66 FLRA No. 92

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 997
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
42ND AIR BASE WING
MAXWELL AIR FORCE BASE
GUNTER ANNEX, ALABAMA
(Agency)

0-NG-3038

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

February 21, 2012

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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), and concerns the negotiability of two proposals. The Agency filed a statement of position (SOP), which, as discussed below, was untimely. The Union filed a response (response). The Agency did not file a reply to the Union's response.

For the reasons that follow, we dismiss the Union's petition for review (petition).

II. Background

Air reserve technicians (ARTs) are civilian employees who are required as a condition of employment to maintain membership in a military reserve unit. When the Agency decided to change its regulations to require ARTs to wear military uniforms while performing their civilian duties, the Union submitted two proposals. Record of Post-Petition Conference (Record) at 1.

III. Preliminary Issues

A. The Union's hearing request is denied.

The Union requests a hearing. The Union asserts that a hearing would allow the Authority to ask questions about the uniform requirement's technical and procedural effects on civilian employees. Petition, Attach. 4. Under § 2424.31 of the Authority's Regulations, the Authority may order a hearing "[w]hen necessary to resolve disputed issues of material fact." 5 C.F.R. § 2424.31. But facts about the uniform requirement's technical and procedural effects are not material to resolving the negotiability of the Union's proposal. Because the Union does not raise an issue of material fact necessitating a hearing, we deny the Union's hearing request. *See NAIL, Local 7*, 64 FLRA 1194, 1194 (2010) (*Local 7*), *rev'd as to another matter, U.S. Dep't of the Air Force v. FLRA,* 648 F.3d 841 (D.C. Cir. 2011).

B. The Agency's SOP was untimely.

The Authority granted the Agency an extension of time until December 8, 2009, to file its SOP. The Agency's SOP filed with the Authority had a regular-mail postmark of December 10, 2009, and the Authority issued an order directing the Agency to show cause why its SOP should not be dismissed as untimely. The Agency claims that it filed its SOP by certified mail on December 4, 2009, and received a dated certified-mail receipt. Agency's Response to Show Cause Order at 1-2. But the Agency is unable to locate the certified-mail receipt. *Id.* at 1. Instead, it submits two statements from Agency employees declaring that the SOP was mailed by certified mail on December 4, 2009. *Id.*, Attach.

Under the Authority's Regulations, if a document is filed by mail, then the document's filing date is the date it is "deposited in the U.S. mail." 5 C.F.R. § 2429.27(d). When the document has a postmark, the postmark determines the filing date. 5 C.F.R. § 2429.21(b). Here, the envelope in which the Agency mailed its SOP has a regular-mail postmark of December 10, 2009. The Agency's unsubstantiated statements that it filed the SOP by certified mail on December 4, 2009, are not sufficient to establish that the Agency timely filed its SOP. *Compare NTEU*, 42 FLRA 160, 161 (1991) (affidavits, alone, are insufficient to establish a document's mailing date), *with Haw. Fed. Emps. Metal Trades Council*, 57 FLRA 450, 452 (2001) (postmarked, certified-mail receipt, together with an affidavit attesting to mailing the document on the date on certified-mail receipt, was sufficient to establish the filing date). Accordingly, we

find the SOP untimely, and we do not consider it.[1] But, as it is part of the record, we consider the Agency's allegation of nonnegotiability attached to the Union's petition. *See AFT, Indian Educators Fed'n, Local 4524*, 63 FLRA 585, 585 (2009) (*Local 4524*); *Marine Eng'rs' Beneficial Ass'n., Dist. No. 1 - PCD*, 60 FLRA 828, 829 n.2 (2005) (*Dist. No. 1*) (Chairman Cabaniss dissenting).[2]

IV. Proposal 1

A. Wording

> Bargaining unit employees [BUEs] who wear the military uniform while not performing their duties as a civilian employee of the [A]gency will be held harmless with respect to normal military considerations governing wearing the uniform in military status.

Petition, Attach. 1 at 1.

B. Meaning

The Union explains, and the Agency agrees, that the proposal prohibits the Agency from disciplining ARTs when they fail to follow military customs and courtesies while wearing the military uniform when they are off-duty. Record at 2.

