70 FLRA No. 22

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
CUSTOMS AND BORDER PROTECTION
(Agency)

0-NG-3278
(69 FLRA 355 (2016))

_____

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

December 20, 2016

_____

Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

This matter is before the Authority on a negotiability appeal filed under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).[1] The case concerns the negotiability of one proposal that permits Customs and Border Protection officers (officers) – working within the Agency's automated-passport-control system (the kiosk system) – to sit when conducting passenger-security inspections. The Agency filed a statement of position (statement), to which the Union filed a response (response), and the Agency filed a reply (reply) to that response.

The main question before us is whether the proposal is contrary to the Agency's right to determine internal-security practices under § 7106(a)(1) of the Statute[2] or whether it falls within an exception to that right. For the reasons discussed below, we find that the proposal affects that right and does not fall within an exception under § 7106(b)(2) or (3) of the Statute.[3] Thus, we find that the proposal is outside the duty to bargain.

II. Background

This dispute arose after the Agency notified the Union that it intended to implement the kiosk system in certain national and international airports. The kiosk system allows airline passengers to enter required "information into [an automated] kiosk . . . instead of dictating it to [an officer]."[4] After the passengers enter the information into the kiosk, they proceed to a podium, where an officer conducts a "primary" security inspection.[5] The officer's function is "to detect and prevent terrorists and instruments of terror from entering the United States" and to facilitate the efficient flow of passenger travel.[6]

The parties bargained over the implementation of the kiosk system and entered into a memorandum of understanding (MOU). Approximately one year later, the Union reopened negotiations and offered proposals related to the kiosk system (which had been implemented). Subsequently, the Union filed a negotiability petition.[7] That petition involved two proposals, including the one at issue here (proposal one).[8]

In *NTEU*, the Authority dismissed the petition regarding one proposal that was directly related to a pending unfair-labor-practice (ULP) charge.[9] The dismissal was without prejudice to the Union's right to refile its negotiability petition once the ULP charge was resolved.[10]

After the dismissal in *NTEU*, the parties resolved the ULP dispute but not the negotiability of the proposal. As a result, the Union refiled its petition concerning that proposal, which is before us now.

[1] 5 U.S.C. § 7105(a)(2)(E).
[2] *Id.* § 7106(a)(1).
[3] *Id.* § 7106(b)(2), (3).
[4] Statement, Ex. 2, Mem. of Understanding (MOU).
[5] Pet. at 2.
[6] Statement, Ex. 7, Position Requirements at 1.
[7] *See NTEU*, 69 FLRA 355 (2016) (*NTEU*).
[8] *Id.* at 355-56.
[9] *Id.*
[10] *Id.* at 356.

III. Preliminary Matter: We deny the Union's request to take official notice of the Agency's filings in *NTEU*.

The Union requests that the Authority take "judicial notice" of the Agency's statement and reply in *NTEU*.[11] The Agency argues that those filings "have no bearing on the current proceeding."[12] Under § 2429.5 of the Authority's Regulations, the Authority may take official notice of matters not previously presented in prior proceedings when that "would be proper."[13] The Authority has found it appropriate to take official notice of other FLRA proceedings.[14]

Here, the Union is requesting that we take official notice of the Agency's arguments in *NTEU* because the Union, in its refiled petition, addresses some of those arguments. However, as the Union acknowledges,[15] the arguments in *NTEU* do not accurately reflect the *current* dispute. When the Authority dismissed the Union's petition in *NTEU* as to proposal one,[16] it effectively dismissed the parties' subsequent filings related to that proposal.[17] The Union fails to cite any decision where the Authority has taken official notice under a similar circumstance.[18] We find that it would be improper, under these circumstances, to take official notice of, or consider, the Agency's filings in *NTEU*. Instead, we consider only the filings submitted in *this* case. Thus, we deny the Union's request.

