64 FLRA No. 19

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R1-109
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VA CONNECTICUT HEALTHCARE SYSTEMS
NEWINGTON, CONNECTICUT
(Agency)

0-NG-2770

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

September 29, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

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), and concerns the negotiability of one proposal (Proposal 15(a)). [2] For the reasons that follow, we find that the proposal is within the duty to bargain.

II. Proposal 15(a)

> If it is determined that there are physical and or psychological reasons that render the employee unable to qualify with the weapon;
>
> a. the union may bargain to the extent provided by law concerning ergonomic or other accommodative issues including allowing a retesting within accommodative measures bargained for.

III. Meaning of the Proposal

The Union contends that the proposal was developed in response to the implementation of an Agency requirement (the Policy) that all Agency police officers be armed. *See* Post-Petition Conference Report (Report) at 2. In connection with the Policy, the Agency designated the Beretta 92D as the firearm that officers would be required to use. *See* Agency Statement of Position at 3.

Under the plain wording of the proposal, the Agency would be required to "bargain to the extent provided by law" in certain circumstances. Petition for Review, Attachment A (Union Proposals) at unnumbered third page. Specifically, according to the Union, the Agency would be required to bargain over accommodative measures for employees whom the Agency determines to be physically or psychologically unable to qualify to use the designated firearm. S*ee* Report at 2. The Union states that the proposal would allow the Agency to determine when an employee is either physically or psychologically unable to qualify, but that such determination could be subject to arbitral review. *See id.* The Agency does not dispute the Union's statements regarding the meaning of the proposal. Accordingly, based on the proposal's terms and the Union's interpretation, which is consistent with the plain wording of the proposal, we construe the proposal as providing for lawful bargaining on accommodative measures for employees the Agency determines are physically or psychologically unable to qualify to use the firearm the Agency has designated for their use. *See, e.g., NTEU*, 61 FLRA 871, 873 (2006) (then-Member Pope dissenting in part on other grounds) (Authority interpreted proposal based on union's interpretation and plain wording of proposal, noting that agency did not dispute union's interpretation).

IV. Positions of the Parties

A. Agency

The Agency contends that the "proposal is moot, th[e] appeal is untimely, and the [U]nion's continued pursuit of this non-negotiable proposal constitutes an abuse of process." Agency Reply at 5. In this regard, the Agency asserts that: the Policy has been long implemented (nationally in 2000 and locally in 2003); the Union has bargained over the policy "at both the national level (abortively) and at the local level (successfully)[;]" and the Union "has grieved, filed a ULP, and pursued an EEO complaint over the adverse impact of [the Policy] on the one unit officer who failed to qualify[.]" *Id*. at 9.

1. Member Beck's dissenting opinion is set forth at the end of this decision.

2. The petition initially involved seventeen proposals, but sixteen of the proposals were resolved with the assistance of the Authority's Collaboration and Alternative Dispute Resolution Office.

The Agency also argues that the proposal affects the Agency's right to determine its internal security practices under § 7106(a)(1) of the Statute. In this connection, the Agency asserts that it has exercised its right to determine internal security practices by establishing the Policy. According to the Agency, the Union's proposal would undermine the Policy by allowing employees to modify or replace their firearms with different firearms. The Agency further contends that the proposal does not constitute a negotiable procedure or appropriate arrangement under § 7106(b)(2) or (3), respectively.

Finally, the Agency argues that it has no duty to bargain over the proposal because the subject matter of the proposal is covered by an existing memorandum of understanding (MOU) and because the Agency has no duty to engage in mid-term bargaining.

B. Union

The Union contends that the proposal is a negotiable procedure under § 7106(b)(2) of the Statute because the Agency "has no set process or procedure to address . . . employees who fail to qualify with a firearm" and "the union's proposal is intended to review, and when appropriate remedy a known physical or psychological impediment to firearm qualification." Union Response at 8. The Union also contends that the proposal is a negotiable appropriate arrangement under § 7106(b)(3) of the Statute because the Policy allows individual facilities to determine which firearms to use, and that the proposal would merely permit the use of alternatives envisioned by those guidelines.

