

64 FLRA No. 8

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 801
(Union)

and

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
WASECA, MINNESOTA
(Agency)
0-NG-2954

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DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

September 17, 2009

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

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) and part 2424 of the Authority's Regulations, and concerns a single proposal. The Agency filed a statement of position, and the Union filed a response, which, as discussed further below, was untimely. For the reasons that follow, we find that the proposal is outside the duty to bargain. Accordingly, we dismiss the petition for review.

II. Preliminary Matter

On June 28, 2007, the Union filed a petition for review of the Agency's allegation that a Union proposal was nonnegotiable. Petition at 1-2, 5. During the post-petition conference, the Authority granted the Agency's request to extend the due date of the Agency's statement of position to August 22, 2007. Record of Post-Petition Conference (Record) at 3. On August 22, 2007, the Agency filed its statement of position with the Authority. Order of September 14, 2007 (Order) at 1-2. Pursuant to 5 C.F.R. §§ 2424.25(b) and 2429.21(b), the

Union's response had to be either deposited in the United States mail, delivered in person, or received by the Authority from commercial delivery by September 11, 2007. ² On September 10, 2007, the Authority received a request from the Union asking for an extension of time in which to file its response. Order at 1.

Under 5 C.F.R. § 2429.23(a), requests for extensions of time must be "received" by the Authority "not later than five (5) days before the established time limit for filing[.]" Therefore, on September 14, 2007, the Authority denied the Union's request. Order at 1-2. Nevertheless, on September 18, 2007, the Union filed a response to the Agency's statement of position and requested that the Authority waive the time limit for the filing of its response. Response at 1. In its response, the Union claims that it "misread" § 2429.23 and "behaved as if the request needed only to be filed no later than five days before the due date of the Response." *Id.* The Union further asserts that the Agency had agreed to the Union's request for an extension of time and contends that the Agency would not be harmed if the Authority were to waive the time limit. *Id.* at 1-2.

Section 2429.23(b) states that the Authority, "as appropriate, may waive any expired time limit in this subchapter in extraordinary circumstances." We find that the Union does not present any evidence of extraordinary circumstances warranting such a waiver within the meaning of § 2429.23(b). *See AFGELocal 1812*, 59 FLRA 447, 447 n.3 (2003) (union's miscalculation of time limits does not constitute extraordinary circumstances). Consequently, we find that the Union's response was untimely filed and, therefore, we have not considered it. *See AFGELocal 1917*, 55 FLRA 228, 228 n.1 (1999).

2. 5 C.F.R. § 2424.25(b) states:

(b) *Time limit for filing.* Unless the time limit for filing has been extended pursuant to § 2424.23 or part 2429 of this subchapter, within fifteen (15) days after the date the exclusive representative receives a copy of an agency's statement of position, the exclusive representative must file a response.

5 C.F.R. § 2429.21(b) states, in pertinent part:

(b) Except when filing . . . a request for an extension of time pursuant to § 2429.23(a) of this part, when this subchapter requires the filing of any paper with the Authority . . . the date of filing shall be determined by the date of mailing indicated by the postmark date If no postmark date is evident on the mailing, it shall be presumed to have been mailed 5 days prior to receipt. . . . If the filing is by personal or commercial delivery, it shall be considered filed on the date it is received by the Authority or the officer or agent designated to receive such materials.

1. Member DuBester did not participate in this decision.

III. Proposal

The Union submitted the following proposal, as modified during the post-petition conference:

Medication for inmates being released temporarily or permanently will be distributed by Qualified Bargaining Unit Staff, utilizing the following procedure:

1. Inmates will be escorted to [M]edical at a time prearranged by R&D Staff and Distributing Staff member.
2. After verifying the medication received is correct, and receiving any instructions, the inmate will place the medication in his property to be turned over to R&D staff.
3. If it is unfeasible to escort the inmate to Medical, Qualified Staff will distribute the medication in R&D at a time prearranged by R&D staff and the Distributing Staff Member.

Record at 1-2.

