FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

In the Matter of:	
AMERICAN FEDERATION OF , GOVERNMENT EMPLOYEES. NATIONAL NATIONAL VA COUNCIL Union	FMCS Case No: 04 -06942 Grievant: Contract Interpretation (Ground Rules. II.E, II.G)
and	Date: June 27, 2005
DEPARTMENT OF VETERAN AFFAIRS Agency	

Before: Blanca E. Torres, Esq., Arbitrator

For the Union: Jacqueline Sims, Esq.

For the Agency: Denise Biaggi-Ayer, Esq.

INTRODUCTION

This case was heard at the Agency's facility in Washington, D.C., on January 7, 2005. Briefs were submitted on March 1 and March 7, 2005. The parties have agreed to grant the arbitrator an extension of time to June 27, 2005. The grievance concerns the Employer's refusal to sign-off on Article 25, Parking and Transportation during national negotiations on the Master Agreement.

ISSUE

Whether the Department of Veteran Affairs violated the July 17, 2003 Ground Rules for re-negotiation of the Master Agreement by expressly noting on its Article 25 proposal on "Parking and Transportation" that the Article would be "tentative pending receipt and discussion of the balance of the Union's initial proposals".

If so, the grievance should be sustained and the Union's requested remedy that the VA should be compelled to only offer proposals that they are prepared to sign if agreement is reached on them, should be granted.

MEMORANDUM OF UNDERSTANDING - Relevant Ground Rules

II. Procedures (in relevant part)

C. The parties will use a combination of bargaining techniques. As each proposal is taken up, the party offering a proposal will explain it, and will at a minimum provide the meaning and objectives of the proposed language. There will be ample opportunity for questions and answers, additional information, and other discussion. The parties will follow this procedure in good faith effort to reach agreement.

E. VA will submit its initial proposals within 45 days of the signing of the ground rules. AFGE will submit its initial proposals no later than 120 days after the signing of the ground rules. Either party may submit additional proposals thereafter. The first bargaining session will begin no later than 150 days after the date of the signing of the ground rules. . . .

G. The Chief Negotiators are jointly responsible for the following:

- Initialing-off on all articles to which the Master Negotiating Committee has reached consensus.

STATEMENT OF FACTS

The parties have enjoyed a history of bargaining resulting in a 1997 Master Agreement containing 61 articles. The American Federation of Government Employee (AFGE) is a national labor organization. The National VA Council (Union) is an intermediate labor organization consisting of approximately 198 AFGE locals representing employees at approximately 168 VA facilities such as medical centers, regional offices and cemeteries throughout the country. There are currently two certified nationwide bargaining units in AFGE: one for nonprofessional VA employees and one for professional VA employees.

AFGE was delegated the authority to act as the exclusive labor organization for the VA employees within the two nationwide bargaining units to the AFGE National VA Council, who filed this grievance. A further delegation of authority to act as the exclusive labor organization has been granted to the individual AFGE locals within the National VA Council for matters pertaining solely

to the particular local. The National VA Council maintains the authority to act as the exclusive representative within each bargaining unit whenever conditions of employment involving VA employees represented by more than one AFGE local area is at issue.

The collective bargaining agreement renewed automatically every three (3) years. In 2003, the parties entered into negotiations for a new Master Agreement. Under the terms of Article 61, Section 2, the terms of the 1997 Master Agreement are automatically extended until a new agreement is negotiated. By July 17, 2003, the parties had agreed on a Memorandum of Understanding (MOU) concerning the Ground Rules to be used for negotiations. The Chief Negotiator for the Union is Alma L. Lee, president of AFGE-NVAC. The Chief Negotiator for the Department of Veterans Affairs (the VA or the Agency) is Maureen Humphrys, Director of the Medical Center in Sheriden, Wyoming.

On August 29, 2003, Ms. Humphrys forwarded to the Union, the Agency's negotiating proposals for 64 articles in the Master Agreement. The Agency included, among others, proposals for: Article 30 - "Staff Lounges"; Article 25 - "Parking and Transportation; Article 43 - "Local Supplement" and Article 44 - "Mid-term Bargaining." Article 44, Section 4, was entitled "Local Level Bargaining (MOUs) and described local bargaining during mid-term negotiations.

On November 14, 2003, Ms. Lee forwarded to the Agency the Union's initial proposals addressing twenty-one (21) issues in the current Master Agreement. The VA, through Ms. Humphrys, wrote the Union a letter stating:

> Although the ground rules do provide that each party may submit additional proposals subsequent to exchanging initial proposals, it was clear from our discussions during the ground rules negotiations that we intended such additional proposals to concern issues not addressed in the current agreement. . . . If you intend to provide additional proposals relating to matters addressed in the current agreement, please submit them prior to our scheduled February negotiations.

