

64 FLRA No. 41

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 171
COUNCIL OF PRISON LOCALS 33
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
EL RENO, OKLAHOMA
(Agency)
0-NG-2980

—————
DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

November 30, 2009

—————

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 Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The Agency filed a statement of position, to which the Union filed a response. The dispute involves a single proposal related to searches of employees' personal property located within their assigned work stations.

For the reasons that follow, we find that the proposal is within the duty to bargain.

II. Proposal

Where a reasonable expectation of privacy exist[s] and there is reasonable suspicion, searches of employee[s'] personal property within their assigned/work stations by management or a representative of the employer will have a union representative present, absent an overriding exigency. The Union representative will be designated by the Union President or his designee.

III. Meaning of the Proposal

The Union contends that the proposal requires the Agency to permit Union representation at Agency searches of employees' personal property located within their work stations when: (1) there is a reasonable expectation of privacy; (2) there is reasonable suspicion; and (3) no overriding exigency exists. Record of Post-Petition Conference at 2. The Agency argues that the intent of the proposal is to establish an expectation of privacy, but concedes that the proposal could be interpreted as the Union contends. *Id.*

When a union's explanation of a proposal is consistent with the plain wording of the proposal, the Authority adopts the explanation. *AFSCME Local 2830*, 60 FLRA 671 (2005). As the Union's explanation is consistent with the plain wording of the proposal, we adopt it.¹

IV. Positions of the Parties**A. Agency**

The Agency contends that the proposal is contrary to its right to determine the policies and practices that are part of its internal security plan. Statement of Position (SOP) at 3-4 (citing *AFGE, Federal Prison Council 33*, 51 FLRA 1112 (1996)). In this connection, the Agency argues that the Supreme Court has held that the prison environment presents significant security concerns, and has concluded that prison administrators are entitled to deference on security issues. SOP at 4 (citing *Bell v. Wolfish*, 441 U.S. 520, 547 (1979), and *Rhodes v. Chapman*, 452 U.S. 337, 351-52 & n. 16 (1981)). The Agency also argues that the Authority recognized such deference in *AFGE, AFL-CIO, Local 683*, 30 FLRA 497, 500-01 (1987), and *AFGE Council of Prison Locals, Local 919*, 42 FLRA 1295, 1301 (1991).

The Agency asserts that it has published rules related to searches at its facilities, and that there is no expectation of privacy within the secure areas of those facilities.² SOP at 6 n.2. The Agency also asserts that, under the proposal, before the Agency could search an employee's personal property within the work space, the Agency would be required "to wait, no matter how many hours or days it may take, for a Union representative to arrive . . . , unless there is an overriding exi-

1. The meaning we adopt for the proposal would apply in other proceedings, unless modified by the parties through subsequent agreement. See *AFGE, Local 1164*, 60 FLRA 785, 786 n.3 (2005).

2. The relevant portions of the rules, 28 C.F.R. § 511, are set forth in the appendix to this decision.

gency.” *Id.* at 6. In addition, the Agency argues that the proposal would preclude random searches and would require the Agency “to always have a Union representative present unless the extremely high overriding exigency standard is met.” *Id.* at 7. Finally, the Agency contends that the proposal is not sufficiently tailored to constitute an appropriate arrangement and that any Union argument to the contrary should be rejected as a bare assertion. *Id.* at 8.

B. Union

The Union contends that the proposal requires Union representation at searches of employees’ personal property within their work spaces for reasons similar to those that permit union representation at investigatory interviews under § 7114(a)(2)(B) of the Statute.³ Union Response (Response) at 3. The Union argues that the proposal would “not affect internal security in any way or conflict with any investigative techniques that the [A]gency may choose to pursue.” *Id.* The Union asserts that any concern over delay, disruption or denial of a search by virtue of any Union representative’s unavailability or refusal to participate is negated by: (a) ready access to representatives on all shifts; and (b) the overriding-exigency wording in the proposal. *Id.* at 4. Finally, the Union contends that the proposal is “a procedure and/or appropriate arrangement[.]” *Id.* (citing *U.S. DOJ, Bureau of Prisons, Fed. Corr. Inst., El Reno, Okla.*, 59 FLRA 536 (2003) (*El Reno*)).

V. Analysis and Conclusions

- A. The proposal does not establish an expectation of privacy that does not already exist at the Agency’s facilities.

The Agency contends that the proposal assumes that employees have an expectation of privacy that does not exist under the Agency’s current rules. However, the Agency’s own rules regarding searches at its facilities refute its contention.

