

**FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.**

**NATIONAL TREASURY EMPLOYEES UNION
(Union)**

and

**UNITED STATES DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION
WASHINGTON, D. C.
(Agency)**

**0-NG-2809
(62 FLRA 267 (2007))**

DECISION AND ORDER ON REMAND

May 14, 2009

**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 remand from the U.S. Court of Appeals for the D.C. Circuit in *National Treasury Employees Union v. Federal Labor Relations Authority*, 550 F.3d 1148 (D.C. Cir. 2008) (*NTEU v. FLRA*). The court granted in part and denied in part the Union's petition for review of the Authority's decision in *National Treasury Employees Union*, 62 FLRA 267 (2007) (*NTEU*), in which the Authority determined that, as relevant here, a portion of Proposal 6, which would modify the Agency's grooming standards policy, was nonnegotiable. The court remanded this matter to the Authority to determine, based on record evidence, whether the portion of the proposal constitutes an appropriate arrangement under § 7106(b)(3) of the Federal Service Labor-Management Relations Statute (the Statute).

II. The Proposal

The disputed portion of Proposal 6 provides:

Beards and other facial hair shall be permitted except where there is a reasonable likelihood that an officer will need to use a respirator or other device in the performance of his job duties and the device requires a cleanly shaven face. The parties agree that for the overwhelming majority of [Agency] officers, there is not a reasonable likelihood that the officer will need to use such a device. Mustaches and beards will be neatly trimmed and groomed, clean, and will not be of excessive length, i.e., no longer than ½ inch to one inch in length.

NTEU, 62 FLRA at 274.

As set forth by the Authority in *NTEU*, the parties agree that this portion of Proposal 6 is intended to modify the Agency's grooming standards policy to permit officers to have beards and other facial hair if the facial hair is clean, neatly trimmed and groomed, and no longer than one-half inch to one inch in length. *NTEU*, 62 FLRA at 278. The parties also agree that, if the officers are required to use a respirator or other device, then they would be required to shave to the extent necessary to use the respirator or other device. *Id.*

III. Background

A. NTEU

In *NTEU*, the Authority found, as relevant here, that the portion of Proposal 6 (a multi-part proposal) concerning facial hair was outside the Agency's duty to bargain.

In particular, the Authority determined that the facial hair portion of Proposal 6 (hereinafter the proposal) affects the Agency's right to determine its internal security practices. *NTEU*, 62 FLRA at 278-79. The Authority noted the parties' agreement that the proposal would require any officer who needed to use a respirator or other protective gear to shave to the extent necessary to properly use the gear. *Id.* at 278. However, the Authority found it undisputed that the proposal does not account for emergency situations in which officers would be required to use the protective gear without first having time to shave. *Id.* The Authority thus concluded that the proposal limited the circumstances under which officers could operate a respirator or other protective gear.

In addition, the Authority found that the proposal does not constitute an appropriate arrangement because it excessively interferes with the Agency's right to determine its internal security practices. *Id.* at 278-79. For purposes of its decision, the Authority assumed that the proposal is an arrangement that is sufficiently tailored to compensate employees suffering adverse effects attributable to the exercise of management's rights. *Id.* However, the Authority found that the proposal is not an appropriate arrangement because its benefit to officers -- permission to exercise a

personal preference to have facial hair -- is outweighed by the burden on the Agency's ability to safeguard its personnel and control how its work is performed. *Id.*

B. NTEU v. FLRA

In *NTEU v. FLRA*, the U.S. Court of Appeals for the D.C. Circuit concluded, as relevant here, that the Authority acted properly in determining that the proposal would affect the Agency's right to determine its internal security practices. 550 F.3d at 1154. However, the court agreed with the Union that the Authority's finding that the proposal did not constitute an appropriate arrangement was flawed because the Authority's analysis was not based on record evidence. *Id.* at 1155. Accordingly, the court remanded the proposal to the Authority "so that it may determine, based on the record evidence, whether the portion governing facial hair constitutes an appropriate arrangement." *Id.* The court directed the Authority, on remand, to consider the evidence in the record before it, conduct the balanced inquiry required by the Authority's decision in *National Association of Government Employees, Local R14-87*, 21 FLRA 24 (1986) (*KANG*), and then reach its conclusion as to whether the proposal constitutes an appropriate arrangement. 550 F.3d at 1155.

IV. Positions of the Parties

The parties' positions, as stated in their original pleadings, are as follows.

