

69 FLRA No. 51

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

0-NG-3278

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

May 11, 2016

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, 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).¹ The case concerns the negotiability of two proposals relating to the Agency's automated-passport-control system (the kiosk system). The Agency filed a statement of position (statement), to which the Union filed a response (response), and the Agency filed a reply (reply) to the response.

The main question before us is whether Proposal 2 is contrary to the Agency's right to determine internal-security practices under § 7106(a)(1) of the Statute.² Because Proposal 2 affects management's right to determine internal-security practices and is not an appropriate arrangement under § 7106(b)(3) of the Statute, the answer is yes.

II. Background

The Agency notified the Union that it intended to implement the kiosk system at certain airports. The kiosk system permits airline passengers to enter their "basic information into [an automated] kiosk . . . instead of dictating it to [an officer]."³ Officers in the kiosk system work at kiosk podiums and conduct "primary" security inspections of passengers after the passengers have entered their information into a kiosk.⁴

The parties bargained over the implementation of the kiosk system and entered into a memorandum of understanding (MOU). Approximately one year later, the Union reopened negotiations and submitted proposals that, as relevant here, would: (1) grant officers working at kiosk podiums the discretion to sit or stand; and (2) require the Agency to install "plexiglass barriers" between the officers working at kiosk podiums and the traveling public.⁵ The parties were unable to reach an agreement and, after the Federal Service Impasses Panel declined to assert jurisdiction over the dispute, the Union filed the negotiability petition (the petition) that is before us in this case.

Additionally, during bargaining, the Agency issued an Agency-wide directive (the directive) stating that officers who perform primary passenger processing "are responsible for standing up while speaking to travelers and observ[ing] any suspicious movements or potential officer[-]safety threats."⁶ The Union has filed an unfair-labor-practice (ULP) charge alleging that the Agency violated § 7116(a)(1) and (5) of the Statute⁷ by unilaterally implementing the directive.

III. Preliminary Matter: We dismiss Proposal 1, without prejudice, under § 2424.30(a) of the Authority's Regulations.

In the petition, the Union informed the Authority that it has filed the above-mentioned ULP charge in response to the Agency's implementation of the directive.⁸ The Authority's Office of Case Intake and Publication then issued an order to show cause directing the Union to demonstrate why the petition should not be dismissed under § 2424.30(a) of the Authority's Regulations⁹ because it may be directly related to the pending ULP.¹⁰ The Union filed a response to the order, claiming that the ULP is not directly related to the

³ Reply, Ex. 13, Memorandum of Understanding (MOU) at 3.

⁴ Pet. at 2; Statement at 1.

⁵ Pet. at 2-3.

⁶ *Id.* at 1 (quoting the directive).

⁷ 5 U.S.C. § 7116(a)(1), (5).

⁸ Pet. at 1-2.

⁹ 5 C.F.R. § 2424.30(a).

¹⁰ Order to Show Cause at 1-2.

¹ 5 U.S.C. § 7105(a)(2)(E).

² *Id.* § 7106(a)(1).

petition because the “ULP charge concerns [the] [d]irective[, whereas] the [p]etition resulted from bargaining over the implementation of [the kiosk system].”¹¹

Section 2424.30(a) provides, in relevant part, that where a union files a ULP charge, and the charge concerns issues “directly related” to a petition for review in a negotiability case, the Authority will dismiss the petition for review, without prejudice to the union’s right to refile the petition after the ULP charge has been resolved.¹²

Here, the pending ULP charge alleges that the Agency violated § 7116(a)(1) and (5) of the Statute by unilaterally implementing the directive.¹³ And, according to the Union, the directive changed employees’ conditions of employment by requiring officers to “stand[] up” when speaking to travelers or when conducting certain law-enforcement duties.¹⁴

Proposal 1, at issue here, similarly concerns whether officers can sit or stand when performing passenger inspections. Specifically, Proposal 1 states that the Agency “will provide ergonomically appropriate chairs, stools, etc. to be used while [o]fficers inspect passengers after they have accessed the automated kiosks. Nothing in this provision prevents [o]fficers from standing while they inspect passengers if that is their choice.”¹⁵ The parties agree that the purpose of Proposal 1 is “to allow officers the option to sit or stand – at their discretion – while inspecting passengers.”¹⁶

The pending ULP proceedings could resolve whether the Agency has an obligation to bargain over proposals related to whether officers sit or stand. And because Proposal 1 relates to whether certain officers can sit or stand, the resolution of the ULP proceedings could render issues raised in the instant negotiability appeal moot.¹⁷ Thus, we find that the ULP charge concerns issues directly related to Proposal 1, and we dismiss the

petition with regard to Proposal 1, without prejudice, under § 2424.30(a) of the Authority’s Regulations.¹⁸

