

65 FLRA No. 150

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 4052
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
METROPOLITAN DETENTION CENTER
GUAYNABO, PUERTO RICO
(Agency)

0-NG-3063

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

April 13, 2011

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This matter 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 appeal involves the negotiability of one proposal concerning the entrances that staff members may use to access a correctional institution.¹ The Agency filed a statement of position (SOP), to which the Union filed a response (response).² The Agency filed a reply to the response (reply).

For the reasons that follow, we find that the proposal is outside the duty to bargain. Accordingly, we dismiss the petition for review (petition).

1. The appeal originally concerned two proposals, Proposals 4 and 5. During the post-petition conference, the Agency withdrew its allegation of nonnegotiability with respect to Proposal 4. *See* Record of Post-Petition Conference at 2. Consequently, that proposal is no longer before the Authority.

2. As set forth below, the response was not timely filed.

II. Preliminary Issue

Section 2429.24(a) of the Authority's Regulations provides that documents must be filed with the Authority "between 9 a.m. and 5 p.m., Monday through Friday (except Federal holidays)." 5 C.F.R. § 2429.24(a). Therefore, consistent with this regulation, to be accepted for filing on a particular day, documents must be received by the Authority before 5 p.m. The Authority's Regulations also require that a response to an agency's statement of position be filed "in person, by commercial delivery, by first-class mail, or by certified mail." 5 C.F.R. § 2429.24(e).

The Union's response had to be filed with the Authority by January 18, 2011.³ Order to Show Cause at 2. The Union transmitted its response by facsimile (fax) dated January 18. *Id.* The Authority issued an order stating that the response was not received until January 19. *Id.* The order also stated that fax transmission is not an authorized method of filing a response to an SOP. *Id.* Accordingly, the Authority directed the Union to show cause why it should consider the response. *Id.*

In its response to the order, the Union concedes that the response was required to be filed by January 18, but argues that extraordinary circumstances exist to warrant consideration of the response because: (1) the Union representative "did not have sufficient monetary funds" to submit the response by certified mail to the Authority and each Agency representative; and (2) the response was faxed to the Authority and was served by fax or certified mail on the Agency representatives on January 18. Response to Order to Show Cause at 2.

Requests for waivers of time limits may be granted only in "extraordinary circumstances." 5 C.F.R. § 2429.23. In addition, it is well established that parties filing documents with the Authority are "responsible for being knowledgeable" of the statutory and regulatory filing requirements. *AFGE, Local 2065*, 50 FLRA 538, 539-40 (1995).

With regard to the Union's claim that it filed the response on January 18, the transmission report that accompanied the response indicates that it was transmitted after 5 p.m. on that date. The Union does not address the regulatory requirement that documents be filed before 5 p.m., or claim extraordinary circumstances for failure to satisfy that requirement. Accordingly, the Union does not

3. All dates in this section are from 2011.

establish extraordinary circumstances for its failure to timely file the response.

With regard to the Union's claim concerning the cost of filing by certified mail, as stated above, § 2429.24(e) of the Authority's Regulations allows a union to file a response in several different ways; it does not *require* a union to file by certified mail. As such, the Union's argument concerning the costs of certified mail does not demonstrate extraordinary circumstances for its failure to comply with the Authority's filing requirements. Moreover, the Union's remaining claims do not provide a basis for excusing the Union's failure to comply with these filing requirements.

For the foregoing reasons, we do not consider the response.⁴

With regard to the reply, § 2424.26(a) of the Authority's Regulations provides that the "purpose of the agency's reply is to [respond to] any facts or arguments made for the first time in the [union's] response." As we do not consider the response, we also find that there is no reason for the Authority to consider the reply. *See IFPTE, Local 29, Goddard Eng'rs, Scientists & Technicians Ass'n*, 61 FLRA 382, 383 (2005).

III. Proposal

A. Wording

Responsibilities: All staff assigned to Institution Entrances shall refer to the Institutional Post Orders for the proper equipment related to their duties in these assigned areas.

- A. Employees: There are primary three (3) entrances for staff to utilize, Front Entrance (Front Lobby)[,] Staff Entrance[,], and Rear Entrance (Rear Gate). All visitors will enter through the Front Lobby entrance to be processed into the institution. All unidentified staff, whether visiting or assigned, will present their Department of Justice, Federal Bureau of Prisons Identification

Card upon request of staff at the designated entrance area, the Control Center Officer and/or any other institution staff requesting that the visitors identify themselves. (Staff are reminded that they are required to carry their BOP identification at all times while in the institution.)

Record of Post-Petition Conference (Record) at 2.

B. Meaning

The parties agree that the proposal would require the Agency to allow employees to enter the institution through any of the three entrances listed in the proposal. *Id.* at 2. In addition, the Agency asserts that the proposal would allow staff to use the Rear Entrance "regardless of whether or not they are on official assignment[.]" SOP at 5. As this assertion is both undisputed and consistent with the wording of the proposal, we adopt it for the purposes of assessing the negotiability of the proposal. *See Int'l Ass'n of Machinists & Aerospace Workers, Local 726*, 31 FLRA 158, 170 (1988) (adopting undisputed contention as to meaning that was consistent with the provision's wording).

IV. Positions of the Parties

A. Union

The Union argues that the proposal is intended to prevent staff from being visible to others when they walk between the "Front Lobby Visitors Entrance" and the gun locker. Petition at 7. In this regard, the Union claims that the proposal would alleviate the safety and security concerns associated with public exposure by permitting use of another entry. *Id.*

B. Agency

The Agency contends that the proposal violates management's rights to determine its internal security practices and assign work under § 7106(a)(1) and (a)(2)(B) of the Statute. SOP at 5-12. The Agency also contends that the Union has failed to specifically argue that the proposal is an appropriate arrangement or procedure within the meaning of § 7106(b)(2) or (3) and that, in any event, the proposal is neither an appropriate arrangement or a procedure. *Id.* at 12-19.

4. We note that, in responding to the order to show cause, the Union attached a copy of the response. However, as this copy was filed after January 18, it is untimely, and we do not consider it.

V. Analysis and Conclusions

Section 2424.32(c)(2) of the Authority's Regulations provides that "[f]ailure to respond to an argument or assertion raised by the other party will . . . be deemed a concession to such argument or assertion." Consistent with this regulation, when a union does not dispute an agency's claim that a proposal affects the exercise of management's rights, and does not argue that the proposal constitutes an exception to management's rights, the Authority will find that the proposal is outside the duty to bargain. *NATCA*, 62 FLRA 337, 340 (2008); *see also AFGE, Local 1712*, 62 FLRA 15, 16 (2007) (*AFGE*) (finding union's failure to address agency's management rights arguments a concession under 5 C.F.R. § 2424.32).

Here, the Union does not argue in the petition either that the proposal does not affect a management right or that the proposal is within the duty to bargain as an exception to management's rights.⁵ Consequently, consistent with § 2424.32 and the above-cited precedent, we find that the Union has conceded that the proposal is contrary to the Agency's rights to determine internal security practices and assign work, and we find that the proposal is outside the duty to bargain. *See NATCA*, 62 FLRA at 340; *AFGE*, 62 FLRA at 16.

VI. Order

The petition for review is dismissed.

5. As discussed above, we do not consider the response.