

64 FLRA No. 56

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2923
(Union)

and

UNITED STATES
DEPARTMENT OF HEALTH
AND HUMAN SERVICES
NATIONAL INSTITUTE OF HEALTH
NATIONAL INSTITUTE OF ENVIRONMENTAL
HEALTH SCIENCES
(Agency)

0-NG-2951

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DECISION

December 31, 2009

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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 case is before the Authority on a negotiability appeal filed by the American Federation of Government Employees, Local 2923 (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 that the Union seeks to sever into two proposals.¹ The National Institute of Environmental Health Sciences (the Agency) filed a statement of position (SOP). The Union filed a response to the Agency's SOP.

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

II. Background

The First Environments Early Learning Center (the day care center) is located on federal government prop-

1. See the Union's Petition (Petition) at 5, Record of Post-Petition Conference (Conference Record) at 3, and the Union's Response to the Agency's SOP at 8 (Union's Response). For reasons stated in Section V., it is not necessary to address the Union's request to sever the proposal. See 5 C.F.R. § 2424.2(h) ("Severance applies where some parts of the proposal or provision are determined to be outside the duty to bargain or contrary to law.")

erty in a building operated by the Environmental Protection Agency (EPA). Conference Record at 2. The building housing the day care center was built with funding from both the Agency and the EPA. See *id.* The Agency also provides financial support for the day care center's operation. See *id.*; see also SOP at 2. In addition, the Agency has a designated member on the building's Integrated Pest Management System (IPMS) Advisory Team. See Union's Response at 4 (citing Attachment 4 at 2).

III. Proposal

The [Agency] will not pay [for] or approve any application of any pesticide at [the day care center].

The [Agency] will work closely with [the day care center] and/or any contractors or other groups involved in operations at [the day care center] to ensure or provide an [IPMS] that is nontoxic and does not use pesticides. This will help ensure a pesticide free and nontoxic environment for the children and infants at [the day care center].

Petition at 4.

IV. Meaning of the Proposal

According to the Union, the proposal would operate to "inhibit the Agency from paying [for] or approving of pesticides at the day care center." Union's Response at 8. The Union explains that the meaning of the word "approve" as used in the proposal means the same as "authorize." *Id.*

The second and third sentences of the proposal would require the Agency to collaborate with all parties involved in the operation of the day care center in an effort to provide an IPMS that is pesticide free. See Union's Response at 9.

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

The Agency claims that it does not control the day care center or the building where the day care center is located. The Agency asserts that the building is controlled and operated by the EPA. SOP at 2. As such, the Agency argues that it cannot negotiate for the EPA. See *id.* at 3. The Agency asserts, contrary to the Union, that the financial contribution it provides to the day care center does not give it any control over the decision of which pest control system the EPA determines to be appropriate for its building. SOP at 2. The Agency fur-

ther claims that, even if it had such power, it would defer to the expertise of the EPA, over that of the Union, in deciding whether the use of pesticides is an appropriate eradication or prevention measure. *See id.* at 2-3.

With regard to the second and third sentences of the proposal, the Agency states that it has “offered to and expressed the concerns of the Union regarding pesticides” to the day care center and to the EPA, and that nothing prevents the Union from expressing its concerns as well. SOP at 2.

B. Union

According to the Union, the Agency provides subsidies for the children of federal employees for tuition and also “significant amounts of money” for the day care center’s support. Union’s Response at 3-4. The Union asserts that the Agency can “stipulate[] that it will not pay for pesticides” and that it can refuse to pay when it receives billings for such services. *Id.* at 2.

As part of its clarification of the record, the Union asserts that it “does not concede” that the EPA primarily operates the day care center’s building. *See id.* The Union asserts that there are signs inside and outside of the building indicating that the day care center “is a joint or co-sponsored project of both [the] EPA and [the Agency].” *Id.* at 2. The Union also argues that the Agency’s web page indicates that the day care center is co-sponsored by the Agency and the EPA. *See id.* at 4.

