70 FLRA No. 137

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

FEDERAL COMMUNICATIONS COMMISSION
(Agency)

0-NG-3391

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DECISION

July 9, 2018

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Before the Authority: Colleen Duffy Kiko, Chairman, and Ernest DuBester and James T. Abbott, Members
(Member DuBester dissenting)

I. Statement of the Case

In this case, we address proposals which would subject to negotiation the level of internal security an Agency is required to adopt when moving employees from one facility to another.

This matter is before the Authority on a negotiability appeal (petition) filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (Statute).[1] It concerns the negotiability of two proposals involving the Agency's security procedures at two of its facilities. The facilities are located in Powder Springs, Georgia and Livermore, California.

The main question before us is whether the proposals impermissibly affect management's right to determine internal security practices under § 7106(a)(1) of the Statute[2] or whether they are negotiable appropriate arrangements under § 7106(b)(3) of the Statute.[3] Because the proposals excessively interfere with management's right to determine internal security practices, they are not appropriate arrangements, and they are outside the duty to bargain.

[1] 5 U.S.C. § 7105(a)(2)(E).
[2] *Id.* § 7106(a)(1).
[3] *Id.* § 7106(b)(3).

II. Background

The Agency decided to relocate its Atlanta and San Francisco field offices to existing Agency facilities in Powder Springs, Georgia and Livermore, California, respectively. As part of this office relocation, the Agency planned to relocate four bargaining-unit employees from the Atlanta field office to the Powder Springs facility, and to relocate three employees from the San Francisco field office to the Livermore facility. The employees from the Atlanta field office would join approximately ten employees already working at the Powder Springs facility. The employees from the San Francisco field office would be the first employees to work at the Livermore facility, which houses equipment operated remotely from another Agency facility.

In anticipation of the employee relocation, the Agency planned to renovate its Powder Springs and Livermore facilities. The dispute before us arose out of negotiations concerning renovations to these facilities' security systems and equipment.

The Agency declared some of the Union's proposals nonnegotiable. On December 6, 2017, the Union filed a petition with the Authority regarding two of these proposals.[4] On January 5, 2018, the Agency filed its statement of position (statement). On January 19, 2018, the Union then filed its response to the Agency's statement, and on February 2, 2018, the Agency filed its reply to that response. The Authority also conducted a post-petition conference (PPC) with the parties.

III. Proposals 1 and 5

A. Wording

Proposal 1

> Comparable Security – The Agency will provide the same level of protection for employees at the [Powder Springs] Facility as it provides at the Columbia, MD site.[5]

Proposal 5

> Comparable Security – The Agency will provide the same level of protection for the employees at the Livermore Facility as it provides at the Columbia, MD site.[6]

[4] The Union's petition initially included ten proposals, but, in its Response to the Agency's Statement of Position, the Union withdrew Proposals 2, 3, 4, 6, 7, 8, 9 and 10. Resp. at 11-17, 24-34; *see* Record of Post-Petition Conference (Record) at 1.
[5] Pet. at 4.
[6] *Id.* at 8.

B. Meaning

Regarding Proposal 1, the parties agree that the proposal requires the Agency to provide employees at the Powder Springs facility the "same level of protection" that the Agency provides employees at its Columbia, Maryland facility.[7] Specifically, the parties agree that the proposal requires the Agency to adopt security measures comparable – but not necessarily identical – to those implemented at the Columbia facility.[8] Thus, the proposal establishes a standard governing the actions the Agency will take and the practices it will adopt to safeguard the personnel, property, and operations at the Powder Springs facility.[9]

Regarding Proposal 5, the Union sets out two meanings of the proposal, and the Agency disagrees with both. Where the parties disagree over a proposal's meaning, or to resolve other meaning issues, the Authority looks first to the proposal's plain wording and the union's statement of intent. If the union's explanation of the proposal's meaning comports with the proposal's plain wording, then the Authority adopts that explanation for the purpose of construing what the proposal means and, based on that meaning, deciding whether the proposal is within the duty to bargain.[10]

