

71 FLRA No. 55

NATIONAL FEDERATION OF FEDERAL EMPLOYEES LOCAL 1998 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS (Union)

and

UNITED STATES DEPARTMENT OF STATE CHARLESTON PASSPORT CENTER CHARLESTON, SOUTH CAROLINA (Agency)

0-NG-3414

DECISION

September 6, 2019

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

Decision by Member Abbott for the Authority

I. Statement of the Case

We dismiss this negotiability petition because the Union has failed to support any argument that two of its proposals are within the duty to bargain, and because the Agency only raised a bargaining-obligation dispute with respect to the third proposal.

This matter is before the Authority on a negotiability appeal filed under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (Statute).¹ It concerns the negotiability of three proposals related to selecting and compensating employees for travel to temporary-duty assignments. Proposals 1 and 2 concern granting employees compensatory time off for travel outside of normal working hours. Proposal 3 concerns how the Agency selects employees for the temporary-duty assignments.

Because we find that the Union has failed to support its arguments that Proposals 1 and 2 are within the duty to bargain, and because the Agency raises only a bargaining-obligation dispute concerning Proposal 3, we dismiss the Union’s petition.

II. Background

The Agency informed the Union of an opportunity for employees at the Agency’s Charleston Passport Office to assist with counter work at the Atlanta Passport Office. The opportunity would require employees to travel between Charleston, South Carolina, and Atlanta, Georgia. The Union sought to negotiate and, as relevant here, advanced three proposals.

The Union filed its negotiability petition on August 1, 2018. A post-petition conference (PPC) was held with the parties on October 24, 2018.² The Agency filed its statement of position on November 21, 2018, and the Union filed its response on December 4, 2018.³

² At the PPC, the parties stated that there are currently no pending proceedings involving the proposals at issue in this case. Record of Post-Petition Conference (Record) at 1. However, in the Agency’s statement of position (SOP), the Agency explained that it filed a grievance on September 11, 2018, alleging the Union violated the parties’ collective-bargaining agreement (CBA) when the Union filed its petition for review (Pet.) with the Authority in this and another case. SOP at 1. Section 2424.30 of the Authority’s Regulations states that when the “exclusive representative files . . . a grievance alleging an unfair labor practice under the parties’ negotiated grievance procedure, and the . . . grievance concerns issues directly related to the petition for review[,] . . . the Authority will dismiss the petition for review.” 5 C.F.R. § 2424.30(a) (emphasis added). Here, because the Agency filed a grievance and that grievance does not involve an unfair labor practice, we find that § 2424.30(a) does not apply. See generally U.S. EPA, N.Y., N.Y., 64 FLRA 227, 229 (2009) (§ 2424.30 addresses the Authority’s procedures for processing negotiability cases).

³ The Union requests that the Authority direct the Agency to provide the Union with previously requested data “to support/refute a complaint/[unfair labor practice] concerning the claim of a bargaining[-]obligation dispute of ‘covered-by’ made in an Agency Position Statement.” Union’s Resp. to Agency’s SOP (Resp.), Attach. 2, Union’s request for a Hearing and Fact Finding Procedures at 1. Under § 2424.31 of the Authority’s Regulations, the Authority may direct the parties to provide specific documentary evidence “[w]hen necessary to resolve disputed issues of material fact . . . or when it would otherwise aid in decision making.” 5 C.F.R. § 2424.31. Because the Union never explains what issue of material fact necessitates the requested data, and fails to explain how the requested data would support the Union’s petition for review or aid the Authority in deciding this case, we deny the Union’s request. See id.; see also AFGE, Local 997, 66 FLRA 499, 499 (2012) (denying the union’s request for a hearing after finding that it did not raise an issue of material fact necessitating a hearing under § 2424.31(c)).

¹ 5 U.S.C. § 7105(a)(2)(E).

III. Proposals 1 and 2

A. Wording

i. Proposal 1

When travel to the TDY is to be accomplished on a non-work day (e.g. weekend or holiday), then the employee upon request will be granted Compensatory Time Off for the Travel to the TDY, and vice versa.⁴

ii. Proposal 2

When travel to the TDY is to be accomplished on a usual workday (Monday-Friday), then the employee upon request will be granted Compensatory Time Off for the Travel to the TDY that are outside of the employee's usual workday schedule, and vice versa.⁵

B. Meaning

For both proposals, the Union explained that "TDY" is an acronym for "temporary duty yonder" and refers to temporary duty assignments to the Agency's Atlanta Passport Office for employees who work primarily at the Charleston Passport Office.⁶ The Union explained that both proposals allow the Agency to compensate employees with compensatory time off for time spent traveling between the Charleston and Atlanta offices for a temporary assignment.⁷ To be eligible for compensatory time for this travel, employees must request supervisory approval before any actual travel takes place, and the supervisor must approve the request.⁸

The Union explained that Proposal 1 permits compensatory time off for TDY travel that occurs only on a Saturday, Sunday, or federal holiday – days outside of the employees' regular work schedules.⁹ The Union explained that Proposal 2 permits compensatory time off for TDY travel that occurs only on a Monday through Friday – employees' regular workdays – and before or after an employee's shift on those days.¹⁰

The Union clarified that the use of the phrase "vice versa" in both proposals means travel only between the Charleston and Atlanta offices.¹¹ Additionally, the Union clarified that both proposals only operate to

provide compensatory time, and do not allow employees to be compensated with overtime pay for TDY travel.¹²

The Agency agreed with the Union's explanation of the meaning and operation of both proposals.¹³