With regard to the second and third sentences of the proposal, the Union claims that the Agency can make requests and recommendations to the EPA regarding its IPMS because the IPMS policy names the Agency’s Chief, Health and Safety Branch as one of the building’s IPMS Advisory Team members. *See* Union’s Response at 4 (citing Attachment 4 at 2).

VI. Analysis and Conclusions

With regard to the first sentence of the proposal, the Agency only argues that it cannot negotiate over which pest management system will be used in the day care center because the Agency does not have control over the building where the day care center is located. The Agency claims that the building is operated by the EPA and that it cannot negotiate on behalf of the EPA.

Matters pertaining to day care facilities concern conditions of employment of unit employees. *See, e.g., Gen. Serv. Admin., Region 10, Auburn, Wash.*, 47 FLRA 585, 593 (1993). An agency is obligated to bargain over an otherwise negotiable condition of employment to the extent that it has discretion with respect to that condition

of employment even if that discretion is limited to making requests and recommendations to an outside party that controls the condition of employment. *See, e.g., Int’l Fed. of Prof’l & Technical Eng’rs, Local 28*, 38 FLRA 1123, 1133-35 (1990) (Proposal 4); *Nat’l Fed’n of Fed. Employees, Local 2050*, 36 FLRA 618, 644-45 (1990) (Proposal 18) (*NFFE Local 2050*); *Am. Fed. of State, County and Mun. Employees, Local 2477*, 7 FLRA 578, 585-86 (1982) (*Municipal Employees, Local 2477*), *enforced sub nom. Library of Congress v. FLRA*, 699 F.2d 1280 (D.C. Cir. 1983).

The circumstances in this case are similar to the circumstance in *NFFE, Local 2050*, 36 FLRA at 644-45. In *NFFE, Local 2050*, the Union proposed that repairs to the fire alarm system or fuse boxes be confined to weekends or after regular working hours. The Authority found that, although repairs to the building and its systems were the responsibility of the building owners, this did not make the proposal nonnegotiable. Rather, the Authority held, relying on *Municipal Employees, Local 2477*, that the agency was obligated to bargain on otherwise negotiable conditions of employment to the extent that it had discretion. *NFFE, Local 2050*, 36 FLRA at 645; *see Municipal Employees, Local 2477*, 7 FLRA at 585-86.

It is thus not dispositive whether or not the Agency controls the day care center or the building where the day care center is located. Even if the Agency lacks such control, and could not guarantee any specific outcome with respect to pesticides or toxins at the day care center, nothing in the record suggests that the Agency lacks discretion to request or recommend the selection of an IPMS that does not require the use of pesticides. Among other things, the Agency makes considerable financial contributions to the operation of the day care. *See* SOP at 2; Union’s Response at 3-4. In addition, the Agency’s Chief, Health and Safety Branch is a member of the day care center’s IPMS Advisory Team. *See* Union’s Response at 4 (citing the day care center’s IPMS policy, Attachment 4 at 2). Consequently, finding that it is within the Agency’s discretion to make such requests or recommendations, and based on the precedent cited above, we find the first sentence of the proposal within the duty to bargain.

With regard to the second and third sentences of the proposal, the Agency argues that because the day care center is in a facility controlled by the EPA, the Agency cannot compel the EPA to adopt any given pest control system. However, following the analysis applied to the proposal’s first sentence, nothing in the record suggests that the Agency lacks discretion to request or recommend the selection of an IPMS which

does not require the use of pesticides. Indeed, the Agency acknowledges that it has already expressed the Union's concerns regarding pesticides to the day care center and the EPA. In addition, as noted above, the Agency's Chief, Health and Safety Branch is a member of the day care center's IPMS Advisory Team. Accordingly, as the Agency has the requisite discretion to make requests and recommendations — through its representative on the IPMS Advisory Team or otherwise — concerning a pesticide free IPMS, we find that the second and third sentences of the proposal are also within the duty to bargain.

VII. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, negotiate over the proposal.²

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