The wording of Proposal 5 requires the Agency to provide employees at the Livermore facility the "same level of protection" that it provides employees at its Columbia facility.[11] In its petition, the Union adopts the same meaning it assigns to Proposal 1 – that Proposal 5 requires the Agency to adopt security measures comparable – but not necessarily identical – to those implemented at the Columbia facility.[12]

The Union suggested a somewhat different meaning at the PPC. There, the Union added that among the security measures Proposal 5 requires the Agency to provide, this proposal would require the Agency to build a security fence enclosing any buildings or areas that employees might occupy.[13]

Because the meaning ascribed to Proposal 5 in the Union's petition comports with the proposal's wording, and the meaning the Union ascribed to the proposal at the PPC does not, we adopt the petition's meaning to decide whether the proposal is negotiable.[14] The proposal's plain wording does not state that it requires the Agency to construct a fence. As with Proposal 1, Proposal 5's plain wording requires the Agency to provide security at the Livermore facility "comparable," but not necessarily identical, to that at the Columbia facility.[15]

1. Analysis and Conclusions: Proposals 1 and 5 excessively interfere with management's right to determine internal security practices and, thus, are not appropriate arrangements under § 7106(b)(3) of the Statute.

The Union asserts that the proposals are appropriate arrangements under § 7106(b)(3).[16] 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.[17] 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.[18] 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.[19] Even assuming that the proposals constitute arrangements, we find, for the following reasons, that they are not appropriate because they

[7] Record at 1-2.
[8] *Id.* at 1-2.
[9] *Id.* at 2.
[10] *NAGE, Local R-109*, 66 FLRA 278, 279 (2011) (*Local R-109*); *see NAGE, Local R1-100*, 61 FLRA 480, 480 (2006) (*Local R1-100*).
[11] Record at 2.
[12] Pet. at 8.
[13] Record at 2-3.
[14] *See Local R-109*, 66 FLRA at 278-79; *NAGE, Local R1-100*, 61 FLRA at 480.
[15] As Proposal 1 is virtually identical in nature to Proposal 5, practical sense reinforces the conclusion that the meaning of Proposal 1 is the same as the meaning of Proposal 5.
[16] Pet. at 4, 8. We note that the Union does not dispute, in either its petition or its response, the Agency's arguments that these proposals affected the Agency's right to determine internal security practices. Under 5 C.F.R. § 2424.32(c)(2), where, as here, a union does not respond to an agency's claim that a proposal affects the exercise of a management right, the Authority will find that the union concedes that the proposal affects the claimed management right. *See AFGE, Local 2058*, 68 FLRA 676, 682-83 (2015); *AFGE, Local 1938*, 66 FLRA 1038, 1040 (2012).
[17] *E.g.*, *AFGE, Local 3937*, 66 FLRA 393, 400 (2011) (*Local 3937*) (citing *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*)).
[18] *Local 3937*, 66 FLRA at 400 (citing *KANG*, 21 FLRA at 31-33).
[19] *Id.* (quoting *KANG*, 21 FLRA at 31-32).

excessively interfere with the Agency's right to determine internal-security practices.[20]

The proposals' burden on management's right to determine internal security practices is significant. Specifically, the proposals' intent is to countermand the Agency's current internal security practice determinations and require the Agency to exercise its internal security right in a different manner.[21] The proposals are absolute and give management no flexibility to determine that the levels of protection for employees at Powder Springs and at Livermore should vary from the level of security at Columbia – regardless of the individual circumstances of those facilities, the types of activities and employees involved there, and the surrounding areas. Proposals such as these – which involve employee safety and security – involve matters of Agency discretion, to which the Authority gives great deference.[22]

In contrast, any benefits that the proposals would afford employees are limited. Although the Union contends that the proposals would protect employees from harm by outside individuals,[23] the Agency has already taken steps to mitigate any danger to employees[24] by planning "upgrades" to the facilities' security systems.[25] Moreover, the Agency claims, without contradiction, that there have been no reported safety or security concerns involving outside individuals at the Powder Springs or Livermore facilities.[26]