In particular, 28 C.F.R. § 511.10 makes it clear that the rules regarding searches of non-inmates apply to all persons, and the Agency acknowledges that the rules apply to non-visitors as well as non-inmates. *See* SOP at 6 n.2. Thus, the rules apply to employees. Further, § 511.15(a)(2) and § 511.17 indicate that non-inmates

have the right to refuse a search by leaving Agency grounds instead of submitting to a search. Therefore, a non-inmate does not automatically surrender his or her expectation of privacy when entering the prison, and even if a non-inmate is selected for a random search, he or she can preserve his or her privacy rights by electing to vacate the premises. Of course, if an employee makes such an election, then other personnel issues — including those related to absence without leave — may arise. Nevertheless, the Agency’s rule provides employees with a reasonable expectation of privacy, even if that expectation must be balanced against the consequences of acting on it. Although § 511.15(a) addresses random searches, the ability to refuse a reasonable-suspicion search by electing non-entry or departure from the Agency facility is set forth in § 511.17 of the rules. Put simply, under the Agency’s own published rules, all non-inmates, including employees, have a reasonable expectation of privacy by virtue of their ability to leave the facility rather than submit to a search.

In addition, the proposal applies only to reasonable-suspicion searches. In other words, under the proposal, the presence of a Union representative is not required at every search of an employee’s personal property; only reasonable-suspicion searches are covered. Section 511.15(b) of the Agency’s rules addresses reasonable-suspicion searches and provides that reasonable suspicion exists if a staff member knows of facts and circumstances that warrant rational inferences that a non-inmate may be engaged in, attempting, or about to engage in, criminal or other prohibited activity. That is, such searches necessitate facts and circumstances warranting rational inferences of illegal activity by someone in the bargaining unit. There is no basis for finding that the proposal is inconsistent with these rules.

For the foregoing reasons, the proposal does not establish an expectation of privacy that the Agency does not already recognize, and the Agency’s privacy-related arguments do not provide a basis for finding the proposal outside the duty to bargain.

- B. The proposal is not contrary to management’s right to determine internal security.

The right to determine internal security practices 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. *AFGE, Federal Prison Council 33*, 51 FLRA 1112, 1115 (1996). When management shows a link or reasonable connection between its objective of safeguarding its personnel, property, or operations and the investigative technique

3. Section 7114(a)(2)(B) of the Statute provides, in pertinent part, that in certain circumstances an exclusive representative of bargaining-unit employees shall be given the opportunity to be represented at “any examination of an employee in the unit by a representative of the agency in connection with an investigation[.]”

designed to implement that objective, a proposal that conflicts with the technique affects management's right. *NAGE, Locals R14-22 and R14-89*, 45 FLRA 949, 960 (1992); *AFGE Local 2143*, 48 FLRA 41, 44 (1993). In deciding whether a proposal affects management's right to determine its internal security practices, the Authority does not examine the merit of the practices adopted by an agency. *Id.*

The Authority has recognized that Federal correctional facilities are different from other types of facilities and that, at a correctional facility, internal security practices are of paramount importance and there is a critical need to prevent the introduction of unauthorized weapons and contraband into the facility. *AFGE, Council of Prison Locals, Local 919*, 42 FLRA 1295, 1300 (1991) (*AFGE, Local 919*). Accordingly, the Authority has held that proposals that address how an agency is to conduct reasonable-suspicion searches of employees' personal property within the workplace affect management's right to determine internal security. *See, e.g., AFGE, Local 919*, 42 FLRA at 1300; *AFGE, AFL-CIO, Council of Prison Locals, Local 1661*, 29 FLRA 990, 1015 (1987).

However, even if a proposal affects a management right under § 7106(a) of the Statute, the proposal is within the duty to bargain if it constitutes an appropriate arrangement under § 7106(b)(3) of the Statute. *See AFGE, Local 1156*, 63 FLRA 340, 341 (2009). To determine whether a proposal constitutes an appropriate arrangement, the Authority applies the test set forth in *NAGE, Local R14-87*, 21 FLRA 24, 31-33 (1986) (*KANG*). Under this test, the Authority initially determines whether the proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right. *See id.* at 31. In this regard, the Authority considers whether the proposal is "tailored" to compensate or benefit employees who are adversely affected by the exercise of a management right. *See, e.g., AFGE, Local 1687*, 52 FLRA 521, 523 (1996). If the proposal is an arrangement, then the Authority determines whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes with management's rights. *See KANG*, 21 FLRA at 31. In making this determination, the Authority balances the proposal's benefits to employees against its burdens on management. *See NTEU*, 62 FLRA 267, 272 (2007) (Chairman Cabaniss dissenting in part).

The proposal would permit employees to have Union representation, under certain circumstances, when they are searched by management pursuant to management's exercise of its right to determine internal

security practices. As such, it is tailored to benefit only employees who are adversely affected by the exercise of that management right, and we find that it is an arrangement.