IV. Proposal 2

A. Wording

Permanent waist-high see-through plexiglass barriers will be installed between those performing inspection functions at the APC podiums and the traveling public.¹⁹

B. Meaning

The parties agree that the proposal is intended to provide officers working at the kiosk podiums with a physical barrier between the officers and the public.²⁰ The Union clarified that a kiosk podium is not the same as a kiosk: the podiums are manned by officers, whereas the kiosks are unmanned.²¹

C. Analysis and Conclusions

The Agency argues that Proposal 2 excessively interferes with its right to determine internal-security practices under § 7106(a)(1) of the Statute and with its right to determine the methods and means of performing work under § 7106(b)(1).²² In order for an agency to demonstrate that a proposal is contrary to § 7106, the agency must allege and demonstrate that the proposal affects a management right.²³ If the agency does so, then, as relevant here, the Authority will examine any union argument that the proposal is an appropriate arrangement under § 7106(b)(3).²⁴

¹¹ Resp. to Order to Show Cause at 2.

¹² 5 C.F.R. § 2424.30(a).

¹³ Pet., Ex. 5, ULP Charge at 2.

¹⁴ Pet. at 1 (quoting the directive).

¹⁵ *Id.* at 2.

¹⁶ Record of Post-Pet. Conference (Record) at 2.

¹⁷ *Cf. NFFE, Local 1363*, 8 FLRA 134, 134-35 (1982) (finding that a negotiability issue was rendered moot when a regional director determined, in a pending ULP charge, that no change in agency policy had occurred, and, therefore, the agency had no obligation to bargain over proposals related to that policy).

¹⁸ *See, e.g., AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 819, 820 (2012) (*Council of Prison*) (finding proposal “directly related to [a] ULP charge” and dismissing the petition, without prejudice, as to that proposal), *pet. for review granted in part & remanded as to other matters sub nom. U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737 F.3d 779 (D.C. Cir. 2013).

¹⁹ Pet. at 3.

²⁰ Record at 2.

²¹ *Id.*

²² Statement at 1.

²³ *AFGE, Local 2058*, 68 FLRA 676, 677 (2015) (citing *AFGE, Local 3928*, 66 FLRA 175, 179 n.5 (2011); *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 128 n.7 (2011)).

²⁴ *See id.* (citing *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 931-32 (2012) (*Local 506*)).

1. Proposal 2 affects management's right to determine internal-security practices.

The Agency claims that Proposal 2 affects its right to determine internal-security practices under § 7106(a)(1) of the Statute.²⁵ That right “includes the authority to determine the policies and practices that are part of an agency’s plan to secure or safeguard its personnel, physical property, or operations against internal and external risks.”²⁶ Where an agency shows a link or reasonable connection between its security objective and a policy or practice designed to implement that objective, a proposal that conflicts with the policy or practice affects management’s right to determine internal-security practices.²⁷ And, where an agency has established a link between its policy or practice and its security concerns, the Authority will not review the merits of the agency’s policy or practice in the course of resolving a negotiability dispute.²⁸

Here, the Agency contends that it implemented the kiosk system to place officers “in the best position to face any threats that may occur, either to the [o]fficer . . . or to other passengers.”²⁹ The Agency asserts that its “current policy” is to have no barriers³⁰ because barriers inhibit the officers’ ability to “stop any threat that may arise from drugs or from weapons.”³¹ In this regard, the Agency claims that, in the event of an emergency, the barriers “could lead to an [o]fficer being pinned” between the kiosk podium and the barrier.³²

Citing the Authority’s decision in *NTEU*,³³ the Union asserts that the Agency has not established the requisite link between its alleged security objective and its no-barrier policy because the Agency permits barriers in certain circumstances.³⁴ In this regard, the Union asserts that the Agency permits officers to work in non-kiosk inspection booths (the booths) – which “provide a barrier between the [o]fficers and the passengers”³⁵ – despite the Agency’s alleged concern that

barriers prevent officers from quickly reacting to emergencies.³⁶

In *NTEU*, the agency’s uniform policy allowed officers to wear cargo shorts in some locations, but not others.³⁷ The Authority found that the agency did not establish a link or reasonable connection between its uniform policy and its alleged security concerns because the agency “fail[ed] to articulate any security differences . . . that warrant[ed] a different uniform policy in [the different] locations.”³⁸