Because the proposals severely limit the Agency's discretion to determine internal security practices, and produce only "limited" benefits to employees, we find that they are not an "appropriate" way to ameliorate a right's adverse effects within the meaning of § 7106(b)(3).[27] We find accordingly that the proposals' burden on management's rights outweighs any benefits that the proposals would afford employees. Consequently, we further find that the proposals excessively interfere with management's right to determine internal security practices and are not appropriate arrangements.[28]

It is noteworthy here that neither the Agency, nor the Union, address whether or not these proposals constitute conditions of employment that are subject to bargaining. Accordingly, we do not base our decision on that question. We note, however, that question could have, and should have, been addressed as a threshold matter. As we held recently in *U.S. DHS, U.S. CBP, El Paso, Texas*, there is no obligation to bargain over "working conditions."[29] As we noted in that case, it is "imperative" that we "respect . . . and define the differences [between conditions of employment and working conditions] for the labor-management relations community" because that distinction is a central question as to what matters are, and are not, subject to bargaining under our Statute[30] and because the Authority itself had conflated the two terms for far too long.[31]

Because the proposals excessively interfere with a management right, it is not necessary to address the Agency's remaining arguments.[32]

IV. Order

We dismiss the petition.

[20] *See, e.g.*, *AFGE, Local 1164*, 66 FLRA 112, 117 (2011) (*Local 1164*) (even assuming that the proposal constituted an arrangement, it was not an appropriate arrangement because it excessively interfered with the exercise of a management right (citing *AFGE, Local 1164*, 65 FLRA 836, 841 (2011))).

[21] Record at 1-2.

[22] *See NTEU*, 70 FLRA 100, 103 (2016) (finding proposal that limits agency's discretion to determine internal security practices significantly burdens agency's right to determine internal security practices); *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 932-33 (2012) (*Local 506*) (same); *Local 1164*, 66 FLRA at 117 (same).

[23] Resp. Br. at 8, 22.

[24] *See NATCA*, 66 FLRA 658, 661 (2012) (Member DuBester dissenting in part) (finding that benefit of proposal was limited because agency had taken steps to mitigate adverse effect of agency's exercise of management right).

[25] *E.g.*, Statement Br. at 4-5.

[26] *Id.* at 12-13, 37-38.

[27] *See NTEU*, 70 FLRA at 103; *Local 506*, 66 FLRA at 932-33; *Local 1164*, 66 FLRA at 117.

[28] We distinguish the instant proposals from proposal 1 in *NFFE, Local 2050*, 36 FLRA 618, 624-25 (1990) (*Local 2050*). In *NFFE, Local 2050*, the Authority found proposal 1 to be an appropriate arrangement after noting the agency there had offered no argument and had presented no evidence as to the burden the proposal would have placed on the exercise of management's rights. *See id.* at 628-29.

[29] 70 FLRA 501, 501 (2018) (Member DuBester dissenting).

[30] *Id.* at 503.

[31] Member Abbott adds that this is an important distinction because in his view any determination that concerns the internal-security of Agency facilities and property is a right that belongs solely to the Agency and by its very nature "[does] not impact a condition of employment."

[32] Statement Br. at 8-9, 10-11, 35-36.

Member DuBester, dissenting:

The majority's conclusion that the proposals are not appropriate arrangements under § 7106(b)(3) incorrectly balances the proposals' significant benefits to employee safety against the proposals' burden on management's rights. I would find that the proposals are appropriate arrangements because they do not excessively interfere with a management right.

The Union asserts that the proposals are appropriate arrangements under § 7106(b)(3).[1] A proposal that would affect management's rights under § 7106(a) of the Statute is negotiable if it constitutes an appropriate arrangement within the meaning of § 7106(b)(3).[2] To determine whether a proposal constitutes an appropriate arrangement, the Authority first considers whether the proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right.[3] The claimed arrangement must also be sufficiently "tailored" to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights.[4] If the Authority finds that the proposal is an arrangement, then the Authority will determine whether it is appropriate, or whether it is inappropriate because it excessively interferes with management's rights.[5] In doing so, the Authority weighs the benefits afforded to employees under the arrangement against the proposal's burden on the exercise of management's rights.[6]

