64 FLRA No. 167

UNITED AMERICAN NURSES
DISTRICT OF COLUMBIA
NURSES ASSOCIATION
AND
UNITED AMERICAN NURSES
LOCAL 203
(Unions)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS HEALTHCARE
VETERANS INTEGRATED SERVICES
NETWORK 5
(Agency)

0-NG-2997

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

June 14, 2010

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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 Unions under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute), and concerns the negotiability of one proposal. The Agency filed a statement of position (SOP). The Unions filed a response (Response) to the Agency's SOP. The Agency also 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 maintains approximately thirty nursing ward units located at medical centers in Washington, D.C. and Martinsburg, West Virginia. SOP at 8, Response at 4. The Unions represent certain nursing employees within those units (bargaining unit employees). Petition at 1. The Agency intends to implement a new computer scheduling software system (VAS). Record of Post-Petition Conference (Record) at 1. VAS will allow all nursing employees to view their individual work schedules electronically. SOP at 2. VAS will also allow nursing employees to "make scheduling requests, view their posted time schedule, and request extra shifts." *Id.* at 2 n.3.

Moreover, VAS will allow upper-level management "read only" access to the schedules of all employees and allow nursing supervisors to both view and edit the schedules of employees under their supervision. SOP at 2.

However, VAS will not have a function that provides user access to a "read only" view of bargaining unit employees' scheduling information without also allowing access to non-bargaining unit employees' scheduling information. *Id*. The Agency claims it cannot alter the accessibility options because VAS was developed by a third-party vendor. *Id.*

III. Proposal and Meaning

A. The Proposal

> (Paragraph 1) When it becomes technologically feasible, the Agency shall provide each local union President "read only" access to the [VAS] system for scheduling information pertaining to bargaining unit employees. The Agency will notify each local union President upon learning of the technological feasibility of such access. The local union President shall notify in writing the Chief Nurse or equivalent position each occasion he or she accesses the [VAS] system in his or her capacity as a union representative.
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> (Paragraph 2) Until it is technologically feasible to provide . . . each local union President with "read only" access to bargaining unit employees on the [VAS] system, each local Agency facility shall provide the following information in an electronic form:
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> 1. Scheduling preferences submitted by bargaining unit employees for each unit;
> 2. Nurse manager revisions for each unit; and
> 3. Final published schedules for each unit.

> The Department shall electronically provide such information to each local union President within 24 hours of completion of each stage.

Petition at 2-3.

B. Meaning of the Proposal

As to paragraph 1 of the proposal, the parties dispute the extent of the Unions' access under the proposal to certain information on VAS. The Agency argues that the proposal would allow the Unions unrestricted access to the scheduling information of all employees, not just bargaining unit employees. Record at 2. The Agency contends that, because VAS was developed by a third-party vendor, the Agency cannot itself alter the current VAS system to limit the Unions' access to information regarding bargaining unit employees only. *Id.*

Conversely, the Unions claim that paragraph 1 means that the Unions would have "read only" access to the scheduling information of bargaining unit employees only when such limited access becomes available on the VAS system. *Id.* As the Unions' meaning of the proposal is consistent with the plain wording of the proposal, we adopt it for purposes of determining the proposal's negotiability. *See, e.g.*, *NATCA*, 62 FLRA 337, 338 (2008*)* (where parties disputed meaning of proposal, Authority adopted union's interpretation because it was consistent with proposal's plain wording).

The parties agree that paragraph 2 requires the Agency to provide bargaining unit employees' scheduling information to the Unions in electronic form. Record at 2. The parties also agree that the Agency would utilize this method of disclosure until such time as VAS is capable of limiting the Unions' access to bargaining unit employees' information only. *Id.* at 2.

IV. Positions of the Parties

A. Agency

The Agency asserts that the proposal violates § 7114(b)(4) of the Statute by requiring disclosure of information prohibited by the Privacy Act.[1] SOP at 9-10. Specifically, the Agency argues that the proposal would allow the Unions to use VAS to unlawfully obtain scheduling information for non-bargaining unit employees. *Id.* at 9. The Agency reasons that, because it cannot electronically tailor the Unions' VAS access to view only the scheduling records of bargaining unit employees, such access would improperly allow the Unions to view the records of non-bargaining unit employees as well. Reply at 2.

