66 FLRA No. 46

NATIONAL ASSOCIATION
OF GOVERNMENT EMPLOYEES
LOCAL R-109
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
VA CONNECTICUT HEALTHCARE SYSTEM
NEWINGTON, CONNECTICUT
(Agency)

0-NG-3046

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

September 30, 2011

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

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 concerns the negotiability of two proposals relating to the operation of certain equipment by Compensated Work Therapy patients (CWT patients). The Agency filed a statement of position (SOP), to which the Union filed a response. The Agency filed a reply to the Union's response.

For the reasons that follow, we find that the proposals are outside the duty to bargain and dismiss the Union's petition for review (petition).

II. Background

CWT patients are part of a program that permits the Secretary of Veterans Affairs (VA) to "use the services of patients . . . in [VA] health care facilities for therapeutic and rehabilitative purposes." 38 U.S.C. § 1718(a); SOP at 2-3. Under this program, VA inpatients and outpatients, at the direction of the VA and their medical providers, are permitted to work for monetary gain by performing duties that arise from contracts that the VA has with various entities. *See* SOP at 2-3. CWT patients are not employees of the United States Government. *See* 38 U.S.C. § 1718(a). The Agency uses CWT patients to perform various tasks in its facilities. CWT patients perform certain duties at the Agency's Facility Management Services department (service department) that require them to operate mechanical and powered equipment. *See* Response at 2.

III. Proposal 1

A. Wording

> The Employer recognizes that the safety[,] health and environment of Employees and Patients at the VA Connecticut Healthcare System is of paramount importance.
>
> Recently the NAGE raised the issue of CWT patient's [sic] performing certain work functions of bargaining unit employees, specifically the operation of mechanical and or powered equipment in the FMS department.
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> In order to protect the health and safety of bargaining unit employees; and to limit the personal liability involving these unit employees:
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> The employer shall not assign the operation of mechanical and powered equipment in the FMS department to any CWT patients.

Petition, Attach.; *see also* Record of Post-Petition Conference (Record) at 2.

B. Meaning

Where, as here, the parties disagree over the meaning of a proposal, the Authority looks first to the proposal's wording and the union's statement of intent. If the union's explanation of the proposal's meaning comports with the wording, then that explanation is adopted for the purpose of construing what the proposal means and, based on that meaning, deciding whether the proposal is within the duty to bargain. *See NAGE, Local R1-100*, 61 FLRA 480, 480 (2006) (*NAGE*) (Member Armendariz concurring) (citing *AFGE, Local 1900*, 51 FLRA 133, 138-39 (1995)).

The language of the proposal prohibits the Agency from assigning to CWT patients duties that involve mechanical and powered equipment in the service department in order "to protect the health and safety of bargaining unit employees" and to limit unit employees' personal liability. Petition, Attach. The Union asserts that this language means that, to ensure the safety of bargaining unit employees and to limit their liability for the actions of CWT patients, the Agency will

not assign certain duties to CWT patients in the service department. Record at 2. The Agency does not agree with the Union's explanation. *See id.* Although the Agency acknowledges that the proposal addresses bargaining unit employees, it asserts that the proposal actually requires bargaining over CWT patients' "clinical treatment[s]." SOP at 7.

The plain wording of the proposal explicitly states that it is intended to protect bargaining unit employees' health and safety and limit their personal liability. *See* Petition, Attach. Consequently, we adopt the Union's explanation of the meaning of the proposal. *See NAGE*, 61 FLRA at 481. We therefore interpret the proposal as prohibiting the Agency from assigning duties involving the operation of mechanical and powered equipment to CWT patients who work in the service department.

C. Positions of the Parties

1. Agency

The Agency avers that the proposal is non-negotiable because CWT patients, as a matter of law, are not VA employees. According to the Agency, because CWT patients are not employees, they are not entitled to union representation. SOP at 6 (citation omitted). The Agency asserts that the Union has conceded that CWT patients are non-employees. Reply at 1. The Agency contends that, although the Union presented the proposal concerning the assignment of certain duties to CWT patients as a health and safety and personal liability issue, the actual effect of the proposal is to mandate bargaining over the duties and conditions of employment for non-employees. *See* SOP at 6-7.

The Agency also argues that the proposal is outside the duty to bargain because it is covered by the parties' agreement. The Agency contends that the proposal is intended to protect the health and safety of bargaining unit employees while also limiting their liability from the actions of CWT patients. *See id.* at 4. According to the Agency, however, Article 48 of the parties' agreement already covers issues concerning the health and safety of bargaining unit employees because it states that the Agency "shall furnish places and conditions of employment which are free of recognized hazards and unhealthful working conditions." *Id.* at 4 (citing SOP, Ex. C at 141). The Agency, therefore, asserts that the Union's proposal is "inseparably bound up with . . . a subject expressly covered by the contract." Reply at 2 (citing *U.S. Dep't of HHS, Soc. Sec. Admin., Balt., Md.*, 47 FLRA 1004 (1993)).

