

**71 FLRA No. 49**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
NATIONAL COUNCIL OF EEOC LOCALS No. 216  
(Union)

and

UNITED STATES  
EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION  
(Agency)

0-NG-3423

DECISION AND ORDER  
DISMISSING PETITION FOR REVIEW

August 8, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,  
and Ernest DuBester and James T. Abbott, Members  
(Member DuBester concurring, in part,  
and dissenting, in part)

Decision by Member Abbott for the Authority

**I. Statement of the Case**

We find that the Union failed to file a timely petition for review (petition) and thus dismiss the petition.

**II. Background**

The parties are negotiating the Agency's Table of Penalties (TOP)<sup>1</sup> and, by August 2018,<sup>2</sup> had agreed on all but three of the Union's proposals regarding the table.<sup>3</sup>

On August 3, the Agency declared the three proposals "non-negotiable."<sup>4</sup> On August 27, the Union "withdrew" the three original proposals and presented the Agency with three amended proposals, claiming that they were "new[]." <sup>5</sup> On September 5, the Agency responded that it had previously declared the proposals

non-negotiable on August 3.<sup>6</sup> The Union filed this petition on September 6, based on the proposals that it provided the Agency on August 27.

On October 3, the Authority's Office of Case Intake and Publication issued an order directing the Union to show cause why its petition should not be dismissed as untimely. The Union filed a timely response to the Authority's order on October 17.

**III. Analysis and Conclusion: The Union's petition is untimely.**

As relevant here, the Federal Service Labor-Management Relations Statute (Statute) and the Authority's regulations require that a negotiability petition for review be filed no later than fifteen days after an agency declares proposals to be non-negotiable.<sup>7</sup> This time limit may not be extended or waived by the Authority.<sup>8</sup>

There is no dispute that the Agency declared the Union's original proposals to be non-negotiable on August 3.<sup>9</sup> It also is not disputed that the Union did not file a petition for review concerning the Agency's August 3 declaration.

The Authority has held that, if a party withdraws and amends proposals and the amended proposals *substantively* change the original proposals,<sup>10</sup> then the agency must respond anew if the union requests a declaration of non-negotiability.<sup>11</sup> Further, that declaration triggers a new fifteen-day period in which the union may file a petition for review.<sup>12</sup> But, the Authority has held that amended proposals that involve the same matters and substance with only *minor* modifications do not restart the timeline for filing a petition for review.<sup>13</sup> Here, the Union's August 27 proposals contain only *minor* modifications that do not differ in any meaningful respect from the proposals that the Agency declared non-negotiable on August 3.

The Union's amended proposal #4/8 does not substantively change the original proposal.

<sup>6</sup> Resp. to SCO, Ex. 4 at 1.

<sup>7</sup> 5 U.S.C. § 7117(c)(2); 5 C.F.R. § 2424.21(a)(1).

<sup>8</sup> 5 C.F.R. § 2429.23(d).

<sup>9</sup> See Resp. to SCO, Ex. 5 at 1 ("the Agency declares proposals 4, 7, and 8 non-negotiable as they seek to limit the evidence, e.g., prior discipline, the Agency can use to support disciplinary actions").

<sup>10</sup> *Ass'n of Civilian Technicians, Inc., Heartland Chapter*, 56 FLRA 236, 237 (2000) (*Heartland*).

<sup>11</sup> *Id.* at 237-38.

<sup>12</sup> *Id.*

<sup>13</sup> *AFGE, AFL-CIO, Local 1786*, 26 FLRA 184, 186 (1987) (*Local 1786*).

<sup>1</sup> Pet. at 6.

<sup>2</sup> All dates are in 2018.

<sup>3</sup> Union's Resp. to Show-Cause Order (Resp. to SCO), Ex. 4 at 1.

<sup>4</sup> Resp. to SCO, Ex. 5 at 1.

<sup>5</sup> Resp. to SCO at 1-2.