On December 30, 2003, Ms. Lee responded:

> The discussions during the Ground Rules negotiations clearly established either party would be free to make any subsequent proposals after its initial proposals, not limited to only such proposals as would "concern issues not addressed in the current agreement". That limitation is not part of the Ground Rules. The extensive discussion left no doubt there would be no constraints on either party's ability to present such subsequent proposals. Otherwise no meaning can be given to the last sentence [in] paragraph II, Section E of the Ground Rules.

> [The last sentence in Paragraph II, Section E of the Ground Rules provides that *"Either party may submit additional proposals thereafter. . . ."*] (emphasis added).
>
> In keeping with that intent and language, the Council will submit additional proposals throughout the negotiations.

The Union maintains that the plain meaning of *"Either party may submit additional proposals thereafter"* is that additional proposals may be made by either party *after* the initial proposals were made. The Agency argues that *additional proposals* could be made *after all initial proposals* were submitted. This difference of opinion concerning the interpretation of paragraph II, Section E of the Ground Rules is at the core of this grievance.

Background Negotiations:

The Union and the Agency negotiating teams met in February, March and April 2004. Article 30 - "Staff Lounges" was negotiated during the third negotiating session. In the 1997 Master Agreement the issue of staff lounges had been a subject for local negotiations. Here also, the proposals exchanged by the parties reserved certain topics related to staff lounges to be addressed during local negotiations.

The Agency gave the Union its third proposal on staff lounges on the morning of April 1, 2004. Later that day, Ms. Lee informed Ms. Humphrys that the Union agreed to the Agency's proposal on Article 30 - Staff Lounges, and gave her a copy of the article with her signature on it and a space for the Agency's signature. Ms. Humphrys stated that she was reluctant to initial off on the article when the Union had not provided proposals on other related articles, including Article 43 - "Local Supplement" and Article 48 - "Use of Official Facilities". On April 2, 2004, the Union filed a National Grievance arguing that the VA's Chief Negotiator had refused to sign off on the agreement reached on Article 30 - Staff Lounges after the parties reached agreement. The grievance was appealed to arbitration and is not before me.

Negotiations on Article 25:

Another article on which the parties exchanged proposals was Article 25 - "Parking and Transportation". On April 29, 2004, the Union agreed to the language proposed by the VA for Article 25. When presented with this fact by Ms. Lee, Ms. Humphrys added a note to the agreed upon language in handwriting stating: *"Tentative pending receipt and discussion of the balance of the Union's initial proposals."* In light of this action by the VA, the Union filed the grievance in this case, alleging that the VA violated the Ground Rules by inserting the above language in its proposal concerning Article 25 - Parking.

Ms. Humphrys testified that the Union's proposal No. 3 on Article, 25 - Parking, suggested that where reserved parking exists in each facility, the Local Union should be provided with a minimum of four reserved parking spaces. The VA countered by offering Management No. 4, in which parking space for union officials was specifically listed as an issue to be bargained locally. Ms. Humphrys testified that she told the Union that the VA was reluctant to commit every facility to a specific number of spaces. The VA wanted to see the Union's proposal on the Local Supplement article before finalizing the Parking article, or any other article that specifically reserved issues for local bargaining.

When management's proposal No. 4 on the Parking article was presented to the Union negotiating team, Ms. Humphrys explained that she wished to avoid the same kind of misunderstanding that had resulted in the grievance over the staff lounges article. She informed the Union team that the parties could not reach consensus on the local bargaining section of the Parking article until two other related articles were submitted by the Union, discussed and agreed upon: (1) Local Supplement - Article 43 and (2) Mid-Term Bargaining - Article 44. Therefore, the VA made its proposal reserving local bargaining of the Parking issue *tentative* only. This is why she added the language "*tentative pending receipt and discussion of the balance of the Union's initial proposals*".

Ms. Humphrys testified that the Agency is requesting only proposals on the articles that have a bearing on local negotiations.

Position of the Union:

The Union argues that the Agency violated the Ground Rules by refusing to sign off on the agreed-upon language. Paragraph II. Section G of the Ground Rules states that the Chief Negotiators are jointly responsible for: "*Initialing off on all articles to which the Master Negotiating Committee has reached consensus.*" Here, the Agency submitted a proposal on Article 25 and the Union agreed. When asked to sign off on the agreed-to language, the Agency refused to sign off on the agreement. Instead, the Agency added language which made the agreement only a tentative agreement, until the Union submitted the rest of its proposals.

The Union states that the parties agreed in the Ground Rules, paragraph II, Section E, that they may submit proposals throughout the course of negotiations. In light of this, the Union argues that the Agency violated the Ground Rules by demanding that the Union submit all of its proposals before signing off on the agreement on Article 25 - Parking.