Here, the Union asserts that the Agency's decision to relocate employees from the Atlanta and San Francisco field offices to the Powder Springs and Livermore facilities has adversely affected these employees' safety.[7] According to the Union, the relocated employees, "oftentimes alone," must access the facilities and "very expensive" equipment located there, to respond to emergencies that may occur at any time of day.[8] The Union further asserts that unlike the Atlanta and San Francisco field offices, the Powder Springs and Livermore facilities are in "rural locations which are not well lit and not serviced by private security at night, or close to local law enforcement."[9] This, according to the Union, poses a danger to the employees in light of "threats of violence" towards employees following the Agency's recent changes in its net neutrality policy.[10]

Although the Agency disputes the allegation that the relocations raise a security issue affecting employee safety,[11] the Agency's own planned "upgrades" to the facilities' security systems indicate otherwise.[12] For example, the Agency states that "more reliable" alarm systems, utilizing "motion sensors," will be installed.[13] And these alarm systems will be "monitored by security vendors."[14] The Agency also discusses a variety of other security "upgrades."[15]

Based on the parties' submissions, I find that the relocations raise security issues affecting employee safety. And because Proposals 1 and 5 are intended to "protect employees from assaults, robberies, other forms of violence, and any other security concerns"[16] triggered by the Agency's decision to relocate employees, I further find that Proposals 1 and 5 are intended to benefit employees by mitigating the adverse effects of the Agency's exercise of its management right. Accordingly, I conclude that the proposals are "arrangements" within the meaning of § 7106(b)(3).[17]

Regarding whether these arrangements are appropriate, the Union contends that improving security measures at these facilities to the level of security provided at the Columbia facility would benefit employee's safety by helping protect employees from the adverse effects described above.[18] Specifically, the Union argues that the proposals' protection of employees from "assaults, robberies, other forms of violence, and any other security concerns"[19] would far outweigh the burden the proposals impose on management's right. Moreover, the Union asserts that the burden on management's right is minimal because the proposals do not "determine how the Agency will achieve this level of security, and the proposal[s] do[] not require that management adopt precisely the same security measures as it established at its Columbia, MD facility."[20]

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[1] Pet. at 4, 8.
[2] *E.g.*, *NAIL, Local 5*, 67 FLRA 85, 89 (2012); *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*).
[3] *KANG*, 21 FLRA at 31.
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[5] *KANG*, 21 FLRA at 31-33.
[6] *Id.*
[7] Resp. Br. at 7, 21.
[8] *Id.* at 7, 25; Resp. Form, Attach. 1 at 1.
[9] Resp. Form, Attach. 1 at 1.
[10] Resp. Br. at 7, 21.
[11] Statement Br. at 12-13, 37-38; Reply Br. at 4, 8.
[12] *E.g.*, Statement Br. at 4-5.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 4-6.
[16] Resp. Br. at 8, 22.
[17] *See AFGE, Local 3302*, 37 FLRA 350, 358-61 (1990) (*Local 3302*); *NFFE, Local 2050*, 36 FLRA 618, 628 (1990) (*Local 2050*).
[18] Resp. Br. at 8, 22.
[19] *Id.*
[20] Pet. at 4, 8.

The Agency asserts that the burden on the exercise of management's right outweighs the proposals' potential benefits because only a "small number of employees" would benefit.[21] Further, the Agency claims, the proposals would burden management's right by requiring management to change how it secures the facilities. The Agency bases this claim on the supposition that the proposals might require a security guard, a security-guard station, and fencing, in addition to the Agency's planned renovations.[22]

I find that the proposals' significant benefits to the relocated employees outweigh the proposals' limited burden on the Agency's right to determine internal security practices. The benefits to employees concern employee-safety issues. Employee safety, by its nature, is a significant concern.[23] In this case, the proposals' entire focus is on employee security. Further, the existence of employee-security issues is confirmed by the record. Specifically, in apparent recognition of the need to increase employee security, the Agency has already made clear its intent to "upgrade" security measures at the Powder Springs and Livermore facilities, in anticipation of the relocation of employees to those facilities.[24]

In contrast, the proposals' burden on management's right to determine internal security practices is limited. I agree with the majority that the proposals would not require the Agency to adopt any particular security measures. The proposals only require the Agency to establish security measures at the Powder Springs and Livermore facilities that are comparable to, but no greater than, measures the Agency has already determined, in the exercise of this management right, to establish at the Agency's Columbia facility.

