The "Vitally Affects Test" – When it's Used . . . and Not Used

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Introduction

The Federal LMR Statute gives recognized unions the right to negotiate on conditions of employment that affect bargaining unit employees. Ordinarily, unions may not negotiate on matters that affect employees or people outside of the unit they represent. However, the courts and the FLRA have established a narrowly drawn exception to this rule; namely, when a union proposal directly affects certain individuals outside the bargaining unit and the subject matter of the proposal "vitally affects" the conditions of employment of unit employees.

In applying the "Vitally Affects Test," the primary reference for the FLRA and other labor relations practitioners is *Department of the Navy, Naval Aviation Depot, Cherry Point, NC vs. FLRA*, D.C. Circuit Court of Appeals, (952 F.2d 1434).January 14, 1992.

The following analysis explains when the "Vitally Affects Test" comes into play.

Situation 1 – The union proposal "indirectly affects" non-unit individuals

A union proposal that is otherwise negotiable but which "indirectly affects" the working conditions of non-unit personnel (e.g., contractors; employees in other units; supervisors; non-unit non-supervisors) is negotiable. The fact that a proposal has an indirect effect on non-unit employees may relate to its reasonableness or merits, but does not render the proposal outside the duty to bargain. The Vitally Affects Test is *not* applicable.

EXAMPLE – Union proposal:

"Unit employees . . . shall be given access to parking spaces in the same proportion as the number of unit members to the Library population as a whole."

FLRA FINDING: "The precise line between proposals that have an indirect effect on non-unit employees, and proposals that have a direct effect may be difficult to discern, but nothing on the face of this proposal indicates a direct effect on non-unit employees. The Union's proposal would require the Agency only to provide a proportionate number of parking spaces to unit members. It would not directly determine the allocation of parking spaces to non-unit employees [such as supervisors and managers]. Although allocation of spaces to employees in the Union's unit obviously would reduce the number of spaces available to others, that effect is not sufficient to remove the proposal from the Agency's duty to bargain.

"the court [952 F.2d (1992)] also stated that a proposal requiring the agency to allocate all parking spaces to unit employees would be within the duty to bargain. The court stated that:

> Such a proposal arguably would be unreasonable, for, if accepted, it would leave no parking space for persons outside of the unit. But 'reasonableness' does not determine whether a subject is bargainable. The employer's recourse in

response to such a proposal is to reject it or to counter with a more reasonable proposal." (53 FLRA 118, 2/25/98)

Situation 2 – The union proposal "directly affects" supervisors or employees in other bargaining units

A proposal that is otherwise negotiable but which "directly affects" or "directly determines" the working conditions of either supervisors or employees in other units is not negotiable, even though the vital interests of unit employees are addressed by the proposal. The Vitally Affects Test is *not* applicable.

EXAMPLE 1 – Union Proposal:

"The number of FTEE be increased to compensate for the increased workload given the FTEE in question and the number of RNs be decreased."

FLRA FINDING: ". . . an agency is not required under the Statute to bargain with one exclusive representative about conditions of employment in a unit represented by another union because such a requirement would run afoul of the principle of exclusive recognition. . . .

"In this case, it is undisputed that the RNs are represented by the Georgia Nurses Association, a unit different from that represented by the Union. It is also undisputed that the proposal, by its express terms, would require that 'the number of RNs be decreased.' A decrease in the number of RNs would directly affect their conditions of employment. As the Union made no request to sever and separately address the portion of the proposal relating to NAs, . . . we find that [the] Proposal . . . in its entirety is outside the duty to bargain since it would directly affect conditions of employment of employees represented in a different bargaining unit. . . . " (55 FLRA 184, 11/30/99)

EXAMPLE 2 – Union Proposal:

"OPM central office competitive areas:

> "(a) Each of the following services will constitute a separate competitive area: Human Resources Systems Service, Employment Service, Retirement and Insurance Service, Workforce Training Service, and the Investigations Service.
>
> "b) The Office of the Inspector General will constitute a separate competitive area.
>
> "(c) The Office of the Director and all other organizations not listed above will constitute a single competitive area."