IV. Proposal One

A. Wording

> CBP will provide ergonomically appropriate chairs, stools, etc. to be used while Officers inspect passengers after they have accessed the automated kiosks. Nothing in this provision prevents Officers from standing while they inspect passengers if that is their choice.[19]

B. Meaning

The parties agree that the proposal requires the Agency to provide officers working at kiosk podiums "ergonomically appropriate chairs, stools, etc."[20] The Union clarified that "etc." means other furniture that permits officers to sit.[21] The parties also agree that the proposal grants "officers the option to sit or stand – at their discretion – while inspecting passengers."[22]

C. Analysis and Conclusions

The Agency argues that the proposal affects its rights to determine internal-security practices under § 7106(a)(1) and to determine the methods and means of performing work under § 7106(b)(1) of the Statute.[23] In order for an agency to demonstrate that a proposal is contrary to § 7106, the agency must allege and demonstrate that the proposal affects a management right.[24] If the agency does so, then the Authority will examine any union argument that the proposal is negotiable as a procedure or an appropriate arrangement under § 7106(b)(2) and (3) of the Statute, respectively.[25]

---

[11] Resp. at 1 n.1
[12] Reply at 1 n.1.
[13] 5 C.F.R. § 2429.5.
[14] *AFGE, Local 3690*, 70 FLRA 10, 11 (2016) (*Local 3690*) (citing *U.S. Dep't of the Air Force, Air Force Material Command, Eglin Air Force Base, Hurlburt Field, Fla.*, 66 FLRA 375, 377 n.4 (2011)).
[15] Resp. at 1 n.1 (noting that the Agency's statement and reply omit arguments that the Agency made in *NTEU*).
[16] *See NTEU*, 69 FLRA at 355-56.
[17] *See* 5 C.F.R. § 2424.24(a) (an agency's statement should "state any disagreement with the facts, arguments, or meaning of the proposal or provision [as] set forth in the [union's] petition"); *id.* § 2424.25(a) (one of the "purpose[s] of the [union's] response is to inform the Authority and the agency . . . whether . . . [it] disagrees with any facts or arguments in the agency's statement of position"); *id.* § 2424.26(a) ("The purpose of the agency's reply is to inform the Authority and the [union] whether and why it disagrees with any facts or arguments made for the first time in the [union's] response.").
[18] *See Local 3690*, 70 FLRA at 11 (declining to take official notice where the circumstances of the case were not similar to circumstances in prior decisions where the Authority had taken official notice).
[19] Pet. at 2.
[20] Record of Post-Pet. Conference (Record) at 2 (quoting proposal one).
[21] *Id.*
[22] *Id.*
[23] Statement at 1.
[24] *AFGE, Local 2058*, 68 FLRA 676, 677 (2015) (citing *AFGE, Local 3928*, 66 FLRA 175, 179 n.5 (2011); *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 128 n.7 (2011)).
[25] *See id.* (citing *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 929, 931-32 (2012) (*Local 506*)).

1. The proposal affects management's right to determine internal-security practices.

As noted above, the Agency claims that the proposal affects its right to determine internal-security practices under § 7106(a)(1) of the Statute.[26] That right "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."[27] Where an agency shows a link or reasonable connection between its security objective and a policy or practice designed to implement that objective, a proposal that conflicts with the policy or practice affects management's right to determine internal-security practices.[28] And where an agency has established a link between its policy or practice and its security objective, the Authority will not review the merits of the agency's policy or practice in the course of resolving a negotiability dispute.[29]

Here, the Agency identifies its security objective as safeguarding officers, the general public, and the nation's airports from the risk of weapons and drugs.[30] The Agency asserts that its "current . . . policy" requires officers in the kiosk system to stand.[31] According to the Agency, standing officers are in an "engaged posture";[32] have unobstructed sightlines;[33] and are able to "quickly . . . react" to emergency situations.[34] As to proposal one, the Agency argues that permitting an officer to sit while performing his or her duties places the officer in a "defensive position";[35] slows reaction time;[36] and impairs the officer's sightlines.[37]

Citing *NTEU and U.S. DHS, Bureau of CBP* (*DHS*),[38] the Union alleges that the Agency has not established a link between its security objectives and its policy.[39] Specifically, the Union asserts that an officer working in a non-kiosk inspection booth (the booth) is permitted to sit, despite the Agency's alleged security concerns.[40]

In *DHS*, the agency had a policy that allowed officers to wear cargo shorts in some locations, but not others.[41] The Authority found that the agency did not establish a link or reasonable connection between its policy and its alleged security objective because the agency "fail[ed] to articulate any security differences . . . that warrant[ed] a different uniform policy in [the different] locations."[42]

Here, unlike in *DHS*, the Agency identifies relevant security determinations that justify a different policy.[43] In particular, the Agency explains that an officer in the kiosk system "perform[s] a *different* primary inspection [within] a *different* construct."[44]

