GAO EMPLOYEES ORGANIZATION, IFPTE LOCAL 1921 v. U.S. Government Accountability Office

Docket No. LMR-2013-01

Date Issued: July 15, 2013

Cite as: GAO Employees Organization, IFPTE Local 1921 v. GAO, Docket No. LMR-2013-01 (7/15/13)

Before: William E. Persina, Administrative Judge

Headnotes:

Labor Relations – Appropriate Arrangement

Labor Relations – Management Rights

Labor Relations – Negotiability

DECISION ON NEGOTIABILITY ISSUES

PERSONNEL APPEALS BOARD
U.S. GOVERNMENT ACCOUNTABILITY OFFICE
WASHINGTON, D.C.

GAO EMPLOYEES ORGANIZATION, IFPTE LOCAL 1921, Petitioner	)	
	)	**Docket No. LMR-2013-01**
v.	)	
U.S. GOVERNMENT ACCOUNTABILITY OFFICE, Respondent	)	July 15, 2013

DECISION ON NEGOTIABILITY ISSUES

This matter is before the Personnel Appeals Board on a Petition for Review filed on March 25, 2013 by the GAO Employees Organization, IFPTE Local 1921 (Union), pursuant to 4 C.F.R. §28.122(b). In its Petition, the Union seeks review of the determination of the Government Accountability Office (GAO or the Agency) that a proposal made by the Union in collective bargaining negotiations is nonnegotiable. For the reasons set forth below, the undersigned Administrative Judge finds that the Union's proposal is nonnegotiable and denies the Union's Petition for Review.

I. Background and Findings of Fact

In an effort to, among other things, reduce its use of office space in its field offices, GAO decided to implement a pilot program in which employees are permitted to telework for more than half of their work schedule. The pilot was designated as the Field Office Workspace Sharing and Expanded Telework program. A key element of this program is "hoteling," that is, having office space available to employees when they are required to come to the office, on an

as-needed basis, rather than having an assigned office for each employee's exclusive use. Thus, an employee who comes to the office on Monday could use an office, while another employee who comes to the office on Tuesday could use the same office.

Another element of GAO's plan is to have employees reserve office space ahead of time using an on-line reservation system. When employees arrive at the office on the day that they are scheduled to work there, they would "check in" using a reservation system kiosk located in the office. This "check in" establishes that the employee is present and using the office space that was reserved. *See* Reply to Petition for Review (Reply) at 2-3.

GAO implemented this program in increments beginning with the San Francisco and Boston Field Offices. The Union and GAO negotiated a Memorandum of Agreement (MOA) to govern implementation of the program at these two field offices. *See* Reply Exhibit (Ex.) 1. Among other things, the MOA required in relevant part as follows: "All employees, including those with dedicated workspace, must 'check in' using the reservation system kiosk each day they are in the official duty station, unless they are using a hot desk."[1] *Id.* ¶9.

GAO next implemented its work space program in the Seattle and Los Angeles Field Offices. The Union and GAO again negotiated an MOA governing implementation of the program at these field offices. This MOA contained the identical language set out above concerning the kiosk "check-in" requirement for employees. Reply Ex. 2 ¶10.

The third phase of GAO's implementation of its work space program was at its Atlanta, Dallas, and Denver Field Offices. During negotiations between the Union and GAO for an MOA covering these offices, however, it appears that GAO bargaining representatives made comments to the effect that the information gathered through the kiosk "check-in" system might

[1] A "hot desk" is non-reservable overflow workspace. Reply Ex. 1 at 7 ¶1.

be used by management as an employee tracking and location device in case of an emergency at the office. *See* Petition ¶¶3, 5, 6; Reply at 4 & Ex. 5. It does not appear from the record that GAO had articulated this possible use of the "check-in" system in the earlier two negotiations.

In light of this information, the Union added language to the above-quoted "check in" provision contained in the two previous MOAs, providing that the information gathered from the kiosk "check in" could be used "for the sole purpose of recording and tracking workspace usage." *See* Reply Ex. 5. The proposal then read in relevant part as follows:

> All employees, including those with a designated workspace, must 'check in' using the reservation system kiosk each day they are in the official duty station <u>for the sole purpose of recording and tracking workspace usage.</u> [Underscoring added.]

Reply Ex. 4 ¶10. It is this added phrase concerning the "sole purpose" for which "check-in" information can be used that is the focus of this negotiability case.