Because the proposals' benefits to employees outweigh the proposals' burden on the Agency's exercise of its management's right to determine internal security practices, the proposals do not excessively interfere with that right.

In addition, I find that the proposals do not affect the other management rights the Agency cites. The Agency argues that Proposals 1 and 5 impermissibly affect the Agency's management rights, under § 7106(a)(1) of the Statute, to determine its budget and to determine the number of its employees; and its management rights under § 7106(a)(2) [25] to hire and to assign employees. [26] The Agency bases these claims on the supposition that both proposals would require the Agency to hire and retain a security guard at the Powder Springs and Livermore facilities, and that Proposal 5 would require the Agency to erect fencing at the Livermore facility.[27]

The Agency's argument lacks merit. As I interpret the proposals, they do not require the Agency to adopt any specific security measures. Because the Agency's argument is based on a misinterpretation of the proposals, the Agency fails to demonstrate that the proposals impermissibly affect these additional management rights it cites.[28]

Finally, I reject the Agency argument that, in the specific circumstances of this case, it has no obligation to bargain over Proposal 1.[29]

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[21] Statement Br. at 13, 38.

[22] *Id.*

[23] *See AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 940-41 (2012) (finding as appropriate arrangement a proposal that protects employees from hospitalized inmates); *Local 3302*, 37 FLRA at 352 (finding as appropriate arrangement a proposal that protects employees from dangerous individuals); *Local 2050*, 36 FLRA at 628-29 (finding as appropriate arrangement a proposal that improves security at Agency facilities).

[24] Statement Br. at 4-6.

[25] 5 U.S.C. § 7106(a)(2).

[26] Statement Br. at 10-11, 35-36.

[27] *Id.*

[28] *NFFE, IAMAW, Fed. Dist. 1 Fed. Local 1998*, 69 FLRA 586, 594 (2016) (rejecting agency's argument that proposal affects management's right where argument premised on misinterpretation of proposal).

[29] Statement Br. at 9-10; *see* 5 C.F.R. § 2424.2(a) (defining a bargaining-obligation dispute, in pertinent part, as "a disagreement . . . concerning whether, in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable."). The Agency argues that its planned security changes to the Powder Springs facility, which the Agency asserts gave rise to the Union's proposal, are minor, and would have only a de minimis impact on conditions of employment. Statement Br. at 8-9. The Agency's assertion, even if true, does not demonstrate that the Agency has no duty to bargain over Proposal 1. What gave rise to the Union's request to bargain over Proposal 1 is not the Agency's planned changes to the Powder Springs facility's security measures. What gave rise to the Union's request to bargain over Proposal 1 was the Agency's decision to relocate employees to that facility. Because the Agency's argument does not address that change in employees' conditions of employment, the Agency's argument does not demonstrate that the Agency has no duty to bargain over Proposal 1. *See NFFE, IAMAW, Fed. Dist. 1, Local 1998*, 69 FLRA 626, 634 (2016) (Member Pizzella dissenting).

For these reasons, and contrary to the majority, I would find the proposals negotiable.[30]

[30] The majority's distinction, in dicta, between "conditions of employment" and "working conditions," "cannot withstand scrutiny." Majority at 5-6; *U.S. DHS, U.S. CBP, El Paso, Tex.*, 70 FLRA 501, 505 (2018) (*DHS*) (Dissenting Opinion of Member DuBester) (citing *GSA, E. Distrib. Ctr., Burlington, N.J.*, 68 FLRA 70, 75 (2014). As I explained at length in *DHS*, this claimed distinction is inconsistent with the Statute's legislative history, as well as Authority and judicial precedent. *DHS*, 70 FLRA at 505-06 (Dissenting Opinion of Member DuBester).