Regarding the inspection, the Agency argues that an officer in a booth uses a computer monitor to input passengers' "administrative information,"[45] and, as a result, the officer "split[s] [his or her attention] between . . . data gathering and [passenger] assess[ment]."[46] But, in the kiosk system, an officer's "administrative role is removed"[47] because the passenger completes that portion of the inspection using the automated kiosks.[48] This results in a "length[ier], more thorough[,] and safer enforcement inspection" in the kiosk system.[49] The Union claims that a booth officer performs the "exact same [security] inspection" as a kiosk officer.[50] However, in the MOU, the Union agreed that the kiosk system "allows the [officer] to focus more on the enforcement part of his[or] her duties" and "is designed to increase the amount of time [the o]fficer has to perform . . . enforcement examination[s]."[51]

[26] *See* Statement at 3-5; Reply at 9-18.
[27] *AFGE, Local 3937*, 66 FLRA 393, 395 (2011) (*Local 3937*) (citing *AFGE, Fed. Prison Council 33*, 51 FLRA 1112, 1115 (1996) (*Council 33*)).
[28] *Local 506*, 66 FLRA at 931 (citing *AFGE, Local 723*, 66 FLRA 639, 643 (2012)); *see also Local 3937*, 66 FLRA at 395 (citing *Council 33*, 51 FLRA at 1115).
[29] *Local 3937*, 66 FLRA at 395 (citing *AFGE, Local 2143*, 48 FLRA 41, 44 (1993) (*Local 2143*)); *see also Int'l Bhd. of Police Officers*, 46 FLRA 333, 337-38 (1992) (*Int'l Bhd.*).
[30] Statement at 3; *see id.* at 6 (noting "[c]oncerns over weapons and drugs").
[31] Reply at 21.
[32] *Id.* at 16; *see also* Statement at 4.
[33] Statement at 4.
[34] *Id.* at 3.
[35] Reply at 11.
[36] *Id.* at 13.
[37] *Id.* at 20.
[38] 61 FLRA 48 (2005).
[39] Resp. at 20-24.
[40] *Id.* at 23-24; *see id.* at 12 n.12 (arguing that if a seated officer is in a defensive posture, as alleged by the Agency, then the Agency should not permit officers in the booths to sit).
[41] 61 FLRA at 48.
[42] *Id.* at 51.
[43] *See* Statement at 4; Reply at 2, 7, 9-11, 13-19, 22.
[44] Reply at 2 (emphasis added).
[45] *Id.* at 14, 20.
[46] *Id.* at 14.
[47] *Id.* at 18.
[48] Statement at 1-2.
[49] Reply at 18.
[50] Resp. at 24.
[51] MOU at 1.

As to the difference between "construct[s],"[52] the Agency argues that the kiosk system, compared to the booth construct, does not provide the same "physical barriers between the officer and the [passenger]."[53] The Union does not dispute this difference and, in fact, acknowledges that, in the kiosk system, an officer is exposed to a greater threat from attack because the podiums do not offer "proper separation of the officer and the passenger."[54]

Based on the foregoing, we find that the Agency has sufficiently articulated security differences that warrant different policies with regard to booth officers and kiosk officers. Accordingly, we find that *DHS* is distinguishable.[55] We also find, based on the above, that the Agency has demonstrated that its policy of requiring kiosk officers to stand is reasonably connected to its stated purpose of safeguarding passengers, officers, and airport property.[56]

To the extent that the Union argues that the Agency has not demonstrated the requisite link because the Agency has not offered proof that standing officers are better suited to accomplish the Agency's security objectives,[57] the Authority does not examine the extent to which a policy or practice adopted by an agency to achieve its security objectives actually facilitates the accomplishment of those objectives.[58]

By permitting officers in the kiosk system to sit, the proposal conflicts with the Agency's policy requiring those officers to stand. Therefore, we find that the proposal affects management's right to determine internal-security practices under § 7106(a)(1) of the Statute.