GAO provided the Union with a formal determination of nonnegotiability concerning the Union's "sole purpose" proposal pursuant to 4 C.F.R. §28.122. (Attach. to Petition). GAO first stated that the proposal "interferes with GAO's reserved management rights under 5 U.S.C. §7106(a)."[2] The Agency did not specify which management right it was relying on in this

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[2] 5 U.S.C. §7106(a) is the management rights provision of the Civil Service Reform Act of 1978, which governs labor relations in the Executive Branch. It provides as follows:

> **(a)** Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—
> **(1)** to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
> **(2)** in accordance with applicable laws—
> **(A)** to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;
> **(B)** to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;
> **(C)** with respect to filling positions, to make selections for appointments from—
> **(i)** among properly ranked and certified candidates for promotion; or
> **(ii)** any other appropriate source; and
> **(D)** to take whatever actions may be necessary to carry out the agency mission

regard. GAO also claimed in its declaration of nonnegotiability that the matter of the use of kiosk "check-in" information had already been the subject of negotiation by the parties in their April 27, 2011 Master Collective Bargaining Agreement. Specifically, GAO claimed that the use of information such as that provided by the kiosk "check-in" process was contained in and covered by section 24.11 of the Master Agreement.[3] Reply Ex. 3. Thus, since GAO asserted that it had already bargained on the matter, it was not required to do so again.[4]

The Union then filed the subject Petition for Review with the Board. It first pointed out that GAO did not specify which management right it relied on in its declaration of nonnegotiability. Petition ¶4. The Union went on to argue, however, that its "sole purpose"

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during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

[3] Section 24.11 of the Master Agreement provides:

> The Agency has determined it is not a primary purpose of the security gates or other electronic access devices to act as time and attendance monitors. However, if there is a reasonable belief that an employee has an attendance problem, information from the security gates or other electronic access devices may then be used as corroborating evidence to support an administrative action. The Agency has determined that surveillance cameras are not devices used to track employee time and attendance. If the Agency decides to use surveillance cameras, security gates, or other electronic access devices as primary means of recording time and attendance, it will notify the Union and provide it an opportunity to bargain consistent with law.

[4] This so-called "contained in/covered by" doctrine, which is a defense to a union claim that an agency has not complied with its duty to bargain, is based in case law. *See Dep't of Navy Marine Corps Logistics Base Albany v. FLRA*, 962 F.2d 48 (D.C. Cir. 1992); *Social Security Admin. & Council 220*, 47 FLRA 1004, 1015-19 (1993). Under the doctrine, if the matter submitted for bargaining is "expressly contained in the parties' agreement," then there is no bargaining obligation. If the matter is not "expressly contained" in an existing agreement, there is still no bargaining obligation if the matter submitted for bargaining is "inseparably bound up with, and thus, an aspect of a subject covered by the parties' agreement." *HUD & AFGE Local 3956*, 66 FLRA 106, 107 n.4 (2011).

proposal did not violate any management right. Petition ¶6. Even if it did, the Union further claimed, the proposal was nonetheless negotiable as an "appropriate arrangement" under 5 U.S.C. §7106(b)(3) for employees adversely affected by GAO's exercise of a management right. The Union said that its proposal is "consistent with the purpose" of the pilot telework program and "addresses the Agency's use of the kiosk in a manner beyond its intended purpose." The Union also asserted that GAO's use of the kiosk "check-in" process "could potentially have an impact on employees outside the confines of the pilot." Further, the Union said that the purpose of its proposal was to "limit the use of the kiosk as a general location device to track employee whereabouts for which the kiosk would be ill-suited in any event." Petition ¶6.

The Union in its Petition also disagreed with GAO's claim that it was not obligated to bargain on the Union's proposal because the matter was contained in or covered by section 24.11 of the Master Agreement. The Union agreed with GAO to the extent that it claimed that section 24.11 did cover the kiosk "check-in" process insofar as that process dealt with time and attendance issues. However, the Union said that the proposal is "silent with respect to other issues," such as the use of the kiosk system for "non-approved purposes" like "general tracking of employee location." These other uses of kiosk "check-in" information are not contained in or covered by section 24.11. Petition ¶5.