Unlike the agency in *NTEU*, the Agency here identifies “security differences”³⁹ that justify its different barrier policies. The Agency asserts that officers working at kiosk podiums perform a “different” security inspection than officers in the booths.⁴⁰ In this regard, the Agency states that officers in the booths “have computers and computer terminals” that require them to input administrative information for the passenger.⁴¹ But, in the kiosk system, “the administrative burden is shifted to the traveler,” allowing the “[o]fficer[s] to focus on law[-]enforcement functions.”⁴² The Union does not dispute these differences, and, in fact, agreed in the MOU that the kiosk system was implemented to “increase the amount of time an [o]fficer has to perform an enforcement examination.”⁴³

Based on the foregoing, we find that the Union’s reliance on *NTEU* is misplaced and that the Agency’s no-barrier policy in the kiosk system is reasonably connected to its stated purpose of safeguarding passengers and officers.

Although the Union claims that the Agency provided “no evidence” that Proposal 2’s plexiglass barriers would inhibit officers from being able to quickly address emergencies,⁴⁴ as noted above, we will not examine the extent to which the policy or practice adopted by the Agency to achieve its security objectives actually facilitates the accomplishment of those

²⁵ Statement at 8; Reply at 19-23.

²⁶ *AFGE, Local 3937*, 66 FLRA 393, 395 (2011) (*Local 3937*) (citing *AFGE, Fed. Prison Council 33*, 51 FLRA 1112, 1115 (1996) (*Council 33*)).

²⁷ *Local 506*, 66 FLRA at 931 (citing *AFGE, Local 723*, 66 FLRA 639, 643 (2012)); see also *Local 3937*, 66 FLRA at 395 (citing *Council 33*, 51 FLRA at 1115).

²⁸ E.g., *Local 3937*, 66 FLRA at 395 (citing *AFGE, Local 2143*, 48 FLRA 41, 44 (1993)).

²⁹ Reply at 10.

³⁰ *Id.* at 20.

³¹ *Id.* at 22.

³² *Id.* at 21.

³³ 61 FLRA 48 (2005).

³⁴ See Resp. at 39-42.

³⁵ *Id.* at 41.

³⁶ *Id.* at 41-42.

³⁷ *NTEU*, 61 FLRA at 48.

³⁸ *Id.* at 51.

³⁹ *Id.*

⁴⁰ Reply at 2.

⁴¹ *Id.* at 9.

⁴² *Id.* at 11 (noting that, as compared to the booths, “the focus of the [o]fficer-[p]assenger interaction at the kiosk podiums is a greater focus on law[-]enforcement functions and a greater ability of the [o]fficer to focus on any threats”).

⁴³ MOU at 3 (emphasis added).

⁴⁴ Resp. at 34.

objectives.⁴⁵ Moreover, because Proposal 2 requires the Agency to install plexiglass barriers between officers working at kiosk podiums and the traveling public, it conflicts with the Agency's current no-barrier policy in the kiosk system.⁴⁶ Accordingly, we find that Proposal 2 affects management's right to determine its internal-security practices under § 7106(a)(1) of the Statute.⁴⁷

2. Proposal 2 is not an appropriate arrangement under § 7106(b)(3) of the Statute.

The Union contends that, even if Proposal 2 affects management's right to determine its internal-security practices, the proposal is an appropriate arrangement⁴⁸ under § 7106(b)(3) of the Statute.⁴⁹ When determining whether a proposal is within the duty to bargain under § 7106(b)(3), the Authority initially determines whether the proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right.⁵⁰ If the proposal is an arrangement, the Authority determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with the relevant management rights.⁵¹ The Authority makes this determination by weighing "the competing practical needs of employees and managers," in order to ascertain whether the benefits to employees flowing from the proposal outweigh the proposal's burdens on the exercise of the management right involved.⁵²

Even assuming that Proposal 2 constitutes an arrangement, we find, for the following reasons, that it is not appropriate because it excessively interferes with the Agency's right to determine its internal-security practices.⁵³

As described by the Union, Proposal 2 would benefit officers by providing "more separation between the [o]fficers and the passengers."⁵⁴ The Union claims that the additional space would protect officers from "irate passenger[s]"⁵⁵ and from "passenger[s] lunging at the officer[s]."⁵⁶ The Union also argues that the additional space would protect officers "from airborne germs in the event the passenger sneezes, coughs, or is contagious."⁵⁷ Further, according to the Union, the burden on the Agency is minimal because officers already have "the option to ask travelers to step back if there is an officer[-]safety concern."⁵⁸ In this regard, the Union claims that Proposal 2 simply "memorialize[s]" the current practice "by using the barriers to create the space that [o]fficers can already request on a case-by-case basis."⁵⁹