A. Agency

The Agency claims that the proposal would excessively interfere with its right to determine its internal security practices. Statement of Position (SOP) at 13. It explains that officers, in the performance of their duties, may be required to use protective gear, including respirators, which cannot be effectively used if the officers are permitted to wear beards. *Id.* The Agency notes that the wearing of such protective gear is a specific requirement of its confined space entry training program, and that its goal is to deliver this training to all officers. Reply at 10. According to the Agency, officers may encounter a confined space during a normal tour of duty in various locations. *Id.* Also according to the Authority, when that happens, officers may face a situation that requires the use of protective gear to save their lives or the lives of others. *Id.* The Agency asserts that the training program is intended as part of ongoing training to ensure that all officers have the ability to perform the full range of duties assigned to them. *Id.* Further, the Agency asserts that, on a more routine basis, officers wear dry mask equipment when handling narcotics seizures. The Agency maintains that facial hair interferes with the wearing of protective gear that officers need to perform their jobs. *Id.*

As discussed below, in its response to the Agency's Statement of Position, the Union submitted evidence that at some Agency ports, respirators are not used. In its reply, the Agency asserts that these statements are "inaccurate" because the wearing of protective gear is a requirement of the confined space entry program. Reply at 10.

B. Union

The Union asserts that the proposal is an appropriate arrangement. The Union explains the adverse impact of the Agency's grooming standards on this issue as follows:

The adverse impact on employees is that they will no longer be permitted to exercise a basic personal liberty and privacy right of determining how they wish to present themselves to others. For example, under the Agency's proposal, employees will no longer be able to determine for themselves how to wear their hair, whether to grow facial hair . . . and make other grooming decisions as are made daily by other federal and private sector workers.

Response at 8.

The Union also notes that the Agency failed to respond to its request for information on the number of respirators distributed to bargaining unit officers, procedures on use and distribution, training, and the basis for determining that officers must have cleanly shaven faces. Response at 20. Attached to the Union's Response are e-mails from officers of seven ports, representing a total of more than 1,000 officers, attesting that respirators are not used in those ports. *See* Response, Exhibits 6-12. In these e-mails, the officers state that they have not used respirators, that they have not observed other officers using respirators, and that their offices are not equipped with respirators.¹

¹ The following is a summary of each of the e-mails that the Union submitted:

Exhibit 6, e-mail from an officer at the port in Newark, New Jersey: This officer states that respirators are never used at the Newark port, and that "it is safe to say that 99% of the employees here in Newark will NEVER need to use a respirator."

Exhibit 7, e-mail from the NTEU Chapter President at the Los Angeles Airport: This officer states that no one has used a respirator in the 20 years that he has worked in that location.

Exhibit 8, e-mail from the NTEU Chapter President at Port Huron: This officer states that in her nine years at that location, respirators never had to be used by Agency officers. She states further that the Port Huron office calls the local fire department to respond to situations requiring respirators.

Exhibit 9, e-mail from an officer at the port in Detroit, Michigan: This officer states that in her 20 years at the Agency, she has never seen an officer use a respirator of any type, and that there are no respirators in her office.

Exhibit 10, e-mail from the NTEU Chapter President at the port in Champlain, New York: This officer states that he was stationed at Champlain since 1984, and that respirators were not distributed to his port or his Chapter.

V. Analysis and Conclusion

As set forth above, the court found that the Authority properly determined that the facial hair portion of Proposal 6 affects the Agency's right to determine its internal security practices. 550 F.3d at 1154-55. However, the court remanded Proposal 6 to the Authority so that we may determine whether this portion is an appropriate arrangement. *Id.* at 1155.

In determining whether a proposal is an appropriate arrangement, the Authority applies the framework set forth in *KANG*. Doing so, the Authority first determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. *See KANG*, 21 FLRA at 31. To establish that a proposal is an arrangement, the burden is on the union to articulate how employees will be adversely affected by the exercise of a management right and how the proposal compensates for the adverse effects. *Id.* *See also* 5 C.F.R. § 2424.32(a) (The exclusive representative has the burden of raising and supporting arguments that the proposal or provision is within the duty to bargain). In addition, the claimed arrangement must be sufficiently tailored to compensate employees suffering adverse effects attributable to the exercise of management's rights. *See, e.g., NAGE, Local R1-100*, 39 FLRA 762, 766 (1991). If the proposal is an arrangement, then the Authority determines whether it is appropriate. *See KANG*, 21 FLRA at 31-33. The Authority determines whether an arrangement is appropriate by weighing the competing practical needs of employees and managers. *Id.* at 31-32.