2. The proposal is not a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3) of the Statute.

The Union contends that, even if the proposal affects a management right under § 7106 of the Statute, the proposal is negotiable as a procedure[59] or an appropriate arrangement[60] under § 7106(b)(2) and (3) of the Statute,[61] respectively.

i. Appropriate Arrangement

When determining whether a proposal is within the duty to bargain under § 7106(b)(3), the Authority initially determines whether the proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right.[62] If the proposal is an arrangement, the Authority determines whether it is appropriate, or whether it is inappropriate because it excessively interferes with the relevant management rights.[63] The Authority makes this determination by weighing "the competing practical needs of employees and managers" in order to ascertain whether the benefits to employees flowing from the proposal outweigh the proposal's burdens on the exercise of the management right involved.[64]

Even assuming that the proposal constitutes an arrangement, we find, for the following reasons, that it is not appropriate because it excessively interferes with the Agency's right to determine internal-security practices.[65]

As described by the Union, the Agency's current policy results in officers standing for prolonged periods.[66] The Union alleges that the proposal – by permitting officers to sit – will: alleviate and prevent the multitude

[52] Reply at 2.
[53] *Id.*
[54] Resp. at 25.
[55] *See e.g., NTEU*, 69 FLRA at 357-58 (distinguishing *DHS* where agency identified security differences justifying different security policies).
[56] *See id.* (finding that a no-barrier policy was reasonably related to the objective of safeguarding officers and passengers, where the agency argued that the policy placed officers in the best position to quickly react to threats from weapons and drugs).
[57] Resp. at 2 (claiming that "the sightlines are the same whether the [o]fficer is examining a passenger when standing vs. when seated"); *id.* at 3 (arguing that the Agency failed to "offer[] [any] proof . . . establish[ing] that an [o]fficer while seated is less able to defend herself than [an] [o]fficer[] that [is] standing"); *id.* at 7 (disagreeing with the Agency's claim that a seated officer is "not able to react quickly at a moment's notice") (emphasis omitted); *id.* at 25 ("Officers seated on stools . . . can react very nearly as fast as officers who are standing . . . .").
[58] *See Int'l Bhd.*, 46 FLRA at 337-38 (agency was not required to prove that a proposal that conflicted with internal-security practice would cause a "lapse in security" in order to demonstrate a link between its internal-security practices and its security objectives).
[59] *See* Resp. at 35-37.
[60] *See id.* at 38-46.
[61] 5 U.S.C. § 7106(b)(2), (3).
[62] *E.g., Local 3937*, 66 FLRA at 400 (citing *NAGE, Local R14-87*, 21 FLRA 24, 31 (1986) (*KANG*)).
[63] *Id.* (citing *KANG*, 21 FLRA at 31-33).
[64] *Id.* (quoting *KANG*, 21 FLRA at 31-32).
[65] *See, e.g., AFGE, Local 1164*, 66 FLRA 112, 117 (2011) (*Local 1164*) (even assuming that the proposal constituted an arrangement, it was not an appropriate arrangement because it excessively interfered with the exercise of a management right (citing *AFGE, Local 1164*, 65 FLRA 836, 841 (2011))).
[66] Resp. at 5 (stating that managers may require officers to stand for two to eight hours and that some managers "require [o]fficers to remain [standing] . . . . for hours on end"); *but see* Statement at 5 (asserting that kiosk officers stand for "an hour or two at most").

of physical and mental conditions that prolonged standing causes;[67] reduce workers' compensation claims and sick-leave requests;[68] and improve employee morale.[69] The Agency disputes that the proposal will benefit the officers[70] and claims, without contradiction, that there have been no reported injuries due to standing in the kiosk system.[71] The Agency also asserts that it has already taken steps to mitigate "any [adverse] effects of standing."[72] Specifically, the Agency has provided officers with "cushioned foot support,"[73] thus limiting the alleged benefit of the Union's proposal.[74]

With regard to the burden on management's rights, the proposal would countermand the Agency's current internal-security practice and require the Agency to exercise its internal-security right in a different manner.[75] A proposal such as this – which negates the Agency's internal-security determination entirely – is not an "appropriate" way to ameliorate a right's adverse effects within the meaning of § 7106(b)(3).[76]

Based on the forgoing, we find that the proposal significantly burdens the Agency's right to determine internal-security practices and this burden outweighs any benefits that the proposal would afford to the officers. Consequently, we find that the proposal excessively interferes with management's right to determine internal-security practices and is not an appropriate arrangement.

ii. Procedure

The Union asserts that the proposal is a negotiable procedure under § 7106(b)(2) of the Statute.[77] In the Union's view, the proposal neither prohibits nor interferes with the Agency's exercise of its management rights.[78] In contrast, the Agency argues that the "proposal directly interferes with [the Agency's] [k]iosk[system] . . . by removing the [o]fficer from the safest enforcement position."[79]