GAO filed a Reply to the Union's Petition for Review. GAO first specified that the Union's "sole purpose" bargaining proposal directly affects GAO's management right to determine its internal security practices under 5 U.S.C. §7106(a)(1). In this connection, GAO stated that it could use kiosk "check-in" information to establish the whereabouts of all employees at the official duty station, and this would assist it in locating and accounting for employees in the case of emergency like a fire or terrorist attack. According to GAO, this fact

establishes a link between its intended use of the kiosk information and its right to decide what is necessary to protect Agency personnel, a key component of the internal security management right. Reply at 6.

GAO next argued that the Union's proposal was not negotiable as an appropriate arrangement under 5 U.S.C. §7106(b)(3). It first pointed out that the Union had not identified any adverse effects or reasonably foreseeable adverse effects on employees flowing from GAO's use of kiosk "check-in" data. Nor did the Union show how its proposal is "tailored" to addressing those adverse effects. Accordingly, GAO concluded, the Union's proposal was not an arrangement within the meaning of 5 U.S.C. §7106(b)(3). Reply at 7. GAO next argued that even if the proposal is an arrangement, it is not an appropriate one because it would completely negate GAO's right to protect its personnel in case of emergency. Reply at 8.

Finally, GAO argued that it is not obligated to bargain on the Union's proposal because the matter addressed in the proposal, that is, use of kiosk "check-in" information, is "inseparably bound up with" the subject of section 24.11 of the parties' Master Agreement. GAO stated that the parties, when negotiating on section 24.11, should have contemplated that the agreement would foreclose further bargaining on the subject. The kiosk reservation system, GAO claimed, is one of the "electronic access devices" referenced in section 24.11. Therefore, GAO argued that section 24.11 reflects the parties' understanding that GAO "can and does use the data collected by such devices for different purposes," as time and attendance monitoring is not a primary purpose of electronic access devices. Reply at 9. The Union did not seek to file a response to GAO's Reply to the Petition for Review.

II. Discussion

A. The Union's Proposal Directly Affects GAO's Management Right to Determine Its Internal Security Practices Under 5 U.S.C. §7106(a).

The Government Accountability Office Personnel Act (GAOPA) expressly states that the labor-management relations program established as part of the GAO personnel management system administered by the Board shall be "consistent with [C]hapter 71 of [T]itle 5."[5] 31 U.S.C. §732(e)(2). Consistent with this statutory mandate, GAO has promulgated Order 2711.1 (Apr. 27, 2001), which governs labor-management relations at GAO. This Order tracks in most relevant respects the Executive branch statute, including the management rights provision, 5 U.S.C. §7106. *See* Order 2711.1, ¶7.

Accordingly, the Board has properly looked to FLRA precedent for guidance in resolving labor-management issues that come before it. *E.g., PAB/OGC v. GAO*, No. 09-03 (Feb. 18, 2010) at p. 5. Indeed, both the Union and GAO recognize in their submissions in this case that relevant provisions of Chapter 71 of Title 5 of the United States Code, and FLRA precedent applying that law, are properly viewed as providing guidance in resolving the issues before me. The Board does not view FLRA precedent arising under the Executive branch labor-management law as binding on it. However, I see no reason to disagree with the parties' view that that precedent provides important guidance in deciding this case.

Turning now to the issue of the negotiability of the Union's proposal, it is first necessary to examine the nature of the management right to determine the internal security practices of the agency. Fundamentally, the right entails an agency's "authority to determine the policies and

[5] Chapter 71 of Title 5 of the United States Code establishes the labor-management relations program that governs the Executive branch. 5 U.S.C. §7106 is contained in Chapter 71 of Title 5. The Federal Labor Relations Authority (FLRA) was established by Congress in Chapter 71 to administer this Executive branch labor-management relations program.

practices that are part of an agency's plan to secure or safeguard its personnel, physical property, or operations against internal and external risks." *AFGE Council of Prison Locals 33 & Dep't of Justice, FCI, Coleman,* 66 FLRA 929, 931 (2012); *AFGE Local 987 & Dep't of the Air Force, Robins AFB*, 37 FLRA 197, 200 (1990).

The FLRA has held that where an agency shows a "link or reasonable connection" between its security objective and a policy or practice designed to implement that objective, a proposal that conflicts with the policy or practice affects management's right under §7106(a)(1). *AFGE Local 723 & Dep't of the Interior, U.S. Geological Survey, Great Lakes Science Ctr., Ann Arbor, Mich.*, 66 FLRA 639, 643 (2012). Once this link has been established, the FLRA will not review the merits of the agency's plan when resolving a negotiability dispute. *AFGE Local 2143 & VAMC, Boston,* 48 FLRA 41, 44 (1993).