Original Proposal #4/8: The Table of Penalties shall not be applied to any discipline occurring before the training in paragraph 1 takes place.<sup>14</sup>

Amended Proposal #4/8: The Table of Penalties is not retroactive and shall not be applied to any discipline occurring before the training in paragraph 1 takes place.<sup>15</sup>

The language of the Union's amended proposal only adds that the TOP is "not retroactive," which is already implicit in the original proposal, and both proposals state that the table of penalties would not be applied to any discipline that occurred prior to training.<sup>16</sup> As the amended proposal is only a minor modification to the original proposal, the amendment did not restart the timeline for filing a petition for review.<sup>17</sup>

The Union's amended proposal #7 does not substantively change original proposal #7.

Original Proposal #7: A subsequent penalty under TOP applies to disciplinary action currently appropriately placed as a matter of record in an employee's electronic official personnel folder (eOPF) and for which the employee was informed in writing and had an opportunity to dispute. A previous action will not be relied upon if it has been withdrawn, expired, not upheld by a higher-level agency official and/or third party or has a challenge pending. In assessing penalties, consideration will be given to the freshness of the time frame of previous offenses; past discipline occurred years, for example 3 years, before the current action and that involved unrelated offenses may be discounted.<sup>18</sup>

Amended Proposal #7: When discipline becomes necessary, the goal is to impose the minimum remedy that can reasonably be expected to correct and improve employee behavior. A previous penalty under TOP can be relied upon for penalty assessment for a subsequent offense where the employee was informed in writing, had an opportunity to dispute, and is a matter of record properly filed in an employee's eOPF. Consideration will be given to the freshness of the timeframe of previous offenses, for example, within three years of the current offense. Similarity to the prior misconduct can be considered in the penalty determination. A previous action will not be relied upon if it has been withdrawn, expired, not upheld by a higher-

level agency official and/or third party or has a challenge pending.<sup>19</sup>

While the amended proposal rearranges the ideas from the original proposal and adds one sentence, the amendments do not substantively modify or clarify any ambiguity in the original proposal, which limited the evidence upon which the Agency would be permitted to rely when determining the penalty.<sup>20</sup> Like in *AFGE, AFL-CIO, Local 1786*, where the Authority held that the amended proposals were not substantial modifications because the proposals addressed the same matters and substance,<sup>21</sup> here, the amended proposal and the original proposal both address factors to consider in applying the TOP to subsequent disciplinary offenses. Therefore, the clock for filing a petition regarding proposal #7 did not restart.

The Union's amended proposal #9 does not substantively change the original #9.

Original Proposal #9: Disciplinary and adverse actions will be in accordance with CBA Article 37 and 38 of the CBA and applicable law, rules and regulations and will be based on just cause.<sup>22</sup>

Amended Proposal #9: The parties agree that discipline and adverse actions will be based on just cause and be consistently applied equitably and promote the efficiency of the Federal Service.<sup>23</sup>

The Union removed "in accordance with CBA Article 37 and 38 of the CBA and applicable law, rules and regulations" and added that discipline "be consistently applied equitably and promote the efficiency of the federal service." But, both proposals address the same matters and substance — that disciplinary and adverse actions will be based on just cause. Moreover, the Authority has previously held that requirements that discipline be for the "efficiency of the service" and "just cause" are functional equivalents,<sup>24</sup> so the inclusion of the efficiency-of-the-service standard in the amended proposal is not a substantive change. Therefore, the

<sup>14</sup> Resp. to SCO, Ex. 2 at 1.

<sup>15</sup> Resp. to SCO, Ex. 1 at 1.

<sup>16</sup> *Id.*

<sup>17</sup> *Local 1786*, 26 FLRA at 186.

<sup>18</sup> Resp. to SCO, Ex. 2 at 1.

<sup>19</sup> Resp. to SCO, Ex. 1 at 1.

<sup>20</sup> See *AFGE, AFL-CIO, Local 2312 v. FLRA*, 815 F.2d 718, 721 (D.C. Cir. 1987); *Heartland*, 56 FLRA at 238; *NFFE, Local 15*, 43 FLRA 1165, 1168 (1992) (finding later-submitted proposal substantively different from earlier proposal because later-submitted was more limited in scope and pertained to different employees); *NFFE, Local 284*, 39 FLRA 1537, 1540-41 (1991) (no substantive modifications to language of proposal declared nonnegotiable by agency).