Further, the Union argues that the Agency's demand has been addressed by the FLRA in Chicago. (Case No. WA-CO-04-0392). In that case, the FLRA stated: "The charge alleged that the Union had violated Section 7116(b)(5) of the Statute and the parties' July 17, 2003 ground rules agreement by failing to submit a complete set of bargaining proposals in connection with the parties negotiations for a new agreement." (Id. at p. 1). The FLRA dismissed the Agency's Unfair Labor Practice (ULP) charge. The Agency appealed the dismissal relying on case law that allows the FLRA

to interpret contractual language in situations where the contract language is raised as a defense by one of the parties. The Agency raised the Ground Rules as a defense, citing Section II.E.

The FLRA rescinded the dismissal and reconsidered the Agency's ULP charge in light of the Ground Rules and the relevant case law and found that "a dispute arose concerning the meaning of the parties' ground rules agreement." (*Id.* p. 2). However, "[t]o the extent the Agency is alleging that the Union has repudiated the ground rules agreement by submitting its initial proposals, such allegation is without merit in view of the determination . . . that the Union's actions were permitted by the ground rules agreement. To the extent the Agency is arguing that the Union has refused to bargain in good faith, such allegation is unavailing in view of the above determination. . . . not[ing] that the Agency suspended negotiations in April 2004 to pursue the subject charge." (*Id.*, See p.2, ft. 1).

Thus, the FLRA found that the Union's action submitting 21 initial proposals and submitting more proposals during the negotiating process, was consistent within the plain meaning of the language of paragraph II.E of the Ground Rules. Similarly, in this grievance the Union argues that its failure to submit 61 initial proposals prior to the first negotiating session is in keeping with the language of the Ground Rules. As a result, the Agency's action requiring the Union to make all of its proposals before signing off on Article 25 - Parking is in violation of Section II.E of the Ground Rules.

The Union asserts that past practice does not support the notion that all proposals must be submitted prior to commencing bargaining. This was not a requirement in prior negotiations.

Finally, in spite of the current grievance, it is the Union's position that it is prepared to submit its remaining proposals at the bargaining table.

Position of the Agency

The VA argues that the issue of "staff lounges" was decided in arbitration in favor of the Agency. Similarly, the issue presented in this grievance, Article 25 - Parking and Transportation, previously had been a subject for local negotiations. The VA argues that the parties could not reach consensus on all the material terms of Article 25 - Parking. Section 2 of Article 25 addressed the issue of local negotiations because the Agency's proposal on Section 2 stated: "*The parties agree that parking is a substantive subject for local negotiations to the extent not specifically covered in this Agreement.*" Under this proposal, parking would be a subject addressed in each facility's Local Supplemental Agreement or local MOU, as in the parties' prior Master Agreement. Agency argues that there was an unresolved dispute over the nature of local negotiations and the effect that the new master agreement would have on pre-existing local agreements. The parties had not yet reached agreement on what it meant to reserve an issue for local bargaining.

The VA argues that consensus on Article 25, Section 2, would also require consensus on whether there would be local bargaining at all. This could be addressed by the parties only in the context of either mid-term bargaining or a local supplemental agreement. The VA cited *Internal Revenue Service v. Philadelphia Dist. Office and Nat'l Treasury Employees Union, Chapter 22*, 22 FLRA No. 24 (1986) (finding no "meeting of the minds" and therefore no obligation to sign agreement where related issue remained unresolved).

The VA further argues that the determination made by the FLRA in Case No. WA-CO-04-0392, will not resolve the instant grievance. There, the VA filed a ULP charge alleging that the Union violated its duty to negotiate in good faith, as defined by 5 USC § 7114(a)(4), (b)(1) and (b)(2), and/or committed an unfair labor practice under 5 USC § 7116(b)(5) by refusing to provide a complete set of its initial proposals before the start of negotiations, and by refusing to discuss any of the articles where they had not submitted a proposal. The FLRA dismissed the complaint.

The VA takes the position that the FLRA resolution of this ULP charge against the Union does not resolve the instant grievance. This is so because even if the Union had presented all of its proposals prior to bargaining, there still could have been no consensus on Article 25 until the scope, nature and timing of local bargaining was resolved. There was no meeting of the minds. Thus, the answer to whether the Agency was right or wrong concerning the interpretation of the Ground rules and of the Union's obligation to provide proposals would be irrelevant to the issues raised by this grievance.

In response to the Union's argument that the notion of a tentative proposal is an unwarranted departure from the past practice between the parties, the VA argues that past practice is irrelevant to the facts of this case. For example, the ground rules used in the negotiations for the 1997 Master Agreement did not require the parties to submit proposals before the start of negotiations. The Agency argues that, in contrast, the Ground Rules governing the current negotiations specifically require the parties to submit their initial proposals before the start of negotiations.