V. Analysis and Conclusions

A. The proposal is not moot, and the negotiability appeal does not constitute an abuse of the Authority's process.

The Agency argues that the proposal is moot and that the Union's filing of the negotiability appeal constitutes an abuse of the Authority's process. Specifically, as discussed above, the Agency contends that the Policy was implemented a long time ago, that bargaining has occurred, and that the Union "has grieved, filed a ULP, and pursued an EEO complaint over the adverse impact of [the Policy] on the one unit officer who failed to qualify[.]" Agency Reply at 9.

Section 2429.10 of the Authority's Regulations states, in pertinent part, that "[t]he Authority . . . will not issue advisory opinions." Consistent with this regulation, the Authority will not resolve the negotiability of proposals that are moot. *See, e.g., NTEU, Chapter 207*, 58 FLRA 409. 410 (2003) (Chairman Cabaniss dissenting). The Authority has held that a dispute becomes moot when the parties no longer have a legally cognizable interest in the outcome. *See Soc. Sec. Admin.*, 57 FLRA 264, 268 (2001) (citation omitted) (Member Wasserman dissenting in part).

Even assuming that no employee had been adversely affected by the Policy, the proposal could nonetheless benefit employees who, in the future, fail to either qualify or re-qualify with their firearms for physical or psychological reasons. As such, the parties continue to have a legally cognizable interest in the outcome of this negotiability appeal, and we find that the proposal is not moot.

With regard to the Agency's "abuse of process" claim, there is no basis in the record for finding that any of the other proceedings cited by the Agency have resolved the negotiability of the Union's proposal. As such, and given that the proposal is not moot, we find no basis for concluding that the Union has abused the Authority's processes by filing this negotiability appeal.

B. The appeal is timely.

On September 9, 2004, the Authority granted the Union's request to withdraw its negotiability petition without prejudice, as the Union had indicated that the petition was related to a pending grievance. On May 26, 2005, the Union filed a motion requesting reinstatement of its petition. The Agency filed an opposition to the Union's motion, arguing that the motion was untimely because the duty to bargain issue was "not properly addressed in the subject grievance, nor otherwise made ripe by any intervening event." Agency Opp'n to Union Motion at 3. Subsequently, the Union provided evidence that the purportedly related grievance had been withdrawn on June 7, 2005 and then settled on June 9, 2005. *See* Union's Reply to the Show Cause Order, Attachments dated June 7 & 9, 2005.

Under § 2424.30(a) of the Authority's Regulations,

> where an exclusive representative files . . . a grievance alleging an unfair labor practice under the parties' negotiated grievance procedure, and the charge or grievance concerns issues directly related to the petition for review filed pursuant to this part, the Authority will dismiss the petition for review . . . without prejudice to the right of the exclusive representative to refile the petition for review after the . . . grievance has been resolved administratively[.] . . . No later than thirty (30) days after the date on which the . . . grievance is resolved administratively, the exclusive representative may refile the petition for review, and the

Authority will determine whether resolution of the petition is still required.

As discussed above, the Union withdrew the allegedly related grievance on June 7, 2005, and the grievance was settled on June 9, 2005. In addition, its request for reinstatement was timely filed. Because the Union's withdrawal request was granted without prejudice to the Union's right to refile, we will consider the petition.