<sup>21</sup> 26 FLRA at 186.

<sup>22</sup> Resp. to SCO, Ex. 2 at 1.

<sup>23</sup> Resp. to SCO, Ex. 1 at 1.

<sup>24</sup> *U.S. DOJ, Exec. Office for Immigration Review*, 66 FLRA 221, 225 (2011) (citing *U.S. Dep't of Transp., FAA*, 63 FLRA 383, 385 (2009)).

amendments do not rise to level of a substantial modification, and the clock for filing a petition regarding proposal #9 did not restart.<sup>25</sup> The record shows that the Union's three proposals reflect only insubstantial modifications of the proposals alleged by the Agency on August 3 to be nonnegotiable.

Thus, the argument made by the Union in its response to the Authority's order — that it withdrew its August 3 proposals and submitted new proposals on August 27 triggering a new requirement for a declaration of nonnegotiability — is without merit. Section 7117(c)(2) of the Statute requires a petition for review to be filed “on or before the 15th day after the date on which the agency *first* makes the allegation” of nonnegotiability.<sup>26</sup>

As we found recently in *National Weather Service Employees Organization*, parties may not extend unilaterally timeframes to which they agreed in a negotiated agreement.<sup>27</sup> That proposition is even more relevant here where the Union attempts to circumnavigate the relatively short timeframes that are established by the Statute<sup>28</sup> and are intended to “expedite” negotiability disputes and achieve resolution “at the earliest practicable date.”<sup>29</sup>

Under the circumstances of this case, the Union had until August 18, 2018, to file its negotiability petition.<sup>30</sup> It did not do so. Therefore, the petition that it filed on September 6, 2018 is untimely.<sup>31</sup>

#### IV. Order

We dismiss the petition as untimely filed.

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<sup>25</sup> *Local 1786*, 26 FLRA at 186.

<sup>26</sup> 5 U.S.C. § 7117(c)(2) (emphasis added).

<sup>27</sup> 71 FLRA 275, 277 (2019) (Member DuBester dissenting).

<sup>28</sup> See 5 U.S.C. § 7117(c)(2)-(4).

<sup>29</sup> *Id.* § 7117(c)(6).

<sup>30</sup> *Id.* § 7117(c)(2).

<sup>31</sup> *Id.*

**Member DuBester concurring, in part, and dissenting, in part:**

I agree with the majority's decision to dismiss the negotiability petition as untimely filed as to proposals 4/8<sup>1</sup> and 9.<sup>2</sup> However, I disagree with the majority's conclusion that the petition's remaining proposal – proposal 7<sup>3</sup> – “does not substantively change”<sup>4</sup> original proposal 7. Because proposal 7 substantively revises and clarifies the original proposal, I would find the petition timely filed as to proposal 7.<sup>5</sup>

The Authority has held that, where a union submits a proposal to an agency that the agency alleges is nonnegotiable – and the union later withdraws the proposal – the union may *substantively revise* and resubmit the disputed proposal to the agency for negotiation.<sup>6</sup> The union may then properly request, and the agency must provide, a new allegation of nonnegotiability over the *revised* proposal. Such allegation triggers the union's right to file a petition over the revised proposal.<sup>7</sup>

Applying this precedent, I would conclude that the revised version of proposal 7 is substantively different from the original. Both proposals address the manner in which the Agency determines appropriate levels of disciplinary penalties. But while original proposal 7 was limited to setting forth particular factors the Agency could or could not consider in determining a penalty, proposal 7 adds a new element to the proposal stating that the “goal” of a disciplinary penalty is to “impose the minimum remedy that can reasonably be expected to correct and improve employee behavior.”<sup>8</sup> This is a significant change to the original proposal because it

would create a new and independent standard by which to measure the appropriateness of a disciplinary penalty.<sup>9</sup>