The facial hair portion of Proposal 6 addresses employees' preferences to exercise their personal choice to have facial hair. *See* Response at 8. This competes with the Agency's preference to establish an internal security practice of ensuring that officers required to use respirators or other protective gear can do so effectively. Pursuant to *KANG*, the Authority balances these competing factors by ascertaining the nature and extent of the limitation imposed by the proposed arrangement on the exercise of a management right. *Id.* at 32. The Agency has the burden of raising and supporting the argument that the proposal excessively interferes with the Agency's exercise of its management right to determine internal security practices. *See* 5 C.F.R. § 2424.32(b) (The agency has the burden of raising and supporting arguments that the proposal or provision is outside the duty to bargain.).

Exhibit 11, e-mail from an inspector at the port in Buffalo, New York: This officer states that in his 30 years as an inspector he has never used a respirator.

Exhibit 12, e-mail from an officer at the Los Angeles Seaport: This officer states that respirators and respirator training are not provided at the seaport. He states further that officers are not allowed to enter environments where the use of respirators is required.

Exhibit 13, e-mail from the same officer who authored Exhibit 12: The officer states that no one at the Los Angeles Seaport is certified to operate respirators.

The Union has met its burden under *KANG* to articulate an adverse effect on employees from the exercise of a management right, i.e., interference with the freedom of employees to make personal grooming decisions. *See* Response at 8. The Agency, by failing to respond to the Union's assertion of adverse effect, has conceded the point. *See* 5 C.F.R. § 2424.32(c)(2) (Failure to respond to an argument or assertion raised by the other party will, when appropriate, be deemed a concession to such argument or assertion.).

Moreover, although the Agency asserts that the proposal excessively interferes with its right to determine internal security practices, *see* SOP at 13; Reply at 10, the Agency has offered no record evidence that Agency officers are required to use respirators or other protective gear requiring a cleanly shaven face. Further, the Union counters the Agency's excessive interference argument with evidence that in seven offices of the Agency, which employ a total of more than 1,000 officers, respirators and other protective gear requiring a cleanly shaven face are neither provided nor required to be used. *See* Response, Exhibits 6-12. The court characterized this evidence as "fragmentary." 550 F.3d at 1155. However, even so, the Agency made no attempt in its reply to identify any specific inaccuracies in this evidence or to dispute its relevance to the issue of whether the facial hair portion of Proposal 6 is an appropriate arrangement. Likewise, the Agency did not, in its statement of position, in its reply, or in its response to the Union's request for information, submit any evidence that Agency officers are provided with and required to use respirators.

Based on the foregoing, we conclude that, on balance, the burden on the Agency's exercise of its right to determine internal security practices does not outweigh the undisputed benefits that the facial hair portion of Proposal 6 provides to officers.

VI. Order

The facial hair portion of Proposal 6 is within the duty to bargain. The Agency shall, upon request or as agreed to by the parties, negotiate over the facial hair portion of Proposal 6.²

² In finding that this proposal is within the duty to bargain, we make no judgment as to its merits. In particular, as we have previously stated, a finding of negotiability means only that a proposal is within the duty to bargain and "could legally be implemented, not that the proposal must, or ought to, be implemented." *NTEU, Chapter 83*, 35 FLRA 398, 414-16 (1990).

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STATEMENT OF SERVICE

I hereby certify that copies of the Decision And Order On Remand of the Federal Labor Relations Authority in the subject proceeding have this day been mailed to the following:

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Jonathan S. Levine
Union Representative
NTEU
1750 H Street, NW
Washington, DC 20006

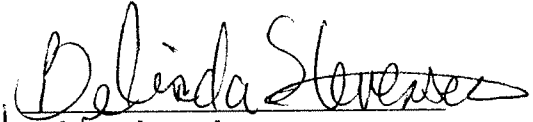
Michael Wenzler
Agency Representative
Department of Homeland Security
Bureau of Customs and Border Protection
1300 Pennsylvania Avenue, NW
(Attn: OHR-LR, 1400 L St., NW, 7th Floor)
Washington, DC 20229

FAX ONLY

Dr. Thomas D. Cairns
Chief Human Capital Officer
U.S. Department of Homeland Security
Washington, DC 20005
Fax No. 202-357-8504

DATED:

May 14, 2009
WASHINGTON DC


Deborah Johnson
Labor Relations Specialist