As to whether the arrangement is "appropriate," or whether it is inappropriate because it excessively interferes with management's rights, the Union cites *El Reno*, 59 FLRA 536. In *El Reno*, the Authority found that an award enforcing a provision similar to the proposal here did not excessively interfere with management's right to determine its internal security practices.⁴ *Id.* at 538. Specifically, the Authority found that by ensuring both the "integrity" of searches and the "authenticity of any findings," the provision at issue afforded "significant" benefits to employees. *Id.* Moreover, noting that the provision permitted searches without representation in an "overriding exigency" and that there was no indication how this wording would be applied in future cases, the Authority rejected the agency's contention that, on its face, the provision was not enforceable under § 7106(b)(3) of the Statute. *Id.* at 539.

Like the provision in *El Reno*, the proposal here permits reasonable-suspicion searches without Union representation when there is an overriding exigency. Also like the provision in *El Reno*, the proposal would afford employees significant benefits. Although the Agency claims that the proposal is nonnegotiable on its face, the effect and benefits of this proposal are indistinguishable from the effects and benefits of the provision at issue in *El Reno*. Thus, *El Reno* supports a conclusion that the proposal is within the duty to bargain. *See KANG*, 21 FLRA 24 (1986); *NTEU*, 62 FLRA 267 (2007), *rem'd on other grounds*, 550 F.3d 1148 (DC Cir. 2008).

We reject the Agency's argument that application of this proposal would obligate it "to wait, no matter how many hours or days it may take, for a Union representative to arrive prior to a search, unless there is an overriding exigency." SOP at 6. As the Union states, there are approximately twenty union representatives employed at the facility, some of whom are present on every shift. Response at 4. Further, other than the Agency's unsupported assertion of undue delay, the Agency does not explain why a Union representative's attendance at searches where overriding exigencies do not exist would excessively interfere with management's right to determine internal security practices.

4. As the Union cites Authority precedent to support its argument, we reject the Agency's claim that the Union's argument is a bare assertion.

For the foregoing reasons, we find that the proposal does not excessively interfere with management's right to determine internal security practices and, thus, constitutes an appropriate arrangement within the meaning of § 7106(b)(3) of the Statute. Accordingly, it is within the duty to bargain.

VI. Order

The proposal is within the duty to bargain, and the Agency shall, upon request, or as otherwise agreed to by the parties, negotiate with the Union over that proposal.⁵

APPENDIX

28 C.F.R. §§ 511.10-18 provides, in pertinent part:

Subpart B—Searching and Detaining or Arresting Non-Inmates

§ 511.10 Purpose and scope.

(a) This subpart facilitates our legal obligations to ensure the safety, security, and orderly operation of Bureau of Prisons (Bureau) facilities, and protect the public. These goals are furthered by carefully managing non-inmates, the objects they bring, and their activities, while inside a Bureau facility or upon the grounds of any Bureau facility (Bureau grounds).

(b) *Purpose.* This subpart covers:

(1) Searching non-inmates and their belongings (for example, bags, boxes, vehicles, containers in vehicles, jackets or coats, etc.) to prevent prohibited objects from entering a Bureau facility or Bureau grounds;

(2) Authorizing, denying, and/or terminating a non-inmate's presence inside a Bureau facility or upon Bureau grounds; and

(3) Authorizing Bureau staff to remove from inside a Bureau facility or upon Bureau grounds, and possibly arrest and detain, non-inmates suspected of engaging in prohibited activity.

(c) *Scope/Application.* This subpart applies to all persons who wish to enter, or are present inside a Bureau facility or upon Bureau grounds, other than inmates in Bureau custody. This subpart applies at all Bureau facilities and Bureau grounds, including administrative offices.

§ 511.11 Prohibited activities.

(a) "Prohibited activities" include any activities that could jeopardize the Bureau's ability to ensure the safety, security, and orderly operation of Bureau facilities, and protect the public, whether or not such activities are criminal in nature.

(b) Examples of "prohibited activities" include, but are not limited to: Introducing, or attempting to introduce, prohibited objects into a Bureau facility or upon Bureau grounds; assisting an escape; and any other conduct that violates criminal laws or is prohibited by federal regulations or Bureau policies.

5. In finding the proposal to be within the duty to bargain, we make no judgments as to its merits.

§ 511.12 Prohibited objects.

(a) “Prohibited objects,” as defined in 18 U.S.C. 1791(d)(1), include any objects that could jeopardize the Bureau's ability to ensure the safety, security, and orderly operation of Bureau facilities, and protect the public.

(b) Examples of “prohibited objects” include, but are not limited to, the following items and their related paraphernalia: Weapons; explosives; drugs; intoxicants; currency; cameras of any type; recording equipment; telephones; radios; pagers; electronic devices; and any other objects that violate criminal laws or are prohibited by Federal regulations or Bureau policies.

§ 511.13 Searches before entering, or while inside, a Bureau facility or Bureau grounds.

