70 FLRA No. 63

NATIONAL NURSES UNITED
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
JAMES A. HALEY
VETERANS' HOSPITAL AND CLINICS
TAMPA, FLORIDA
(Agency)

0-NG-3322

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

August 7, 2017

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Before the Authority: Patrick Pizzella, Acting Chairman, and Ernest DuBester, Member

I. Statement of the Case

This matter is before the Authority on a negotiability appeal filed under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).[1] The case concerns the negotiability of one proposal that reserves to the Union the right to contest lack of appropriate nurse training. The Agency filed a statement of position (statement) and the Union did not respond to the statement.

Under § 2424.32(a) of the Authority's Regulations, the Union bears the "burden of raising and supporting arguments that the proposal . . . is within the duty to bargain, within the duty to bargain at the [A]gency's election, or not contrary to law."[2] In its statement, the Agency argues that the proposal is non-negotiable because it seeks to bargain over a matter that is provided for by existing federal law, is covered by the parties' collective-bargaining agreement, and is too vague and ambiguous to properly evaluate. As the Union did not respond to these arguments, effectively conceding them, we find that the proposal is outside the duty to bargain and we dismiss the petition.

[1] 5 U.S.C. § 7105(a)(2)(E).
[2] 5 C.F.R. § 2424.32(a).

II. Background

The Agency notified the Union that it intended to make a change to the required competency of registered nurses (RNs) who staff the operating rooms. The Agency also employs surgical-scrub technicians who are outside this bargaining unit, and whose primary duty is to "scrub cases."[3] This entails assisting in the operating room by passing instruments to surgeons, retracting tissue during surgery, or performing other duties as instructed. Previous to the notice, if also qualified, RNs could perform these duties, but only if they volunteered to do so. The Agency notified the Union that following training, it would require all operating room RNs be available to do so as needed.

The Union filed a negotiability petition with the Authority. Initially, four proposals were in dispute. These proposals were resolved through the parties' participation in the Authority's Collaboration and Alternative Dispute Resolution Office (CADRO) and will not be addressed further.[4] In CADRO, the Union crafted another proposal that remained in dispute. CADRO advised that the case should be taken out of abeyance. The Authority resumed processing the petition and held a post-petition conference. Then, the Agency filed a statement.

III. Proposal 1

A. Wording

> The Union reserves the right to contest lack of appropriate training in any appropriate forum to the maximum extent allowed by law.[5]

B. Meaning

At the post-petition conference, the parties agreed that the reserved "right" in the proposal "includes any right that may exist to challenge the adequacy of training under: (1) the parties' collective-bargaining agreement; (2) state or federal laws or regulations; or (3) the rules for professional accreditation in the healthcare field."[6] In its statement, the Agency states that it does not agree with the inclusion of "(3) the rules for professional accreditation in the healthcare field,"[7] as "it is too vague to understand to what is being referred."[8]

The parties agreed that the "'right to contest' the adequacy of training does not include a right to refuse to

[3] Record of Post-Petition Conference (PPC Record) at 1-2.
[4] *See generally* 5 C.F.R. § 2424.10.
[5] PPC Record at 1.
[6] *Id.* at 2.
[7] Statement at 2-3.
[8] *Id.* at 3.

perform assigned duties based on an alleged 'lack of appropriate training.'"[9] They also agreed that "appropriate training" is limited to training for RNs scrubbing cases and that "'any appropriate forum' means any forum that may exist – whether formal or informal."[10]

The parties disagreed over the meaning of "to the maximum extent allowed by law."[11] The Union stated that the phrase is intended to be expansive and include "'everything' that may exist now or in the future."[12] The Agency stated that the phrase is "too vague to know its precise contours" and that it could mean what the Union explains, or that it "could refer to the limits of a particular law."[13]

The Union explained that the purpose of the proposal is to counter a perception that the Union "has surrendered the ability of RNs to dispute, through any lawful means available, the adequacy of their training to 'scrub cases.'"[14] The Agency disagrees that the proposal would serve this purpose.[15]

Where the parties disagree over the meaning of a proposal, the Authority looks first to the proposal's wording and the union's statement of intent.[16] If the union's explanation of the proposal's meaning comports with the wording, then the Authority relies on that explanation to assess whether the proposal is within the duty to bargain.[17] Here, the Union's explanation comports with the plain wording of the proposal, so we adopt it for the purpose of assessing its negotiability.