The Agency disputes whether employees face liability for the actions of CWT patients. According to the Agency, because CWT patients are not Agency employees, bargaining unit employees cannot be liable for their actions. SOP at 5 (citing 38 U.S.C. § 1718; *U.S. Dep't of Veterans Affairs, Hunter Holmes McGuire Med. Ctr.*, 54 FLRA 471 (1998)). Furthermore, the Agency asserts that, other than citing distinguishable Authority precedent, the Union has not explained how an employee could be liable for the actions of a CWT patient. *See id.* at 5-6 (citation omitted); *see also* Reply at 2-3. The Agency acknowledges that the Union relies on a VA Office of General Counsel opinion (GC opinion) concerning CWT patient liability. *See* Reply at 2-3. However, the Agency avers that the opinion is distinguishable. *See id.*

2. Union

The Union does not respond to the Agency's assertion that the proposal is non-negotiable because it addresses non-employees. However, the Union concedes that CWT patients are not employees of the Agency within the meaning of the Statute. *See* Response at 3-4. The Union also disagrees with the Agency's assertion that the proposal is covered by the parties' agreement. *See id.* at 5-6 (citation omitted).

The Union next contends that, contrary to the Agency's claims, the Agency has "recognized liabilities" associated with CWT patients. *Id.* at 6. The Union avers that the GC opinion states that CWT patients do not have protection under the Federal Tort Claims Act and the VA cannot purchase liability coverage for patients. *Id.* Thus, according to the Union, employees would be unable to recover compensation for any injuries or property damage caused by the CWT patients' operation of mechanical and powered equipment. *See id.* at 6-7.

D. Analysis and Conclusions

The Agency argues that the proposal is non-negotiable because it would require the Agency to bargain over the duties and conditions of employment of non-employees, i.e., CWT patients. *See* SOP at 6-7. The Union agrees that CWT patients are not employees, but avers that the proposals are intended to address safety issues for bargaining unit employees. *See* Response at 2-4.

A proposal that directly determines the conditions of employment of non-employees is outside the duty to bargain unless the proposal addresses matters that "vitally affect" conditions of employment of bargaining unit employees. *See AFGE, Local 32*, 51 FLRA 491, 502 (1995) (*AFGE, Local 32*) (citation omitted); *U.S. Dep't of the Navy, Naval Aviation Depot, Cherry Point, N.C. v. FLRA*, 952 F.2d 1434, 1442 (D.C. Cir. 1992) (*Cherry Point*); *AFGE, Local 32 v. FLRA*, 110 F.3d 810, 813 (D.C. Cir. 1997). Proposal 1 directly determines the conditions of employment of

non-employees by prohibiting the Agency from assigning them certain responsibilities. The Union asserts that the proposal "seek[s] to protect employee safety." Response at 2. However, the Union has not asserted that this proposal "vitally affects" bargaining unit employees, which is required when a proposal concerns non-employees. *AFGE, Local 32*, 51 FLRA at 502.

Under § 2424.32(a) of the Authority's Regulations, the Union has the burden of "raising and supporting arguments that the proposal . . . is within the duty to bargain." 5 C.F.R. § 2424.32(a); *see also* 5 C.F.R. § 2424.25(a) (stating that purpose of a union's response to an agency SOP "is to inform the Authority and the agency why, despite the agency's arguments in its [SOP], the proposal . . . is within the duty to bargain"). In the absence of any arguments that the proposal vitally affects the conditions of employment of bargaining unit employees, the Union has failed to meet its burden of establishing that the proposal is within the duty to bargain. *Cf. AFGE, Local 1547*, 65 FLRA 911, 913 (2011) (*AFGE, Local 1547*) (Member Beck dissenting, in part, as to other matters) (relying on 5 C.F.R. § 2424.25(b), Authority dismissed agency's claim that proposal was contrary to law because agency failed to provide any support for this claim). Consequently, we dismiss the Union's petition as to Proposal 1. *See id.*

IV. Proposal 2[1]

A. Wording

> In the event that it is determined that such an assignment is outside the duty to bargain or is otherwise non-negotiable, the Employer shall provide the NAGE with written records that any CWT has been trained and is certified to be competent to operate mechanical and powered equipment in the FMS department, in a manner which does not threaten the safety and well being of NAGE employees.
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> Safety training records will contain at a minimum
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> Dates and times of training;
> Name and Title of safety trainer;
> Trainer's qualifications, or training record;
> Any necessary safety certifications or requirements;
>
> Copies of any training materials utilized by the trainer.

Record at 3.