Applying these principles to the present case, I find first that GAO's articulated plan of using kiosk "check-in" information to quickly locate employees in case of emergency such as terrorist attack, to ensure their prompt evacuation from the work site, is a practice or policy to ensure the safety of agency personnel. In this connection, I find the present case to be similar to *NTEU Chap. 101 & Customs Service,* 58 FLRA 653 (2003) (*NTEU*). In that case, an agency component announced a plan to move to a new location. The union offered a bargaining proposal in connection with the move that would allow employees to choose their work stations anywhere on the floor to which the employee would be assigned. The agency declared the proposal nonnegotiable because it intended to co-locate employees to work stations within their respective branches. The agency said that one of the purposes of its plan was to ensure that branch supervisors could quickly locate all the employees in his/her branch, to ensure swift and safe evacuation in case of emergency.

The FLRA held that the proposal directly affected management's right to determine its internal security practices under 5 U.S.C. §7106(1)(1). Specifically, the FLRA found that the agency had established a link between its plan to locate employees within their respective branches and its goal of safeguarding its personnel. The union's proposal, which would have allowed employees to select their work stations anywhere on the floor rather than by branch, therefore affected the agency's plan to locate employees in such a way as to ensure their safety. The FLRA accordingly declared the proposal nonnegotiable under section 7106(a)(1). *NTEU,* 58 FLRA at 654-55.

In my view, the *NTEU* case stands for the proposition that an agency's ability to locate employees quickly in case of an emergency, to ensure their prompt evacuation from the work site in case of an emergency, is an aspect of its right to determine its internal security practices. In the present case, I find that GAO's plan to use kiosk "check-in" information to locate employees at the work site is reasonably connected to that security objective.[6] Because the Union's proposal would forbid GAO from using the information for that purpose, I hold that the proposal directly affects GAO's ability to exercise its internal security right.

B. The Union's Proposal Is Not an Appropriate Arrangement Within the Meaning of 5 U.S.C. §7106(b)(3).

Having determined that the Union's proposal directly affects GAO's ability to exercise its right to establish its internal security practices, it still remains to be decided whether the Union

[6] The record is devoid of information about the physical layout of the field offices at issue. Thus, it is possible that one or more of the offices are so small that employees are easily located even without use of the kiosk data. While this fact may arguably go to the reasonableness of the link between GAO's security plan and its right to protect its personnel in times of emergency, there is no basis in the record for me to find the link established by GAO as unreasonable. Indeed, as FLRA precedent cited above establishes, it is not for the reviewing forum to question the merits of an agency's plan to safeguard its personnel, and I will not do so here.

has established that its proposal is nonetheless negotiable under 5 U.S.C. §7106(b)(3) as an appropriate arrangement for employees adversely affected by GAO's exercise of its internal security right. I find that it has not.

As set out at footnote 2, above, section 7106(b)(3) specifies that the management rights established in 5 U.S.C. §7106(a) shall not preclude a union and an agency from bargaining on "appropriate arrangements for employees adversely affected" by the exercise of that right. The test for determining whether a proposal is within the duty to bargain under §7106(b)(3) is set out in *NAGE Local R14-87 & Kansas Army Nat'l Guard*, 21 FLRA 24 (1986) *(KANG)*. Under that test, the FLRA initially determines whether a proposal is intended to be an "arrangement" for employees adversely affected by the exercise of a management right. *Id.* at 31. An arrangement must seek to mitigate adverse effects "flowing from the exercise of a protected management right." *Dep't of the Treasury, IRS v. FLRA*, 960 F.2d 1068, 1073 (D.C. Cir. 1992).

To establish that a proposal is an arrangement, a union must identify the effects or reasonably foreseeable effects on employees that flow from the exercise of management's rights and how those effects are adverse. *KANG*, 21 FLRA at 31. Proposals that address speculative or hypothetical concerns do not constitute arrangements. *E.g.*, *NFFE Local 2015 & National Park Serv.*, 53 FLRA 967, 973 (1997). The alleged arrangement must also be sufficiently tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management's rights. *E.g.*, *AFGE Local 1687 & VAMC, Mountain Home*, 52 FLRA 521, 523 (1996).