IV. Meaning of the Proposal

The Union explains that the proposal is intended to apply to the operation of the Receiving and Discharge (R&D) Department when an inmate is scheduled for temporary or permanent release from the correctional institution. Record at 2. The Union explains that the term “Medical” refers to the Medical Department, which is governed by Program Statement 6360.01. *Id.* The Union explains that “Qualified Bargaining Unit Staff” are unit employees who have completed the Pharmacy Services Orientation, referenced in Program Statement 6360.01, ¶ 7.c., and who are, therefore, authorized to distribute medication. *Id.* According to the Union, the term “distribute” is intended to be understood as being consistent with the definition of “distribution” in Program Statement 6360.01, ¶ 9.a.(3). *Id.* As such, the term is intended to mean the act of qualified personnel physically handing a filled medication order to an inmate. *Id.* As the Union’s statement of intent, as expressed at the post-petition conference, comports with the plain words of the proposal, we adopt the Union’s interpretation of the proposal. *See, e.g., AFGE, Local 1164*, 60 FLRA 785, 785 (2005).

V. Positions of the Parties

A. Agency

The Agency argues that the proposal is outside the duty to bargain because it affects its rights to determine

its internal security practices and to assign work under section 7106(a) of the Statute. Statement of Position at 4, 10. As to its right to determine its internal security practices, the Agency asserts that it has developed a system for the safe distribution of inmates’ medications when they are required to leave the institution. *Id.* at 5. Under this system, the Medical Department dispenses, packages, labels and delivers a 30-day supply of medication to the releasing staff in the R&D Department. *Id.* A releasing officer then gives the medication to the inmate upon the inmate’s release. *Id.* at 6. According to the Agency, the system has been developed “to prevent inmates from having access to large quantities of medication while still in the institution prior to their actual release.” *Id.*

The Agency contends that the proposal would result in medication being given to inmates while they are still in the secure area of the institution. *Id.* The Agency claims that it would “then be the inmate’s responsibility to transport his medication through the institution to the R&D area where it is inventoried with all of his belongings.” *Id.* The Agency argues that the proposal would “prevent the Agency from continuing what it has deemed to be a secure practice for having inmates receive their medications upon transfer or release” *Id.* at 6-7. As such, the Agency asserts that it has “demonstrated a sufficient link to establish that the proposal affects the Agency’s right to determine its internal security practices.” *Id.* at 7. Additionally, the Agency contends that the Union does not allege that the proposal is a procedure or an appropriate arrangement under section 7106(b)(2) and (3) of the Statute.³ *Id.*

As to its right to assign work, the Agency contends that the Union proposal requires the assignment of specific duties to identified individuals. *Id.* at 10-11. Specifically, the Agency asserts that the Union “is telling the Agency that only Medical Staff . . . can perform the specific task of actually handing medication to an inmate who is being transferred or discharged.” *Id.* at 11. According to the Agency, because the proposal affects the Agency’s “authority to determine the particular qualifications and skills needed to perform the work of a position, as well as the authority to determine which employees possess the requisite qualifications and skills[.]” the proposal affects the Agency’s right to assign work. *Id.* at 11-12.

3. The Agency notes that the Union claims that the proposal is intended to set forth procedures, but contends that the Union “appears to be using the word procedure in its generic sense[.]” Statement of Position at 9. As the Union does not dispute this contention, we do not address it further.

B. Union

In its petition for review, the Union stated that it would make its legal arguments in its response to the Agency's statement of position. Petition at 4.

VI. Analysis and Conclusions

Section 2424.32(c)(2) of the Authority's Regulations provides, in pertinent part, that "[f]ailure to respond to an argument or assertion raised by the other party will . . . be deemed a concession to such argument or assertion." Consistent with § 2424.32(c)(2), when a union offers no argument or precedent to dispute an agency's claim that a proposal affects the exercise of management's rights and offers no argument or precedent to support a claim that the proposal constitutes an exception to management's rights, the Authority will find that the proposal is outside the duty to bargain. *NATCA*, 62 FLRA 337, 340 (2008). In this connection, the Authority has found that a union's failure to address an agency's management rights argument results in the union's concession of that argument under § 2424.32(c)(2). *See AFGE Local 1712*, 62 FLRA 15, 16 (2007).

Here, the Union does not argue in its petition for review that the proposal is within the duty to bargain as an exception to management's rights. Moreover, as discussed above, we have not considered the Union's arguments stated in its response. Consequently, consistent with § 2424.32 and the above-cited precedent, we find that the Union has conceded that the proposal affects both the Agency's right to determine its internal security practices and its right to assign work. *See also AFGE Local 1836*, 62 FLRA 369, 371 (2008) (union's untimely response to agency's statement of position not considered by the Authority, resulting in Authority finding union concession of agency's arguments). As the Union concedes these arguments raised by the Agency and does not otherwise argue that the proposal is within the duty to bargain as an exception to the Agency's management rights, we find that the proposal is outside the duty to bargain. *See id.*

VII. Order

The petition for review is dismissed.