B. Meaning

Like Proposal 1, the parties disagree over the meaning of Proposal 2. As stated above, when interpreting a disputed proposal, the Authority looks first to the proposal's wording and the union's statement of intent. If the union's explanation of the proposal's meaning comports with the wording, then that explanation is adopted for the purpose of construing what the proposal means and, based on that meaning, deciding whether the proposal is within the duty to bargain. *See NAGE*, 61 FLRA at 480.

The wording of the proposal states that the Agency will provide the Union with written records that establish CWT patients have been "trained" and "certified" to operate mechanical and powered equipment in the FMS department in a manner that will not harm bargaining unit employees. Record at 3. The Union contends that this language means that CWT patients would be allowed to operate machinery in the FMS department only if the Agency provides the Union with written documentation that they are trained and certified to do so. *See id.* The Agency does not dispute the Union's contention.

The Union's explanation that the proposal would prohibit the Agency from allowing CWT patients to operate machinery in the service department unless the Agency provides the Union with certain written records is consistent with the wording of the proposal. Consequently, we adopt the Union's explanation of the meaning of the proposal. *See NAGE*, 61 FLRA at 481. We therefore interpret the proposal as requiring the Agency to provide the Union with documentation that CWT patients have been trained and certified to operate mechanical and powered equipment in the service department before they are allowed to operate this machinery.

C. Positions of the Parties

1. Agency

As with Proposal 1, the Agency argues that Proposal 2 is non-negotiable because it would impermissibly require bargaining over the duties and conditions of non-employees. *See* SOP at 6-7. The Agency notes that the Union has conceded that CWT patients are non-employees. *See* Reply at 1. Alternatively, the Agency argues that, even if CWT patients are employees, the proposal would be non-negotiable because it would interfere with management's

[1] The Union contends that the Authority need only address Proposal 2 if it finds that Proposal 1 is non-negotiable. *See* Record at 3. The Agency does not dispute this assertion. Because we have found that Proposal 1 is outside the duty to bargain, we will consider the negotiability of Proposal 2.

rights to direct and assign work under § 7106(a)(2)(A) and (B) of the Statute. *See* SOP at 7 n.3.

The Agency avers that the proposal is outside the duty to bargain because it is covered by Article 48 of the parties' agreement. *See id.* at 4-5; *see also* Reply at 2.

The Agency also contends that the proposal is non-negotiable because it is contrary to several laws. First, the Agency argues that the Union has no representational interest in receiving information regarding non-employees; as such, the Agency asserts that disclosure of the Union's requested information would violate the Privacy Act. SOP at 7; Reply at 3. Second, the Agency argues that the proposal is contrary to several provisions of Title 38 that prohibit the release of certain medical information. *See* SOP at 8; Reply at 3. Third, the Agency avers that releasing the information would violate the Health Insurance Portability and Accountability Act. *See* SOP at 8-9.

2. Union

The Union concedes that CWT patients are not employees within the meaning of the Statute. *See* Response at 3. The Union further asserts that the right to assign work does not apply to non-employees; as such, the Union asserts that the Agency's reliance on this management right is misplaced. *See id.* at 3-4. Alternatively, the Union contends that the proposal constitutes an appropriate arrangement and/or a procedure. *See id.* at 4.

The Union disagrees with the Agency's assertion that the proposal is covered by Article 48 of the parties' agreement. *See id.* at 4-6. The Union also disagrees with the Agency's claim that the proposal is contrary to law. The Union contends that the CWT patient records it seeks are "easily segregable" and that the Agency simply does not want to release them. *See id.* at 7.

D. Analysis and Conclusions

As stated above, the parties agree that CWT patients are not employees. *See* SOP at 5-6; Response at 3-4. As also stated above, a proposal that directly determines the conditions of employment of non-employees is outside the duty to bargain unless the proposal addresses matters that "vitally affect" conditions of employment of bargaining unit employees. *See AFGE, Local 32*, 51 FLRA at 502. Proposal 2 directly determines the conditions of employment of non-employees by conditioning their operation of certain equipment on the Agency's prior disclosure to the Union of written documentation. Like Proposal 1, the Union has not asserted that Proposal 2 vitally affects conditions of employment of bargaining unit employees. *See* Response at 2-4. Thus, in the absence of any arguments that the proposal vitally affects the conditions of employment of bargaining unit employees, the Union has failed to meet its burden of establishing that Proposal 2 is within the duty to bargain. *Cf. AFGE, Local 1547*, 65 FLRA at 913 (relying on 5 C.F.R. § 2424.25(b), Authority dismissed agency's claim that proposal was contrary to law because agency failed to provide any support for this claim). Consequently, we dismiss the petition as to Proposal 2. *See id.*

V. Order

The petition for review is dismissed.[2]

[2] Based on this order, it is unnecessary to address the Agency's remaining arguments concerning Proposal 2.