If a proposal is an arrangement, then the Authority determines whether it is an appropriate one, or whether it is inappropriate because it excessively interferes with the relevant management rights. *KANG*, 21 FLRA at 31-33. The FLRA makes this determination by

"weighing the competing practical needs of employees and managers" to ascertain whether the benefit to employees flowing from the proposal outweighs the proposal's burden on the exercise of the management right involved. *Id.* at 31-32.

In the matter at hand, the Union's entire argument concerning why its proposal is an appropriate arrangement under section 7106(b)(3) is contained in its Petition for Review. There the Union said that its proposal is:

> consistent with the purpose of the [telework] pilot and addresses the Agency's use of the kiosk in a manner beyond its intended purpose. Indeed, the sole purpose of the Union's proposal was to limit the use of the kiosk as a general location device to track employee whereabouts for which the kiosk would be ill-suited in any event.

Petition ¶6.

I find the Union's statement falls well short of establishing that its proposal is an appropriate arrangement under the above-stated analytical framework.[7] First, it does not establish that the proposal is in fact an arrangement. That is, it does not identify the effects or reasonably foreseeable effects on employees that flow from the exercise of GAO's right to determine its internal security practices, and how those effects are adverse. Nor does the Union's statement show how the proposal is "tailored" to meet these adverse effects.

Even assuming that the Union had succeeded in establishing its proposal as an arrangement, it has made no showing that it is an appropriate one. The Union's proposal would absolutely bar GAO from using kiosk data in locating employees in times of emergency. This

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[7] I am aware that at the time the Union filed its Petition for Review, it had not received a definitive statement from GAO as to which management right it was relying on in declaring the Union's proposal to be nonnegotiable. This fact may well have hampered the Union in focusing its appropriate arrangements argument in its Petition. However, the Union did not seek to file a response to GAO's Reply to the Petition for Review, in which Reply GAO specified its reliance on the management right to determine its internal security practices. I can only interpret this approach as indicating that the Union was content to rely on the above-quoted statement in its Petition for its appropriate arrangements argument.

absolute prohibition undoubtedly constitutes an excessive interference with GAO's exercise of its right to determine its internal security practices. Accordingly, there is no basis in the record for me to conclude that the Union has established that its proposal is an appropriate arrangement.[8]

CONCLUSION

The Union's Petition for Review is denied.

/s/
William E. Persina
Administrative Judge

Date: 7-15-13

[8] In light of my decision on the internal security management right, I need not and do not rule on GAO's argument concerning whether the subject matter of the Union's proposal need not be bargained because it is contained in or covered by section 24.11 of the parties' Master Collective Bargaining Agreement.

NOTICE—BOARD REVIEW

This Decision will become final on August 9, 2013, unless a request for review by the full Board is filed by one of the parties within fifteen (15) days of service of this Decision [by July 25, 2013], or unless the full Board, prior to August 9, 2013, decides to review the Decision on its own motion. *See* 4 C.F.R. §§28.87, 28.4.

In the alternative, either party may, within ten (10) days of service of this Decision [by July 22, 2013], file and serve a request for reconsideration with the Administrative Judge who rendered this Decision. The filing of such a request will toll the commencement of the fifteen-day period for filing a notice of appeal with the full Board, pending a decision by the Administrative Judge on the request for reconsideration.

The original and five copies of a notice of appeal requesting review by the full Board shall be filed with the Board in person or by commercial carrier at the office of the Board, or by mail (address listed below). When filed by mail, the postmark shall be deemed to reflect the date of filing. The party filing the request shall serve a copy of the notice of appeal on all other parties. Within twenty-five (25) days following the filing of a notice of appeal requesting review by the full Board, the appellant shall file and serve a supporting brief. The brief shall identify with particularity those findings or conclusions in the Initial Decision that are challenged and shall refer specifically to the portions of the record and the provisions of statutes or regulations that assertedly support each assignment of error. The responding party shall have twenty-five (25) days, following service of appellant's brief, to file and serve a responsive brief. Within ten (10) days of service of appellee's responsive brief, appellant may file and serve a reply brief.

The Board may grant a request for review when it finds that:

1. The findings in the Decision are unsupported by substantial evidence in the record viewed as a whole; or

2. New and material evidence is available that, despite due diligence, was not available when the record was closed; or

3. The Decision is based on an erroneous interpretation of statute or regulation; or

4. The Decision is arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law; or

5. The Decision is not made consistent with required procedures and results in harmful error.

See 4 C.F.R. §28.87.

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