On the other hand, the Agency asserts that officers must be able to quickly "step out from the podiums and to stop any threat that may arise from drugs or from weapons."⁶⁰ The barriers, according to the Agency, would inhibit the officers' movement and detract from the officers' ability to quickly respond to an emergency beyond the podium.⁶¹ The Agency further states that the barriers "could lead to an [o]fficer being pinned" between the kiosk podium and the barrier during an emergency.⁶²

On balance, we conclude that the burdens that Proposal 2 places on the Agency outweigh the limited benefits to the officers.⁶³ In this regard, Proposal 2 precludes the Agency from maintaining its current barrier-free kiosk system, which, according to the Agency, places officers in the "best [position to] respond to any security incidents that occur around the [kiosk] podium."⁶⁴ Although the Union disputes the Agency's assertion that the barriers would impede the officer's ability to respond to an emergency,⁶⁵ the Union

⁴⁵ See, e.g., *Local 3937*, 66 FLRA at 395-96; see also *Int'l Bhd. of Police Officers*, 46 FLRA 333, 337-38 (1992) (the Authority requires an agency to show only "a reasonable connection between its goal of safeguarding personnel or property and its practice designed to implement that goal, rather than factual proof").

⁴⁶ Reply at 20.

⁴⁷ See *Local 3937*, 66 FLRA at 399 (Member DuBester dissenting in part) (proposal that required installation of a barrier to protect employees from the public affected agency's right to determine internal-security practices); *Int'l Bhd. of Police Officers*, 47 FLRA 397, 398-99 (1993) (proposal that required the installation of a divider to protect the safety of officers affected agency's right to determine its internal-security practices); *U.S. Dep't of the Treasury, IRS, Dallas Dist.*, 19 FLRA 979, 981 (1985) (proposal that required the installation of a barrier or device to restrain the public from entering an area affected agency's right to determine internal-security practices).

⁴⁸ Resp. at 43.

⁴⁹ 5 U.S.C. § 7106(b)(3).

⁵⁰ E.g., *Local 3937*, 66 FLRA at 400 (citing *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*)).

⁵¹ *Id.* (citing *KANG*, 21 FLRA at 31-33).

⁵² *Id.* (quoting *KANG*, 21 FLRA at 31-32).

⁵³ See, e.g., *id.*; *Local 506*, 66 FLRA at 932.

⁵⁴ Resp. at 44.

⁵⁵ *Id.* at 46.

⁵⁶ Pet. at 3.

⁵⁷ *Id.*

⁵⁸ Resp. at 35 n.25 (quoting Resp., Ex. 42 at 4); see also Reply at 20.

⁵⁹ Resp. at 39.

⁶⁰ Reply at 22.

⁶¹ *Id.* at 19; see also Statement at 8.

⁶² Reply at 21.

⁶³ See *Local 3937*, 66 FLRA at 400.

⁶⁴ Reply at 21.

⁶⁵ Resp. at 37.

does not explain how the addition of a “physical barrier”⁶⁶ would *not* obstruct an officer’s movement. Moreover, to the extent that Proposal 2 simply “memorialize[s]”⁶⁷ the officers’ current ability to create space between themselves and the public in the event of a safety concern, the barriers provide no additional benefit to the officers. Accordingly, we find that the proposal excessively interferes with management’s right to determine its internal-security practices and is not negotiable as an appropriate arrangement under § 7106(b)(3) of the Statute.⁶⁸

As noted above, the Agency also argues that Proposal 2 affects its right to determine the methods and means of performing work under § 7106(b)(1) of the Statute.⁶⁹ And the Union, in response, claims that Proposal 2 is negotiable as an appropriate arrangement⁷⁰ under § 7106(b)(3) of the Statute. However, because we have found that Proposal 2 excessively interferes with management’s right to determine internal-security practices, Proposal 2 is outside the duty to bargain even if it is an appropriate arrangement for the exercise of management’s right to determine the methods and means of performing work.⁷¹ Consequently, it is unnecessary to resolve whether Proposal 2 affects management’s right to determine methods and means, or whether it is an appropriate arrangement for the exercise of that right.⁷²

V. Order

We dismiss, without prejudice, the petition as to Proposal 1. And we dismiss the petition as to Proposal 2.

⁶⁶ Record at 2.

⁶⁷ Resp. at 39.

⁶⁸ See *Local 3937*, 66 FLRA at 400.

⁶⁹ Statement at 2, 7.

⁷⁰ Resp. at 45.

⁷¹ See *Council of Prison*, 66 FLRA at 831.

⁷² See, e.g., *id.*