The Agency also argues that the proposal is contrary to management's right to determine its internal security practices under § 7106(a)(1). SOP at 11. Relying on the reasons discussed above in its "Privacy Act" argument, the Agency claims that VAS would provide the Unions with only one access option, which would improperly permit the Unions to view the scheduling records of non-bargaining unit employees. *Id.* In this regard, the Agency asserts that, under the proposal, it would not be able to electronically monitor or restrict the Unions' VAS access to prevent the Unions from improperly viewing non-bargaining unit employees' scheduling information. *Id.* at 11-12.

The Agency further contends that paragraph 2 of the proposal requires the Agency to disclose information that is not normally maintained in the regular course of business and is not reasonably available to the Agency within the meaning of § 7114(b)(4) of the Statute. Reply at 2-3. Specifically, the Agency maintains that paragraph 2 would require the Agency to compile scheduling information manually for each bargaining unit employee and sort each bargaining unit employee by ward. *Id.*

Lastly, the Agency claims that it has no duty to bargain over the proposal because the disclosure of information required by paragraph 2 of the proposal is "covered by" Article III of the parties' local agreement, and Articles 39 and 47 of the parties' national agreement.[2] SOP at 14-15.

1. The Privacy Act is codified at 5 U.S.C. § 552 (2009).

2. The relevant portions of the parties' local and national agreements state:

Article III, Section L: "Upon approval of this Agreement, the Employer will furnish the Association a list of names, grades and salaries for nurses covered by the Agreement." SOP, Attach. R at 4.

Article 39, Section 4:

> In accordance with 5 [U.S.C.] §7114(b)(4), the VA agrees to provide UAN, upon request, and, to the extent not prohibited by law, with information that is normally maintained in the

B. Unions

The Unions disagree with the Agency's arguments that the proposal violates § 7114(b)(4) regarding violation of the Privacy Act and § 7106(a)(1) regarding management's right to determine internal security practices. In support of their position, the Unions point out that the proposal would allow the Unions to access VAS for the scheduling information of bargaining unit employees only. Response at 3-4. Therefore, under the proposal, they would not receive the information regarding non-bargaining unit employees' scheduling information that assertedly violates the Privacy Act and interferes with the Agency's right to determine its internal security practices. *Id.* Furthermore, the Unions contend that the proposal would not permit the Unions to access VAS at all until the Agency can limit accessibility to viewing the scheduling information of bargaining unit employees only. *Id.* at 4. Therefore, because the proposal would restrict the Unions' access solely to bargaining unit employees' scheduling information, the Unions argue that they would not be able to gain access to non-bargaining unit employees' scheduling information. *Id.* at 3-4.

Moreover, as to the Agency's "covered by" defense, the Unions assert that neither the local agreement nor the national agreement addresses the Unions' review of bargaining unit employees' scheduling information. *Id.* at 6. In addition, the Unions argue that the "covered by" defense cannot apply to their proposal because, during negotiations, the parties did not address any issues relating to the implementation of a computerized scheduling system. *Id.*

> regular course of business, reasonably available, and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining . . . . This information will be provided to the UAN within a reasonable time and at no cost to the UAN.
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> SOP, Attach. S at 82.

Article 47, Section 1(c): ". . . mid-term agreements may include substantive bargaining on all subjects not covered in the National Master Contract." SOP, Attach. T at 102.

V. Analysis and Conclusions

A. The proposal does not violate the Privacy Act.

The Agency argues that the proposal violates the Privacy Act because the Unions' access to VAS would allow them to view the protected scheduling information of non-bargaining unit employees. However, given the Unions' asserted meaning for the proposal that we have adopted, the Agency's interpretation is erroneous. As addressed above, under the proposal, properly construed, the Unions would have access to VAS limited solely to viewing the scheduling information of bargaining unit employees if and when such a restricted view becomes available. Record at 2.

Therefore, because the Agency's "Privacy Act" argument is premised on an erroneous interpretation of the proposal, it is rejected.

B. The proposal does not violate the Agency's right to determine its internal security practices pursuant to § 7106(a)(1) of the Statute.

The Agency contends that the proposal violates its right to determine its internal security practices under § 7106(a)(1) because the proposal allows the Unions unmonitored and unrestricted VAS access to non-bargaining unit employees' scheduling information. As stated above, the Agency's interpretation of the proposal is erroneous. Therefore, its argument, which is premised upon this erroneous interpretation, lacks merit. Accordingly, the Authority finds that the Agency has not established that the proposal concerns the Agency's right to determine its internal security practices under § 7106(a)(1).[3]

C. The proposal does not violate § 7114(b)(4)(A).

The Agency further argues that the proposal is nonnegotiable because the information sought by paragraph 2 of the proposal is not normally maintained in the regular course of business or

3. In view of our finding that the Agency has not shown that the proposal concerns its right to determine its internal security practices, 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).

reasonably available within the meaning of § 7114(b)(4). Reply at 2-3.[4] The Unions do not dispute the Agency's claim that the proposal would entitle the Unions to information greater than that to which they would be entitled under § 7114(b)(4). Nevertheless, the Agency's position is inconsistent with Authority precedent.