C. Positions of the Parties

1. Agency

The Agency alleges that Proposal 1 is nonnegotiable because it affects the Agency's right to discipline under § 7106(a)(2)(A) of the Statute. Petition, Attach. 5 (Allegation).

2. Union

The Union maintains that the proposal does not preclude the Agency from disciplining employees for off-duty misconduct. Instead, the Union asserts, the Agency has already specified in an Agency instruction, Air Force Instruction (AFI) 36-704, the off-duty conduct that is subject to discipline.[3] The Union adds that failing to follow military customs and courtesies while wearing the military uniform when off-duty is not specified. Consequently, the Union argues, consistent with AFI 36-704, Proposal 1 does not affect the Agency's right to discipline employees because the Agency has already determined in AFI 36-704 that such conduct is not subject to discipline. Response at 2-3. In addition, the Union states, although management has the right to discipline under § 7106(a)(2)(A), management "does not have the right to infringe on an employee's rights protected by the [C]onstitution." *Id.* at 2.

D. Analysis and Conclusions

Under its terms, and as agreed by the parties, Proposal 1 prohibits the Agency from disciplining ARTs when they fail to follow military customs and courtesies while wearing the military uniform and are off-duty. The Authority has specifically held that proposals intended to prohibit discipline for infractions regarding wearing the military uniform affect management's right to discipline under § 7106(a)(2)(A) of the Statute. *ACT*, 38 FLRA 1005, 1014 (1990), *remanded as to other matters, DOD v. FLRA*, 982 F.2d 577 (D.C. Cir. 1993); *ACT, Wis. Chapter*, 26 FLRA 682, 689 (1987).

The Union argues that the proposal does not affect management's right because it is consistent with AFI 36-704. The exercise of management rights under § 7106(a)(2) is limited by "applicable laws." 5 U.S.C. § 7106(a)(2); *NLRB Union*, 62 FLRA 397, 402 (2008) (*NLRBU*). Proposals that require management to exercise its management rights in accordance with applicable laws do not impermissibly affect such rights and are within the duty to bargain. *NLRBU*, 62 FLRA at 402. An agency regulation constitutes an applicable law when the regulation has the force and effect of law. *Id.*

But under § 2424.25(c)(1)(iv)[4] of the Authority's Regulations, a union must set forth arguments and supporting authorities for any assertion that a proposal enforces an applicable law within the meaning of § 7106(a)(2). *Id.* Although the Union relies on AFI 36-704, the Union does not specifically argue that the proposal requires management to exercise its right to discipline in accordance with AFI 36-704. And the Union does not argue that AFI 36-704 constitutes an

[1] In accordance with Authority precedent, we consider the Union's response to the SOP because it complied with all filing requirements. *See AFT, Indian Educators Fed'n, Local 4524*, 63 FLRA 585, 585 (2009).

[2] In following *Local 4524* and *Dist No. 1*, we note that the Union does not challenge these decisions and does not argue that, because the SOP was untimely, the Agency's allegation of nonnegotiability is precluded from consideration by part 2424 of the Authority's Regulations.

[3] AFI 36-704 sets forth instructions for maintaining discipline and for taking disciplinary and adverse actions against civilian employees. Petition, Attach. 2.

[4] Section 2424.25(c)(1)(iv) provides that a union must state the arguments and authorities supporting its assertion that the proposal does not affect a management right, including "[w]hether and why the proposal . . . enforces an 'applicable law,' within the meaning of 5 U.S.C. § 7106(a)(2)."

applicable law within the meaning of § 7106(a)(2). As such, the Union fails to state whether and why the proposal enforces an applicable law, as required by § 2424.25. *See id.*

Under § 2424.32(c),[5] when a union does not argue that a proposal that affects a management right under § 7106(a)(2) constitutes an exception to management rights under § 7106(b) or enforces an applicable law, the Authority finds that the proposal is outside the duty to bargain. *AFGE, Local 1164*, 65 FLRA 924, 926 (2011); *NLRBU*, 62 FLRA at 402-03. Here, the Union does not argue that the proposal is an exception to management rights under § 7106(b), or that it enforces an applicable law under § 7106(a)(2). Consequently, we find that the proposal affects management's right to discipline under § 7106(a)(2)(A) and that the Union has failed to establish that the proposal is otherwise negotiable.[6] Accordingly, we conclude that the proposal is outside the duty to bargain.