Moreover, revised proposal 7 does not merely “rearrange[]”<sup>10</sup> the original proposal. Rather, it clarifies the manner in which previous disciplinary actions would be considered in assessing a disciplinary penalty. For example, while original proposal 7 states that previous offenses that “occurred *years*, for example 3 years, before the current [disciplinary] action *and* that involved unrelated offenses may be discounted,”<sup>11</sup> revised proposal 7 clarifies that consideration will be given to previous offenses that have occurred “within three years of the current offense.”<sup>12</sup> It further clarifies the potential impact of prior offenses by *independently* stating that “[s]imilarity to the prior misconduct can be considered in the penalty determination.”<sup>13</sup> Therefore, I would conclude that revised proposal 7 both substantively revises and clarifies the original proposal.<sup>14</sup>

Accordingly, because the Union filed its petition within the fifteen-day time limit<sup>15</sup> after the Agency filed its September 5, 2018 allegation of nonnegotiability,<sup>16</sup> I would find the petition timely filed as to revised proposal 7.<sup>17</sup>

<sup>9</sup> See *NFFE, Local 1214*, 51 FLRA 1362, 1366-67 (1996) (citing *Int'l Plate Printers, Die Stammers & Engravers Union of N. Am., AFL-CIO, Local 2*, 25 FLRA 113, 134 (1987)) (explaining that a proposal that permits an agency to consider certain factor in imposing discipline is different from a proposal that limits the agency's discretion to impose appropriate discipline).

<sup>10</sup> Majority at 3.

<sup>11</sup> Pet., Attach. 1, August 3, 2018 Proposal at 1 (emphasis added).

<sup>12</sup> Pet. at 4.

<sup>13</sup> *Id.*

<sup>14</sup> The cases upon which the majority relies to reach its contrary conclusion are distinguishable. For instance, in *AFGE, AFL-CIO, Local 1786*, the revised proposal was “virtually identical” to the original proposal. 26 FLRA 184, 186 (1987). Similarly, the proposals at issue in *NFFE, Local 284* were “substantively identical.” 39 FLRA 973, 974 (1991), *recons. denied*, 39 FLRA 1537 (1991). In *AFGE, AFL-CIO, Local 2303 v. FLRA*, the revised proposal contained “no new language,” but instead merely combined all of one sub-section of the original proposal with another sub-section, and “excised the remainder.” 815 F.2d 718, 720 & n.16 (D.C. Cir. 1987).

<sup>15</sup> 5 U.S.C. § 7117(c)(2); 5 C.F.R. § 2424.21(a)(1).

<sup>16</sup> *Local 15*, 43 FLRA at 1168 (finding agency's response to union's revised proposals constituted allegation of nonnegotiability where response reiterated agency's earlier allegation).

<sup>17</sup> I would therefore review the petition on the merits of revised Proposal 7.

<sup>1</sup> The petition reflects that proposal “4/8” is a revised version of the proposal originally submitted as “Management#8(Union-4)” during negotiations. See Pet. at 7; Pet., Attach. 2, Agency's Written Allegation of Nonnegotiability at 2.

<sup>2</sup> Referred to by the Union as Proposal “Union Par. 9.” Pet. at 5.

<sup>3</sup> Referred to by the Union as Proposal “Union Par. 7.” *Id.* at 4.

<sup>4</sup> Majority at 3.

<sup>5</sup> *AFGE, AFL-CIO, Council of Prison Locals, Local 1661*, 29 FLRA 990, 991-92 (1987) (dismissing portion of union's proposals as untimely filed, but finding remaining proposals timely filed).

<sup>6</sup> *Ass'n of Civilian Technicians, Inc., Heartland Chapter*, 56 FLRA 236, 237-38 (2000) (*Heartland*) (finding addition that clarified original proposal to be a substantive revision); *Nat'l Ass'n of Agric. Emps.*, 48 FLRA 599, 602-03 (1993); *NFFE, Local 15*, 43 FLRA 1165, 1167-68 (1992) (*Local 15*).

<sup>7</sup> *Heartland*, 56 FLRA at 237-38; *Local 15*, 43 FLRA at 1167-68.

<sup>8</sup> Pet. at 4.