Bureau staff may search you and your belongings (for example, bags, boxes, vehicles, containers in vehicles, jackets or coats, etc.) before entering, or while inside, any Bureau facilities or Bureau grounds, to keep out prohibited objects.

§ 511.14 Notification of possible search.

We display conspicuous notices at the entrance to all Bureau facilities, informing all non-inmates that they, and their belongings, are subject to search before entering, or while inside, Bureau facilities or grounds. Furthermore, these regulations and Bureau national and local policies provide additional notice that you and your belongings may be searched before entering, or while inside, Bureau facilities or grounds. By entering or attempting to enter a Bureau facility or Bureau grounds, non-inmates consent to being searched in accordance with these regulations and Bureau policy.

§ 511.15 When searches will be conducted.

You and your belongings may be searched, either randomly or based on reasonable suspicion, before entering, or while inside, a Bureau facility or Bureau grounds, as follows:

(a) *Random Searches.* This type of search may occur at any time, and is not based on any particular suspicion that a non-inmate is attempting to bring a prohibited object into a Bureau facility or Bureau grounds.

(1) Random searches must be impartial and not discriminate among non-inmates on the basis of age, race, religion, national origin, or sex.

(2) Non-inmates will be given the option of either consenting to random searches as a condition of entry, or refusing such searches and leaving Bureau grounds. However, if a non-inmate refuses to submit to a random search and expresses an intent to leave Bureau grounds, he or she may still be required to be searched if “reasonable suspicion” exists as described in paragraph (b) of this section.

(b) *Reasonable Suspicion Searches.* Notwithstanding staff authority to conduct random searches, staff may also conduct *reasonable suspicion* searches to ensure the safety, security, and orderly operation of Bureau facilities, and protect the public. “Reasonable suspicion” exists if a staff member knows of facts and circumstances that warrant rational inferences by a person with correctional experience that a non-inmate may be engaged in, attempting, or about to engage in, criminal or other prohibited activity.

§ 511.16 How searches will be conducted.

You may be searched by any of the following methods before entering, or while inside, a Bureau facility or Bureau grounds:

(a) *Electronically.* (1) You and your belongings may be electronically searched for the presence of contraband, either randomly or upon reasonable suspicion.

(2) Examples of electronic searches include, but are not limited to, metal detectors and ion spectrometry devices.

(b) *Pat Search.* (1) You and your belongings may be pat searched either randomly or upon reasonable suspicion.

(2) A pat search of your person or belongings involves a staff member pressing his/her hands on your outer clothing, or the outer surface of your belongings, to determine whether prohibited objects are present.

(3) Whenever possible, pat searches of your person will be performed by staff members of the same sex. Pat searches may be conducted by staff members of the opposite sex only in emergency situations with the Warden's authorization.

(c) *Visual Search.* You and your belongings may be visually searched as follows:

(1) *Person.* (i) A visual search of your person involves removing all articles of clothing, including religious headwear, to allow a visual (non-tactile) inspection of your body surfaces and cavities.

(ii) Visual searches of your person must always be authorized by the Warden or his/her designee and based on reasonable suspicion; random visual searches are prohibited.

(iii) When authorized, visual searches will be performed discreetly, in a private area away from others, and by staff members of the same sex as the non-inmate being searched. Visual searches may be conducted by staff members of the opposite sex in emergency situations with the Warden's authorization.

(iv) Body cavity (tactile) searches of non-inmates are prohibited.

(2) *Belongings.* A visual search of your belongings involves opening and exposing all contents for visual and manual inspection, and may be done either as part of a random search or with reasonable suspicion.

(d) *Drug Testing.* (1) You may be tested for use of intoxicating substances by any currently reliable testing method, including, but not limited to, breathalyzers and urinalysis.

(2) Drug testing must always be authorized by the Warden or his/her designee and must be based on reasonable suspicion that you are under the influence of an intoxicating substance upon entering, or while inside, a Bureau facility or Bureau grounds.

(3) Searches of this type will always be performed discreetly, in a private area away from others, and by staff members adequately trained to perform the test. Whenever possible, urinalysis tests will be conducted by staff members of the same sex as the non-inmate being tested. Urinalysis tests may be conducted by staff members of the opposite sex only in emergency situations with the Warden's authorization.

§ 511.17 When a non-inmate will be denied entry to or required to leave a Bureau facility or Bureau grounds.

At the Warden's, or his/her designee's, discretion, and based on this subpart, you may be denied entry to, or required to leave, a Bureau facility or Bureau grounds if:

(a) You refuse to be searched under this subpart; or

(b) There is reasonable suspicion that you may be engaged in, attempting, or about to engage in, prohibited activity that jeopardizes the Bureau's ability to ensure the safety, security, and orderly operation of its facilities, or protect the public. "Reasonable suspicion," for this purpose, may be based on the results of a search conducted under this subpart, or any other reliable information.