V. Proposal 2

A. Wording

> In lieu of [BUEs] being required to wear a military uniform the employees [will] be allowed to wear civilian clothing with a suitable [nametag] and/or nametag and suitable uniform top. The [A]gency will furnish the nametags/uniform tops.

Petition, Attach. 1 at 1.

B. Meaning

The Union explains, and the Agency agrees, that Proposal 2 would allow ARTs to wear an alternative uniform – not the military uniform – that would identify the ARTs by name and indicate that they are civilian employees. Report at 2.

C. Positions of the Parties

1. Agency

The Agency alleges that Proposal 2 is nonnegotiable because it affects management's right to determine internal security practices under § 7106(a)(1) of the Statute and management's right to determine the methods and means of performing work under § 7106(b)(1). Allegation at 1.

2. Union

The Union contends that the Agency has not explained how the proposal affects management's right to determine its internal security practices. Response at 4. As to the methods and means of performing work, the Union concedes that this case is "exactly" like *AFGE, Local 1869*, 63 FLRA 598 (2009) (*Local 1869*), in which the Authority concluded that a similar proposal affected management's right to determine the methods and means of performing work within the meaning of § 7106(b)(1) of the Statute. *Id.* at 3. But the Union claims that *Local 1869* was wrongly decided because the Authority relied on precedent pertaining to employees in national guard civilian technician (NGT) positions. *Id.*

The Union asserts that the Authority should not have relied on NGT case law because the ART program "differ[s] substantially from the [NGT] program." *Id.* at 5-6. Specifically, the Union notes that the NGT program is covered under title 32 of the United States Code while the ART program is covered under title 5, *id.* at 8, and that NGTs are authorized by law to wear the military uniform when performing federal service, while there is no such authorization for ARTs, *id.* at 3. The Union maintains that, instead, the Authority should follow the decisions in *AFGE v. Resor*, 387 F.Supp. 63 (D.D.C. 1974), *aff'd,* 543 F.2d 930 (D.C. Cir. 1976). *Id.* In the Union's view, these decisions recognize the civilian character of ARTs' functions.

Additionally, the Union argues that requiring ARTs to wear the military uniform while in civilian status is "unlawful" because 10 U.S.C. § 772 does not authorize the wearing of the military uniform when not

[5] Section 2424.32(c)(1) provides that a "[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument." Section 2424.32(c)(2) provides that a "[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."

[6] To the extent the Union argues that it is unconstitutional for management to discipline employees under § 7106(a)(2)(A) when they fail to follow military customs and courtesies while wearing the military uniform when they are off-duty, we have no authority to review the constitutionality of the Statute. *E.g., Miss. Army Nat'l Guard, Jackson, Miss.,* 57 FLRA 337, 339 (2001) (citing *NTEU v. FLRA*, 986 F.2d 537, 540 (D.C. Cir. 1993)).

on active military duty.[7] *Id.* at 8. Finally, the Union claims that "[t]he military uniform cannot be worn because it violates a previous agreement between the [Agency] and the Civil Service Commission [CSC] entered into in 1957 when it established the [ART] program under the statutory umbrella of the CSC." *Id.* 7.

D. Analysis and Conclusions

Management's right to determine its internal security practices under § 7106(a)(1) includes the authority to determine the policies and practices that are part of the agency's plan to secure or safeguard its personnel, property, or operations. *E.g.*, *NFFE, Fed. Dist. 1, Local 1998*, 66 FLRA 124, 128 (2011). When an agency shows a link or reasonable connection between its goal of safeguarding personnel or property, or of preventing disruption of agency operations, and the disputed practice, the Authority finds that the practice constitutes an exercise of management's right to determine its internal security practices. *Id.*

Although the Agency alleges that Proposal 2 affects management's right to determine its internal security practices under § 7106(a)(1), the Agency does not explain in its allegation how the proposal affects the right. Consequently, the Agency's allegation is unsupported, and we reject it as a bare assertion. *See id.*

As the Union concedes, *see* Union's Response at 3, the Authority has specifically held that the Agency's determination to require ARTs to wear the prescribed military uniform when working in a civilian capacity constitutes a determination of the methods and means of performing work under § 7106(b)(1) of the Statute. *Local 7*, 64 FLRA at 1196; *Local 1869*, 63 FLRA at 599. And a proposal to substitute a civilian or nonmilitary uniform for the prescribed military uniform affects management's right to determine the methods and means of performing work. *Local 7*, 64 FLRA at 1197; *Local 1869*, 63 FLRA at 599.

