

63 FLRA No. 135

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 1458
(Union)

and

UNITED STATES DEPARTMENT
OF HOMELAND SECURITY
UNITED STATES CITIZENSHIP
AND IMMIGRATION SERVICES
MIAMI DISTRICT
MIAMI, FLORIDA
(Agency)

0-NG-2943

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DECISION AND ORDER ON
NEGOTIABILITY ISSUES

June 18, 2009

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Before the Authority: Carol Waller Pope, Chairman and
Thomas M. Beck, Member

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 involves three proposals concerning the relocation of United States Citizenship and Immigration Services (USCIS) offices. The USCIS filed a statement of position (SOP). The Union filed a Response to which the Agency did not file a Reply. For the reasons that follow, we find that the proposals are within the Agency's duty to bargain.

II. Background

In anticipation of office relocations resulting from the creation of the Department of Homeland Security, the parties negotiated a Memorandum of Understanding (MOU). Provision 10 of that MOU states, in pertinent part:

10. Parking: USCIS requires that either commercial or lessor provided parking is available within 1/8 of a mile of the building for the employees and clients not using mass transit. . . . If there is a change in existing working conditions, local bar-

gaining over arrangements and procedures is appropriate.

SOP, Attach. 1. Subsequently, in preparing for the relocation of certain offices, the Union made several proposals. The three that follow were declared nonnegotiable by the Agency.

III. Proposals

Proposal 1 - Management shall provide free, onsite parking to bargaining unit employees, sufficient in number to cover all bargaining unit employees who do not receive a transit subsidy and are assigned to work out of each new facility.

Proposal 2 - Consistent with past practice, management shall provide the Local union President with one free, onsite parking space (government) at the district facility where the Local 1458 union office will be located.

Proposal 3 - At the new facility, as part of its past practice and to promote healthy employees, management shall provide an employee exercise room, with exercise equipment and showers.

Petition at 3.

During the Post-Petition Conference, the Union requested that Proposal 3 be evaluated as a severed proposal and modified to provide as follows:

Sever Proposal 3 - At the new facility, management shall provide an employee exercise room.

Record of Post-Petition Conference at 2.

IV. Meaning of the Proposals

The parties agree that Proposal 1 would require the Agency to provide free parking for all affected unit employees who do not receive a transit subsidy. Record of Post-Petition Conference at 2.

The parties agree that Proposal 2 would require the Agency to provide the Union president with free parking at the District Office facility where the Union's office is located. *Id.*

The parties agree that Proposal 3, as amended at the Post-Petition Conference, would require the Agency to provide an exercise room equipped with equipment and showers. *Id.*

As the parties do not dispute the meaning of the proposals and the Union's explanations comport with the plain wording of the proposals, the proposals are

reviewed in accordance with the meaning provided by the Union. *See Antilles Consol. Educ. Ass'n.*, 56 FLRA 664, 665 (2000).

V. Positions of the Parties

A. Agency

The Agency contends that Proposal 1 is “inconsistent with applicable government-wide regulations under § 7117(a) of the Statute.” SOP at 7. However, the Agency cites no rule or regulation in support of that claim. *See id.* Instead, it cites several Comptroller General (CG) opinions related to parking. The Agency contends that Proposal 2 is not negotiable for the same reason again without providing any citation to a government-wide rule or regulation. SOP at 12. Finally, the Agency contends that Proposal 3 infringes on its right under § 7106(a)(2)(A) to determine the requirements employees must satisfy to retain their positions and, because USCIS has no positions with fitness requirements, no exercise room or facility is required. SOP at 9.¹

B. Union

With respect to Proposals 1 and 2, the Union contends that parking for collective bargaining unit employees is a negotiable matter, especially when it relates to parking at a new location when free parking was provided at the facility being vacated. In support of its position it cites, *AFGE Local 2139, National Council of Field Labor Locals, Dallas, Texas*, 61 FLRA 654 (2006). Petition Ex. A at 1, 2.

In support of its position on Proposal 3, the Union asserts that the unit employees work in a stressful environment and that use of an onsite exercise room provides the employees with a means to reduce the stress they experience in the performance of their duties. Thus, according to the Union, there is a link between employee fitness and the employment relationship. The Union claims that USCIS employees were permitted to use the exercise room and equipment located at the facility being vacated by the Agency, which the Union contends is a binding past practice. In support, the Union cites *AFGE, Local 12*, 60 FLRA 533 (2004). Petition Ex. A, at 3, 4.

1. During the Post-Petition Conference, the Agency claimed that the two parking-related proposals were covered by the February 8, 2007 MOU. However, as that claim was not included in the SOP, we do not address it further.

VI. Analysis and Conclusions

A. Proposals 1 and 2

In relation to Proposals 1 and 2 regarding parking, the Agency’s sole claim of nonnegotiability is that providing parking for collective bargaining unit employees is inconsistent with applicable government-wide regulations. While failing to disclose the actual regulation they are relying upon, the Agency argues that the following:

Federal Property Regulations limit the allocation of assigned parking to a) U.S. Postal mailing operations; b) government owned vehicles; c) POV of Federal Judges, Members of Congress; d) other government owned vehicles including motor pools; and e) accommodations for handicapped personnel.

SOP at 5. This is essentially similar to Part 102-74 of the Federal Management Regulation, 41 C.F.R. § 102-74.285, which provides as follows:

Sec. 102-74.285 How must Federal agencies assign priority to parking spaces in controlled areas?