C. Analysis and Conclusions

In its statement, the Agency argues that the proposal is non-negotiable because it seeks to bargain over a matter that is provided for by existing federal law, is covered by the parties' collective-bargaining agreement, and is too vague and ambiguous to properly evaluate.[18] More specifically, the Agency argues that it cannot bargain over which rights do or do not exist in federal law, particularly as the proposal does not specify the rights or laws at issue.[19] It argues that if the Union is referring to filing an unfair-labor-practice charge under § 7116 of the Statute, the Agency "has no discretion or ability to bargain with [the Union] over the existence and reservation of rights under this [S]tatute or any [f]ederal law."[20] The Agency distinguishes the Union's proposal from negotiable proposals that simply reiterate statutory requirements or specifically refer to a particular statutory authority.[21] The Agency also argues that the Union's proposal is covered by three articles in the collective-bargaining agreement – Articles 15, 23, and 48 – and the three proposals that the parties resolved with CADRO.[22] The Agency further argues that due to the proposal's vagueness the Agency and the Authority cannot assess its negotiability.[23]

Section 2424.32(a) of the Authority's Regulations provides that the Union bears the "burden of raising and supporting arguments that the proposal . . . is within the duty to bargain, within the duty to bargain at the [A]gency's election, or not contrary to law."[24] Further, under § 2424.32(c)(2) of the Authority's Regulations, "[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion."[25]

As the Authority has interpreted this regulation, "[w]here a union does not file a response to a[statement of position], the Authority will consider the union's contentions in its petition for review. . . . However, when a union does not respond to a[statement of position], and the petition for review does not contest certain assertions in the [statement of position], the Authority will find that the union concedes those assertions. . . . Therefore, in determining the negotiability of the proposals, any of the [a]gency's assertions in the [statement of position] that

[9] PPC Record at 2.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 819, 825 (2012).
[17] *Id.*
[18] Statement at 5-6.
[19] *Id.*
[20] *Id.* (citing 5 U.S.C. § 7103(a)(14)(C) ("conditions of employment" excludes matters "specifically provided for by [f]ederal statute"); *U.S. DOJ, INS*, 55 FLRA 892, 897-98 (1999) (matter is specifically provided for only to the extent the governing statute leaves no discretion to the agency); *IAMAW, Franklin Lodge No. 2135 & Int'l Plate Printers, Die Stampers, & Engravers Union of N. America, Local Nos. 2, 24, & 32 & Graphic Commc'ns Int'l Union, Local No. 285 & Int'l Ass'n of Siderographers, Wash. Ass'n*, 50 FLRA 677, 681-85 (1995) (Authority analyzes whether statute grants agency discretion over the matter)).
[21] *Id.* (citing *NTEU, Chapter 213 & 228*, 32 FLRA 578, 580-81 (1988)).
[22] *Id.* at 6-8.
[23] *Id.* at 4-5.
[24] 5 C.F.R. § 2424.32(a).
[25] *Id.* § 2424.32(c)(2).

are not contested in the petition will be treated as undisputed."[26]

Applying these regulatory provisions, we find that the Union concedes the Agency's arguments. As noted above, the Union did not file a response to the Agency's statement. And as the wording of the entire proposal had changed from what was included in the Union's original petition, beyond the Union's response at the post-petition conference as summarized in the post-petition conference report, there is nothing in the record refuting or disagreeing with the Agency's arguments. In these circumstances, the Union's failure to respond to the Agency's statement of position resulted in a concession of its claims.[27] In the absence of any argument to the contrary, the Union has failed to meet its burden of establishing that the proposal is within the duty to bargain.[28] Accordingly, we dismiss the Union's petition. Based on this, it is unnecessary to address the Agency's arguments.[29]

IV. Order

We dismiss the petition.

[26] *AFGE, Local 1547*, 64 FLRA 642, 642 (2010) (citations omitted). To the extent Authority precedent implies a different interpretation of § 2424.32(c)(2), it will no longer be followed. *E.g.*, *AFGE, Local 1858*, 56 FLRA 1115, 1117 (2001) (holding that the Authority will find that a union conceded that a proposal affected a management right under § 7106(a) "where the record was silent with respect to the union's position on that issue *and* where the agency's argument was supported by Authority precedent").

[27] *AFGE, Local 1547*, 64 FLRA at 642 (assertions not contested will be treated as undisputed); *AFGE, Local 801*, 64 FLRA 62, 64 (2009) (failing to argue proposal was within duty to bargain in petition for review and having no timely reply to statement of position concedes agency arguments).

[28] *NAGE, Local R-109*, 66 FLRA 278, 280 (2011).

[29] *Id.* at 281 n.2.