Although conceding this precedent, the Union argues that it was wrongly decided because the Authority relied on NGT case law, instead of case law concerning the ART program. But the Union's arguments provide no basis for distinguishing this precedent.[8] In *Local 7*, the Authority rejected similar arguments that it should not rely on NGT case law because the ART program is different. 64 FLRA at 1197. In addition, nothing in the discussions of the ART program in the court cases cited by the Union pertains to whether the Agency's determination to require ARTs to wear the prescribed military uniform while working in their civilian capacity constitutes a method or means of performing work within the meaning of § 7106(b)(1) of the Statute. Accordingly, we apply *Local 7* and *Local 1839* and conclude that Proposal 2 affects management's right to determine the methods and means of performing work. And, as the Union does not assert that Proposal 2 is a procedure or an appropriate arrangement under § 7106(b)(2) or (b)(3), consistent with this conclusion, we further conclude that Proposal 2 is bargainable only at the election of the Agency. *See Local 1839*, 63 FLRA at 599.

VI. Order

Proposal 2 is bargainable only at the election of the Agency. The petition for review is dismissed.

[7] Title 10 U.S.C. § 772 sets forth circumstances under which individuals may wear military uniforms. See the appendix to this decision for the full text of 10 U.S.C. § 772.

[8] We note the Union's argument that wearing the military uniform while in civilian status is unlawful under 10 U.S.C. § 772. As the Authority specifically held in *Local 7*, 64 FLRA at 1196 n.5, this argument does not involve a dispute regarding the negotiability of a proposal. Instead, the Union's argument concerns whether the Agency's requirement is lawful. Such an argument is not appropriately presented to the Authority in a negotiability proceeding. *See id.* (quoting 5 C.F.R. § 2424.2(c)). As for the Union's argument that ARTs cannot be required to wear the military uniform because the requirement "violates a previous agreement" between the Agency and the CSC, Response at 7, this argument is also not appropriately presented to the Authority in a negotiability proceeding. Specifically, this argument involves neither the legality of the proposal, *see Local 7*, 64 FLRA at 1196 n.5, nor a bargaining obligation dispute within the meaning of § 2424.2(a) of the Authority's Regulations. Accordingly, neither argument provides a basis for finding Proposal 2 within the Agency's duty to bargain.

APPENDIX

10 U.S.C. § 772 provides:

> (a) A member of the Army National Guard or the Air National Guard may wear the uniform prescribed for the Army National Guard or the Air National Guard, as the case may be.
> (b) A member of the Naval Militia may wear the uniform prescribed for the Naval Militia.
> (c) A retired officer of the Army, Navy, Air Force, or Marine Corps may bear the title and wear the uniform of his retired grade.
> (d) A person who is discharged honorably or under honorable conditions from the Army, Navy, Air Force, or Marine Corps may wear his uniform while going from the place of discharge to his home, within three months after his discharge.
> (e) A person not on active duty who served honorably in time of war in the Army, Navy, Air Force, or Marine Corps may bear the title, and, when authorized by regulations prescribed by the President, wear the uniform, of the highest grade held by him during that war.
> (f) While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.
> (g) An officer or resident of a veterans' home administered by the Department of Veterans Affairs may wear such uniform as the Secretary of the military department concerned may prescribe.
> (h) While attending a course of military instruction conducted by the Army, Navy, Air Force, or Marine Corps, a civilian may wear the uniform prescribed by that armed force if the wear of such uniform is specifically authorized under regulations prescribed by the Secretary of the military department concerned.
> (i) Under such regulations as the Secretary of the Air Force may prescribe, a citizen of a foreign country who graduates from an Air Force school may wear the appropriate aviation badges of the Air Force.
> (j) A person in any of the following categories may wear the uniform prescribed for that category:
> (1) Members of the Boy Scouts of America.
> (2) Members of any other organization designated by the Secretary of a military department.