Federal agencies must reserve official parking spaces, in the following order of priority, for--

(a) Official postal vehicles at buildings containing the U.S. Postal Service's mailing operations;

(b) Federally owned vehicles used to apprehend criminals, fight fires and handle other emergencies;

(c) Private vehicles owned by Members of Congress (but not their staffs);

(d) Private vehicles owned by Federal judges (appointed under Article III of the Constitution), which may be parked in those spaces assigned for the use of the Court, with priority for them set by the Administrative Office of the U.S. Courts;

(e) Other Federally owned and leased vehicles, including those in motor pools or assigned for general use;

(f) Service vehicles, vehicles used in child care center operations, and vehicles of patrons and visitors (Federal agencies must allocate parking for disabled visitors whenever an agency's mission requires visitor parking); and

(g) Private vehicles owned by employees, using spaces not needed for official business.

However, in major metropolitan areas, Federal agencies may determine that allocations by zone would make parking more efficient or equitable, taking into account the priority for official parking set forth in this section.

Assuming that the Agency intends to rely on the foregoing Federal Management Regulation, a full and complete reading of the regulation demonstrates that the Agency's argument is flawed. Paragraph (g) of the regulation makes it clear that private vehicles owned by employees may be allowed to park in spaces not needed for official business. Thus, negotiating to obtain and use parking spaces not needed for official business is not precluded by a government-wide rule or regulation. In fact, such use is specifically contemplated and authorized by the Federal Management Regulation. Furthermore, the Agency has conceded that the new location will have free parking sufficient to accommodate official business and unit employees. SOP at 7, 12.

If the proposals were written to require that each unit employee or the Union president be given a designated, assigned parking spot before anyone else, then the purported or actual regulation may have some relevance. However, neither proposal demands such a priority assignment of parking; the proposals merely seek free parking at the new facility, just as it previously was provided. As there is nothing in the record to indicate that the proposals violate the Federal Management Regulation, and it appears by the Agency's own admission that the General Services Administration has negotiated a lease that includes parking sufficient to accommodate all official business and employee parking, we conclude that Proposals 1 and 2 do not violate the regulation and are within the Agency's duty to bargain. *AFGE, AFL-CIO, Local 644*, 27 FLRA 375, 384 (1987); *AFGE, Local 644, AFL-CIO*, 21 FLRA 658, 662 (1986).

Also flawed is the Agency's reliance on Comptroller General opinions related to parking. *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 201 n.1 (D.C. Cir. 1984). Although a Comptroller General opinion serves as an expert opinion that should be prudently considered, a prior assessment of the Comptroller General is not one to which deference must be given. *Ass'n of Civilian Technicians, Puerto Rico Army Chapter v. FLRA*, 269 F.3d 1112, 1116 (D.C. Cir. 2001); sub. appeal at, *Ass'n of Civilian Technicians, Puerto Rico Army Chapter v. FLRA*, 370 F.3d 1214 (D.C. Cir. 2004); sub. appeal at, *Ass'n of Civilian Technicians, Puerto Rico Army Chapter v. FLRA*, 534 F.3d 772 (D.C. Cir.

2008). Aside from the lack of authority a Comptroller General opinion carries, in this case, many of the opinions cited by the Agency represent situations wherein the Comptroller General concluded that the provision of parking for employees was appropriate under the given facts.² Thus, they do not support the Agency's argument that the provision of parking for employees is prohibited by a government-wide rule or regulation.

B. Proposal 3

The Agency contends that Proposal 3, regarding the provision of an exercise room at the new facility infringes upon its right "to determine the requirements employees must satisfy to retain their positions." SOP at 9. In essence, the Agency argues that because the positions within the USCIS do not have a fitness requirement, it is not necessary to provide an exercise room within the work facility. However, the question regarding this proposal is not whether an exercise room is required, the question is whether the Agency must negotiate over making an exercise room available to employees.

The Agency does not explain how the existence of an exercise room would affect its ability to determine what requirements an employee must satisfy to retain his or her position. When an agency fails to support its § 7106(a) claim with an explanation of how management's rights are affected, the Authority rejects the arguments. *See NTEU*, 60 FLRA 367, 380 (2004) (Authority declined consideration of an argument where agency presented "no explanation of how [the proposal] would affect its right to assign work") (Chairman Cabaniss and Member Pope dissenting on other grounds), *petition for review granted, remanded in part, rev'd in part*, 437 F.3d 1248 (D.C. Cir. 2004 [v1][v2][v3]); *AFGE, Nat'l Council of Field Labor Locals, Local 2139*, 57 FLRA 292, 295 n.7 (2001) (Authority summarily dismissed "bare assertion" that proposal interfered with management's right to determine its mission because the agency made no arguments in support of the claim); *United States Dep't of Veterans Affairs, Med. Ctr., Coatesville, Pa.*, 56 FLRA 966, 971 (2000) (Authority denied claim that arbitration award violated agency's right to determine its security where no rationale or explanations were provided); *United States Dep't of Transp., Fed. Aviation Admin., Wash., D.C.*, 55 FLRA 322, 326-27 (1999) (Authority found that management's rights to assign work and determine bud-

2. One CG opinion finds the provision of parking inappropriate. 43 Comp. Gen. 131 (1963). Three find the provision of parking appropriate. 49 Comp. Gen. 476 (1970); 63 Comp. Gen. 270 (1984); 72 Comp. Gen. 139 (1993).

get were not affected when agency made only bare assertions).

Given the Agency's failure to provide any support for its management's right argument, we find that the original Proposal 3 does not violate management's right and that consideration of the severed portion of the proposal is not required. Thus, we conclude that Proposal 3 is negotiable.

VII. Order

The Agency shall, upon request or as agreed to by the parties, negotiate over Proposals 1, 2, and 3.