In negotiability cases involving proposals that require an agency to release information to a union, the "issue is not what information the Union is entitled to by law, but, rather, what it may bargain for." *Patent Office Prof'l Ass'n*, 39 FLRA 783, 815 (1991) (*Patent Office*). The Authority has held that the language of § 7114(b)(4) represents a legal minimum that would exist notwithstanding the parties' agreement. *NTEU, Chapters 243 & 245*, 45 FLRA 270, 276 (1992). In other words, the entitlement to information under § 7114(b)(4) is a "statutory floor and not a ceiling." *Patent Office*, 39 FLRA at 815. Nothing in that section of the Statute prohibits a union from negotiating a right to information over and above the statutory entitlement. *Id.*

Based on the foregoing precedent, the proposal does not violate § 7114(b)(4)(A).

D. The issues the proposal addresses are not "covered by" the parties' agreements.

Under the Authority's "covered by" doctrine, a party is not required to bargain over terms and conditions of employment that have already been resolved by bargaining. *U.S. Dep't of Health & Human Servs., SSA, Balt., Md.*, 47 FLRA 1004, 1017-18 (1993). To assess whether a particular proposal is "covered by" the parties' agreement, the Authority applies a two-prong test. Under the first prong of the test, the Authority examines whether the subject matter in dispute is expressly contained in the agreement. *See, e.g., Dep't of the Treasury, IRS, Kansas City Serv. Ctr., Kansas City, Mo.*, 57 FLRA 126, 128-29 (2001). If a provision of the agreement does not expressly contain the matter, then the Authority will determine, under the second prong of the test, whether the matter is inseparably bound up with, and thus plainly an aspect of, a subject "covered by" the agreement. *Id.*

The Agency fails to substantiate its claim that the subject matter of the proposal is "covered by" the parties' local and national agreements. Article III of the parties' local agreement covers only the disclosure of "names, grades and salaries" of bargaining unit employees, while the proposal does not expressly concern disclosure of such information. SOP, Attach. R at 4. Therefore, Article III does not bar the proposal under the first prong of the "covered by" test.

The proposal is also not barred by Article III under the second prong of the "covered by" test. The subject matter of the proposal concerns the disclosure of bargaining unit employees' scheduling information. As stated above, Article III addresses the disclosure of bargaining unit employees' names, grades, and salaries. Scheduling information is distinct from data relating to names, grades, and salaries because it concerns a written plan or procedure for the completion of nursing duties. Therefore, scheduling information is neither inseparably bound up with such data nor plainly an aspect of it. For these reasons, Article III also does not bar the proposal under the second prong of the "covered by" test.

The Agency's argument that the proposal is "covered by" Article 39 of the parties' national agreement is also without merit. Article 39 incorporates into the collective bargaining agreement the exact language contained in § 7114(b)(4)(A) of the Statute concerning an agency's general obligation to provide information. Clearly, given Article 39's general wording, it does not "expressly contain" the disclosure requirements of the Unions' proposal. Further, because the proposal seeks information without reference to the statutory minimum specified in § 7114(b)(4)(A), the proposal's subject matter is not inseparably bound up with Article 39. Therefore, the proposal is not "covered by" Article 39.[5]

Our conclusion regarding the proposal's negotiability under the parties' national agreement is reinforced by facts concerning the parties' bargaining history. At the time the parties negotiated their national agreement, including Article 39, VAS was a

4. The Authority construes the Agency's argument that the proposal violates § 7114(b)(4) of the Statute as referring to § 7114(b)(4)(A), on whose language the Agency relies. Reply at 3.

5. The Agency also references Article 47 of the parties' national agreement in asserting its "covered by" argument. As the language of Article 47 is itself a reiteration of the "covered by" doctrine and the Agency makes no substantive arguments specific to Article 47, the article does not provide an independent basis for finding that the proposal is "covered by" the parties' collective bargaining agreement.

technological development that neither party foresaw. Response at 6. Therefore, access to information on VAS was not an issue that the parties could have anticipated in concluding their national agreement.

For these reasons, the "covered by" defense does not apply to the proposal.

VI. Order

The proposal is within the duty to bargain.