C. The proposal is not contrary to management's right to determine internal security practices.

It is well established that standard "reopener" proposals – i.e., proposals that specify the conditions under which a party may seek to negotiate mid-term over a subject that is covered by a collective bargaining agreement – are within the duty to bargain. *See, e.g., POPA*, 56 FLRA 69, 72-73 (2000) (Chairman Cabaniss & Member Wasserman dissenting in part on other grounds); *AFGE, Local 1995*, 47 FLRA 470, 471-73 (1993); *NAGE, SEIU, AFL-CIO*, 24 FLRA 147, 148-49 (1986); *AFGE, AFL-CIO, Local 3804*, 21 FLRA 870, 889-91 (1986); *see also NTEU v. FLRA*, 399 F.3d 334, 342 (D.C. Cir. 2005) (court stated that the Authority has "often ordered an agency to bargain over a reopener proposal"). Proposal 15(a) addresses the conditions under which the Agency would be required to bargain after it determines that physical and/or psychological reasons render an employee unable to qualify with a weapon. As the proposal seeks to define the scope of the parties' bargaining rights, it is akin to a negotiable reopener provision.

It also is well established that proposals that "require management to take action in accordance with law[]" are within the duty to bargain. *AFGE, Locals 3807 & 3824*, 55 FLRA 1, 5 (1998) (citing *NTEU, Chs. 213 & 228*, 32 FLRA 578, 581 (1988)); *cf. Professional Airways Systems Specialists*, 56 FLRA 798, 801 (2000) (where union explained and agency did not dispute that proposal only required agency to exercise its right to assign work in manner consistent with law, Authority found proposal did not affect right to assign work) (citing *AFGE, Dep't of Educ. Council of AFGE Locals*, 35 FLRA 56, 62-63 (1990)). [3]

As stated above, Proposal 15(a) expressly would require the Agency to bargain "to the extent provided by law" in certain circumstances. Specifically, once the Agency has determined that an employee is physically or psychologically unable to qualify with a firearm, the Agency would be required to bargain with the Union over "accommodative measures" for those employees. Report at 2. The proposal's plain wording indicates that the Agency would not be required to bargain in any manner that exceeds legal requirements, which includes any bargaining that would be inconsistent with management's right to determine internal security practices. We note, in this regard, that the Union has not offered, and the proposal would not require the Agency to negotiate over, any particular measures.

For the foregoing reasons, we find that the proposal is not contrary to management's right to determine internal security practices. [4]

D. The proposal is not outside the duty to bargain on the ground that it addresses matters that allegedly are "covered by" the parties' MOU.

The parties' MOU provides, in pertinent part, that the Union "may negotiate additional proposals concerning arming of employees to the extent required by law[,] including[,] *but not limited to*, implementation of individual station arming policies and programs, including training and education, certifications, firing ranges, practice facilities, etc." Agency Statement of Position at 6 (emphasis added). In other words, the MOU expressly provides for the Union's right to bargain over proposals concerning the arming of employees. Although the MOU sets forth an illustrative list of topics that such mid-term bargaining may involve, that list is not exhaustive, as the MOU states that bargaining is "not limited to" those topics. *Id.* As such, we conclude that the Agency has failed to establish that it has no obligation to bargain over the proposal based on the MOU.

VI. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, negotiate over the proposal. [5]

3. That a proposal may simply restate existing obligations does not affect its negotiability. Further, parties frequently include in their collective bargaining agreements provisions that mirror, or are intended to be interpreted in the same manner as, statutory provisions. *See, e.g., United States DOJ, Fed. Bureau of Prisons, Fed. Corr. Complex, Coleman, Fla.*, 63 FLRA 351, 354 (2009) (citing, *e.g., NLRB*, 61 FLRA 197, 199 (2005); *AFGE*, 59 FLRA 767, 769-70 (2004)).

4. Our colleague is concerned that our decision will lead to the resolution of negotiability disputes by arbitrators rather than the Authority. However, an arbitrator would be placed in this position only if an agency agreed to the proposal or, following impasse, the Federal Service Impasses Panel imposed it. In our view, a far likelier scenario is that any merits objections to such proposals would be resolved at the bargaining table. By discouraging agencies from declaring the proposals nonnegotiable and thereby encouraging the parties to work out such issues bilaterally, the need for third-party resolution will be less, not more.

5. In finding that this proposal is within the duty to bargain, we make no judgment as to its merits.