The Union cites no authority to support its contention that the proposal is negotiable as a procedure.[80] Moreover, as described above, the proposal determines, in substance, how the Agency will safeguard its personnel, physical property, and operations in the kiosk system.[81] And because the proposal prohibits the Agency from maintaining its chosen internal-security practice of having officers stand, the proposal does not resemble proposals or provisions that the Authority has held to be procedures under § 7106(b)(2).[82] Accordingly, we find that the proposal does not concern the procedures that the Agency will observe in exercising its right to determine internal-security practices, as set forth in § 7106(b)(2).

[67] Resp. at 40 (alleging that "working in a standing position on a regular basis can cause sore feet, swelling of the legs, varicose veins, general muscular fatigue, low back pain, stiffness in the neck and shoulders and other health problems" (citing Resp., Ex. 39, Workplace Fact Sheet at 1)); *see also id.* at 39-42.
[68] *Id.* at 42.
[69] *Id.*
[70] Reply at 20.
[71] *Id.*
[72] *Id.* at 22.
[73] *Id.*
[74] *See NATCA*, 66 FLRA 658, 661 (2012) (Member DuBester dissenting in part) (finding that the benefit of a proposal was limited because the agency had taken steps to mitigate the adverse effect of the agency's exercise of a management right (citing *Local 3937*, 66 FLRA at 397)).
[75] Record at 2.
[76] *See Local 1164*, 66 FLRA at 117; *NAGE, SEIU, Local R7-51*, 30 FLRA 415, 419 (1987) (a proposal "precluding [an] [a]gency from implementing its chosen internal[-]security practice . . . constitutes a significant intrusion into the exercise of management's rights").
[77] Resp. at 35.
[78] *Id.* at 36.
[79] Reply at 19.
[80] *See AFGE, Local 723*, 66 FLRA 639, 644 (rejecting union's assertion that proposals were procedures under § 7106(b)(2) because the union failed to present "authority to support that claim").
[81] *Cf. U.S. Customs Serv. Region I (Boston, Mass.)*, 15 FLRA 309, 311 (1984) (proposal requiring the agency to allow customs officers to sit on stools while performing airport-passenger security inspections – in direct contravention of agency decision to require inspectors to stand – not negotiable).
[82] *Compare AFGE, Local 2058*, 68 FLRA 676, 679 (2015) (proposal that prohibited an agency from implementing its chosen internal-security practice of using security cameras to monitor employee duty stations was not a procedure under § 7106(b)(2)) *and Local 2143*, 48 FLRA at 45 (where rotational-shift policy was an internal-security practice, proposal requiring agency, in some circumstances, to grant shift-change requests even when inconsistent with that policy, not a procedure), *with AFGE, Local 12*, 61 FLRA 209, 220 (2005) (noting that proposals requiring advance notice of an agency action, or of a specific event, are negotiable as procedures (citation omitted)) *and NTEU, Chapters 243 & 245*, 45 FLRA 270, 280 (1992) (drug-testing proposal imposing procedural requirements – but retaining agency's ability to use its internal-security practice of random drug testing – constituted procedure under § 7106(b)(2)).

Finally, as noted above, the Agency also argues that the proposal affects its right to determine the methods and means of performing work under § 7106(b)(1) of the Statute.[83] The Union contests this claim,[84] and argues that the proposal is negotiable as either an appropriate arrangement or a procedure.[85] Because we have found that the proposal affects management's right to determine internal-security practices and does not fall within an exception under § 7106(b)(2) or (3) of the Statute, the proposal is outside the duty to bargain even if it is an appropriate arrangement or a procedure for another management right.[86] Consequently, it is unnecessary to resolve whether the proposal affects management's right to determine the methods and means of performing work under § 7106(b)(1), or whether it is an appropriate arrangement or a procedure for the exercise of that right.[87]

V. Order

We dismiss the petition.

[83] *See* Statement at 5-8; Reply at 18-20.
[84] *See* Resp. 5-6, 31.
[85] *See id.* at 35-46.
[86] *Cf. NTEU*, 69 FLRA at 359 (citing *AFGE, Council of Prison Locals 33, Local 506*, 66 FLRA 819, 831 (2012)).
[87] *See id.*