Finally, the Agency argues that there is no language in the Ground Rules that preclude the use of "tentative proposals" during negotiations. In compliance with Section II.C of the Ground Rules, Ms. Humphrys explained the intent of the management teams proposal No. 4 on Article 25 - Parking. She then asked to see the Union's proposal on the Local Supplement article, which was relevant to the same issue because it addresses local negotiations. The Union refused to provide that proposal and to date has not provided any other proposals. Therefore, the Agency's proposal on this issue remains tentative.

ANALYSIS AND CONCLUSION

The Union asks that I make a decision that the language "*tentative pending receipt and discussion of the balance of the Unions's initial proposals*" is in violation of the Ground Rules. This issue was raised before the FLRA in the form of a ULP against the Union, for failure to bargain by not submitting all of their contract proposals prior to commencing negotiations and by refusing to

discuss the subject of any articles for they did not submit a proposal. The FLRA found that the plain language of the parties' Ground Rules allows for the submission of proposals by the parties beyond the date of their initial proposals.

The Union argues that the FLRA case disposes of the issue before me. This is so because by including the contested language in its Article 25 - Parking proposal, the Agency is attempting to impose a requirement that the Union submit all of its proposals before bargaining continues. The Union argues that the FLRA decision would dictate that the Agency cannot make such a demand, based on the Ground Rules. The Agency argues that even if the Union had submitted all proposals on every contractual provision, the parties could not have come to a meeting of the minds on Article 25, unless there were an agreement on the contents of Articles 43 and 44 concerning local negotiations. The Agency cannot know what it means in Article 25, to leave some Parking issues to local negotiations without first knowing if there will be local negotiations.

I find that the decision in this matter must be made within the four corners of the collective bargaining agreement. The FLRA decision addressed whether the *Union* committed a ULP, not whether the *Agency* violated the Ground Rules.

I have carefully reviewed the provisions cited by the parties and find that there is no requirement that the Union present all of its initial proposals at the inception of the bargaining process. The parties clearly negotiated the possibility of introducing proposals later, during the negotiation process. However, under the facts of this case, the parties entered negotiations and were four months into the negotiation process at the time this grievance was filed. Thus, this is no longer an issue concerning the initial proposals of the parties. As a result, I cannot find that by asking for proposals related to Article 25 - Parking, the Agency violated the Ground Rules.

First, as stated above, negotiations were already in progress and asking for further proposals on Article 25 at this point in the bargaining process, does not equate to asking for initial proposals. Second, the Agency's request for further proposals on articles concerning local negotiations (Articles 43 and 44) was a reasonable request. The Article 25 proposal by the Agency contained language regarding local negotiations. Therefore, this request does not constitute a violation of the Ground Rules which allow for proposals to be made during the negotiating process.

Third, this decision must be made in light of *all* the Ground Rules. With regard to the responsibility of the Chief Negotiators to initial off on articles to which the Master Negotiating Committee has reached consensus, I find there is no requirement to sign off on provisions where no consensus has been reached. The record shows that without proposals from the Union on the issues related to Article 25 (local negotiations and mid-term bargaining), the Agency would not have agreed to its own proposed language. The Agency articulated its concern that Article 25 impacted on other issues, such as mid-term bargaining and bargaining at the local level, found in Articles 43 and 44. These facts do not indicate there was a consensus by the parties.

Thus, there could be no meeting of the minds and no violation of the duty to sign off on provisions where consensus had been reached. Having said that, I also note that the Agency is guilty of the very thing it argues against the Union. The Agency did not provide its full proposal concerning Article 25, until Ms. Humphrys added the contested language to the Agency's initial proposal. This language was added only after the Union agreed to the Agency's original proposal.

I conclude that the Agency did not violate the Ground Rules by making its consensus on Article 25 tentative pending the Union's proposals on the issue of local bargaining. Thus, the Agency did not violate the Ground Rules by adding the language in question to its proposal for Article 25 - Parking. The grievance is hereby denied. This decision is specific to the Article 25 - Parking proposal and the relevant proposals on local negotiations, Articles 43 and 44.[1]

AWARD

The Agency did not violate the Ground Rules by adding the language in question to its proposal for Article 25. The grievance is hereby denied.

Blanca E. Torres

Blanca E. Torres, Esq.
Arbitrator

June 27, 2005

[1] In this proceeding, the Agency articulated that it is no longer asking for "the balance of the Union's proposals" as stated on the face of its Article 25 proposal. It now seeks only the Union's proposals on local bargaining. Further, the Union articulated that it is ready to submit further proposals when negotiations resume. This is encouraging for both parties.