnecessary to address this request.

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