FLRA FINDING: ". . . this case involves a bargaining proposal which concerns supervisors and managerial personnel, who are not in the Union's (or any) bargaining unit. . . . . .

"First, the [Federal 2nd Circuit] court held that the vitally affects test is '<u>not</u> implicated . . . merely because a union proposal, which is otherwise within the scope of mandatory bargaining, would, if accepted, have <u>some impact</u> on persons outside the bargaining unit.' According to the court,

the [vitally affects] test ‘has no application unless the interests of non-bargaining unit personnel are 'directly implicated' by a union proposal.’. .

“Second, the court held that, in applying the vitally affects rest to proposals that directly implicate third-party interests, it is necessary to distinguish among four ‘third-parties’: (1) employees in other bargaining units; (2) supervisory personnel; (3) non-supervisory employees who are not represented; and (4) nonemployees. According to the court, the [vitally affects] test could not properly be applied to require bargaining over conditions of employment of the first two categories of employees: employees in other bargaining units and supervisory personnel. With respect to employees in other bargaining units, the court stated that the test could not overcome ‘the far more fundamental principles involving the sanctity of certification/recognition and exclusive representation.’ As for supervisory personnel, the court stated that, as supervisors ‘are members of management and are legally disabled from belonging to any bargaining unit . . . the same policies that prevent a union from purporting to regulate the conditions of employment of persons in other units apply with equal force to supervisory personnel.’

“. . . When a proposal directly implicates employees in other bargaining units and/or supervisory personnel, the effect of the proposal on unit employees is not sufficient – even if it is ‘vital’ – to bring the proposal within the duty to bargain. In such circumstances, the vitally affects test does not apply. . .

“The arguments in this case do not persuade us that the Union's proposal, which directly determines the working conditions of supervisory personnel, is within the duty to bargain. We recognize that this conclusion places the Union in a ‘catch-22’ situation –because the inclusion of supervisors in the proposed competitive area is, as the Union states, an ‘unavoidable’ result of complying with 5 C.F.R. §351.402.” (51 FLRA 42, 11/6/95)

Situation 3 – The union proposal “directly affects” non-employees or non-unit, non-supervisory employees

A proposal that is otherwise negotiable but which “directly affects” or “directly determines” the working conditions of non-employees or non-unit, non-supervisors is negotiable if it addresses the vital interests of unit employees. The Vitally Affects Test *is* applicable.

EXAMPLE – Union Proposal:

“It is the policy of the Administration to provide equal employment opportunities and treatment for all current OR PRSPECTIVE employees and to: prohibit discrimination because of race, color, religion, sex, national origin, mental or physical handicap, age, marital status, or political affiliation. Toward this end the Administration agrees to maintain a work environment that assures employees fair and impartial treatment in all employment actions with special consideration for the effect and not merely the intent of management decisions.”

FLRA Finding:

“For the following reasons, we find that [the proposal] vitally affects the conditions of employment of bargaining unit employees and is negotiable....

“. . . [According to 952 F.2d], proposals purporting to regulate the working conditions of non-employees are negotiable if the proposals vitally affect the conditions of employment of bargaining unit employees. . . . [The proposal] addresses outside applicants, who are non-employees.. . .

“. . . [T]he elimination of actual or suspected discrimination is a mandatory subject of bargaining under the [National Labor Relations Act] and . . . nothing in the [LMR Statute] warrants a different conclusion here. . . . .

“. . . [D]iscrimination in the hiring process is intertwined with the possible discrimination in the employment relationship and . . . the Union’s legitimate efforts, as the exclusive representative of unit employees, to seek to eliminate discrimination in the employment relationship ‘would be severely . . . impeded it were to require to wait until the firing process complete.’. . .

“. . . As [the proposal] relates to unit employees’ significant and material interest in eliminating discrimination in the unit, we conclude that [the proposal} vitally affects the conditions of employment of unit employees [and is, therefore, negotiable].” (44 FLRA 1405, 5/29/92)