

73 FLRA No. 125

INTERNATIONAL FEDERATION
OF PROFESSIONAL AND TECHNICAL ENGINEERS
LOCAL 4
(Union)

and

UNITED STATES
DEPARTMENT OF THE NAVY
PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE
(Agency)

0-NG-3653

DECISION AND ORDER ON A NEGOTIABILITY
ISSUE

September 7, 2023

Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

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).¹ The dispute concerns one proposal which would allow the Union to take photographs in Union-controlled spaces at the Agency's facility and disseminate those photographs without the Agency's prior approval. For the following reasons, we find the Agency has not demonstrated that the proposal is outside the duty to bargain.

II. Background

The parties began negotiating over the Agency's internal program instructions (instructions). The Union introduced the proposal at issue, and the parties reached impasse. After the Federal Service Impasses Panel declined jurisdiction over the proposal, the Union asked the Agency to provide a written allegation of

nonnegotiability. The Agency did not respond and the Union filed a petition for review (petition).

Subsequently, an Authority representative conducted a post-petition conference (conference) with the parties under § 2424.23 of the Authority's Regulations.² The Agency filed a statement of position (statement), and the Union filed a response to the Agency's statement. The Agency did not file a reply to the response.

III. Preliminary Matter: The Union does not establish that a hearing is necessary.

In its petition, the Union requests a hearing under § 2424.31(c) of the Authority's Regulations³ because it "believe[s] the Agency should provide specific documentary evidence as to why [it] believe[s] the issue is non-negotiable."⁴ Section 2424.31 states that a hearing may be appropriate "[w]hen necessary to resolve disputed issues of material fact in a negotiability . . . dispute, or when it would otherwise aid in decision making."⁵ The Union does not demonstrate there are disputed issues of material fact for the Authority to resolve, nor do we find a hearing would otherwise aid in resolving the parties' negotiability dispute. Consequently, we deny the Union's request for a hearing.⁶

IV. The Proposal

A. Wording

IFPTE Local 4 Officers shall be permitted to freely take pictures/photographs inside the IFPTE Local 4 Office spaces and other spaces such as the IFPTE Local 4 Union Hall controlled by the Union in building M-1/M-3. IFPTE Local 4 shall not be require [sic]⁷ to obtain any pre-approval from Portsmouth Naval Shipyard Management or other Navy Agencies/Activities to distribute such pictures/photographs. The allowance of taking pictures/photographs inside IFPTE Local 4 controlled spaces in M1/M3 supersedes and takes precedence over the requirements of references (a), (b) other PNSY/DoD/DoN Instructions or from any other non-government wide regulation.⁸

¹ 5 U.S.C. § 7105(a)(2)(E).

² 5 C.F.R. § 2424.23.

³ *Id.* § 2424.31(c).

⁴ Pet. at 5; *see also* Record of Post-Petition Conference (Rec.) at 2 (confirming Union was seeking a hearing for the reason stated in the petition).

⁵ 5 C.F.R. § 2424.31.

⁶ *See, e.g., AFGTE, Loc. 997*, 66 FLRA 499, 499 (2012); *AFGTE, Council of Prison Locs. 33*, 65 FLRA 142, 145 (2010) (*Locals 33*).

⁷ *See* Pet. at 4.

⁸ This is the wording as modified at the conference. *Id.*; Rec. at 2.

B. Meaning

The parties agree that the proposal's terms have the following meanings. "M-1/M-3" and "M1/M3" refer to the Union's office space and meeting hall located at the Agency's facility; "PNSY" means Portsmouth Naval Shipyard; "DoD" means the Department of Defense; "DoN" means the Department of Navy; and "(a), (b)" in the last sentence references the Agency's employee-recognition program and the procedures for photographing at the Agency's facilities.⁹

The parties agree that the proposal would operate to allow Union officers to photograph areas only within Union-controlled spaces in M-1 and M-3, using their own or union-supplied cameras, including cellphone cameras, and to disseminate those photographs without prior Agency approval.¹⁰

C. Analysis and Conclusions

The Agency argues the proposal affects its right to determine internal-security practices under § 7106(a)(1) of the Statute.¹¹ We assume, without deciding, that the proposal affects that right.¹² However, for the following reasons, we conclude that the proposal is nonetheless within the duty to bargain.

In its response, the Union argues the proposal is negotiable as a procedure under § 7106(b)(2) of the Statute.¹³ The Agency did not file a reply to the Union's response, and in its statement, the Agency makes no argument regarding § 7106(b)(2); it argues only that the proposal is not negotiable as an appropriate arrangement under § 7106(b)(3) of the Statute.¹⁴ The Authority has held that when an agency fails to address the union's claim that a proposal constitutes a procedure, the agency has conceded that the proposal is negotiable under § 7106(b)(2).¹⁵ Therefore, by failing to address the Union's § 7106(b)(2) argument, the Agency has conceded

it is a negotiable procedure.¹⁶ Accordingly, we find the proposal is within the duty to bargain.¹⁷

V. Decision

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

⁹ Rec. at 2.

¹⁰ *Id.*

¹¹ Statement Br. at 4.

¹² See, e.g., *AFGE, Council of Prison Locs. 33, Loc. 506*, 66 FLRA 929, 940 (2012) (assuming, without deciding, that proposal affected a management right but finding it within the duty to bargain as an appropriate arrangement under § 7106(b)(3) of the Statute (citing *Locals 33*, 65 FLRA at 145)); *NAIL, Loc. 5*, 67 FLRA 85, 89 (2012) (*Local 5*) (same).

¹³ Resp. at 6.

¹⁴ Statement Br. at 4-5.

¹⁵ 5 C.F.R. § 2424.32(c)(2) (failure to respond to an assertion raised by other party will, where appropriate, be deemed a concession to that assertion); see, e.g., *Local 5*, 67 FLRA at 91 (citing *NATCA, Loc. ZHU*, 65 FLRA 738, 744 (2011) (*Local ZHU*)); *NATCA, AFL-CIO*, 61 FLRA 336, 339 (2005) (citing *NTEU*, 60 FLRA 219, 222 (2004)).

¹⁶ *NTEU*, 68 FLRA 334, 335 (2015) (*NTEU 2015*) (citing *Local 5*, 67 FLRA at 91); *Local ZHU*, 65 FLRA at 744 (finding an agency conceded a proposal was a procedure when the union claimed the proposal constituted a procedure in its response, but the agency did not address the union's claim in its statement of position, or file a reply).

¹⁷ As such, it is unnecessary to resolve the Union's claim, see Resp. at 6-8, that the proposal is an appropriate arrangement under § 7106(b)(3) of the Statute. See, e.g., *NTEU 2015*, 68 FLRA at 335 (finding it unnecessary to address an appropriate-arrangement argument after finding proposal was a procedure).