C. Analysis and Conclusion: Proposals 1 and 2 are specifically provided for by the Federal Workforce Flexibility Act.

The Agency argues that Proposals 1 and 2 are nonnegotiable because compensatory time off for travel is governed by the Federal Workforce Flexibility Act¹⁴ and its implementing regulations,¹⁵ which establish an entitlement to compensatory time off for employees in travel status when that time is not otherwise compensable.¹⁶ The Agency maintains that because the subject matters of the proposals are specifically provided for by federal statute and conflict with a government-wide regulation, they are not negotiable.¹⁷

The Union's sole response was that it "disagrees with the Agency's [p]osition" because "the Union requested data from the Agency pursuant to the Statute and [the] Agency refused to supply the data, which will support the Union's disagreement."¹⁸

Section 7103(a)(14)(C) of the Statute excludes from the definition of "conditions of employment," and thus from the duty to bargain, matters that are "specifically provided for by Federal statute."¹⁹ A matter is "specifically provided for" only when the statute leaves no discretion to an agency.²⁰ Here, the Federal Workforce Flexibility Act provides that each hour spent by an employee in travel status away from the official duty station of the employee, that is not otherwise compensable, "shall be treated as an hour of work or employment for purposes of calculating compensatory

¹² *Id.*

¹³ *Id.* at 3.

¹⁴ Federal Workforce Flexibility Act of 2004, Pub. L. No. 108-411, § 203(a), 118 Stat. 2305, 2313 (2004) (codified as amended at 5 U.S.C. § 5550b).

¹⁵ 5 C.F.R. §§ 550.1401-1409.

¹⁶ SOP at 2.

¹⁷ *Id.* at 2-3 (citing *U.S. DOJ, INS*, 55 FLRA 892 (1999) (Member Cabaniss dissenting in part; Member Wasserman dissenting in part); *NAGE, SEIU, AFL-CIO*, 32 FLRA 206 (1988) (finding a proposal inconsistent with a government-wide regulation)).

¹⁸ Resp. at 4, 8.

¹⁹ 5 U.S.C. § 7103(a)(14)(C); see also *IAMAW, Franklin Lodge No. 2135 & Int'l Plate Printers, Die Stampers, & Engravers Union of N. America, Local Nos. 2, 24, & 32 & Graphic Commc'ns Int'l Union, Local No. 285 & Int'l Ass'n of Siderographers, Wash. Ass'n*, 50 FLRA 677, 681 (1995) (*BEP*).

²⁰ *Id.* at 682.

⁴ Pet., Attach. 1 at 1.

⁵ *Id.*

⁶ Record at 2.

⁷ *Id.*

⁸ *Id.* at 2-3

⁹ *Id.* at 2.

¹⁰ *Id.* at 3

¹¹ *Id.* at 2-3.

time off.”²¹ Thus, this federal law “specifically provide[s] for” the subject matter of Proposals 1 and 2.²²

The Union otherwise fails to provide any argument as to why Proposals 1 and 2 are not specifically provided for by federal law or are within the duty to bargain.²³ Although the Union asserts that it “disagrees with the Agency’s [p]osition [s]tatement,” it fails to inform the Authority *why* it disagrees.²⁴ Consequently, it concedes that the subject matter of the proposals is specifically provided for by the Federal Workforce Flexibility Act.²⁵ Accordingly, we find that Proposals 1 and 2 are outside the duty to bargain, and we dismiss the Union’s petition as to those proposals.²⁶

IV. Proposal 3

A. Wording

There shall be an equal number of slots available for BUEs requesting to participate for other BUEs, after all “first timers” have been afforded his/her choice of dates, in which another announcement shall be sent soliciting volunteers that are not “first timers.”²⁷

²¹ 5 U.S.C. § 5550b(a) (emphasis added); *see also* SOP at 2 (citing 5 C.F.R. §§ 550.1401-1409).

²² 5 U.S.C. § 7103(a)(14)(C); *see also* BEP, 50 FLRA at 681-82.

²³ *See* 5 C.F.R. § 2424.32(a) (stating that the Union bears the burden of “raising and supporting arguments that the proposal or provision is within the duty to bargain, within the duty to bargain at the agency’s election, or not contrary to law”).

²⁴ Resp. at 4, 8. Similarly, although the Union asserts that the requested data will support its disagreement, it fails to explain *how* it would do so.

²⁵ *See* 5 C.F.R. § 2424.32(c)(2) (“Failure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion.”); *see also* AFGE, *Local 1164*, 65 FLRA 924, 926 (2011) (finding that a union conceded the nonnegotiability of a proposal by failing to contest the agency’s management-right argument).

²⁶ *See* NAGE, *Local R-109*, 66 FLRA 278, 280 (2011) (dismissing the union’s proposal for failure to meet its burden to establish that the proposal was within the duty to bargain); *see also* AFGE, *Local 1547*, 65 FLRA 911, 913 (2011) (dismissing the agency’s claim as unsupported under 5 C.F.R. § 2424.32(b)); AFGE, *Local 3584, Council of Prison Locals C-33*, 64 FLRA 316, 317 (2009) (dismissing the petition for review because both parties failed to support their arguments).

²⁷ Pet., Attach. 1 at 2; *see also* Record at 3.

B. Meaning

The Union clarified that “slots” means assignments.²⁸ Under the proposal, the Agency will send an announcement to the Union when it first decides to solicit volunteers for temporary-duty assignments.²⁹ Only the Agency may decide the number of temporary-duty “slots” available.³⁰ The Union explained that if the Agency decides to solicit volunteers to fill a set number of assignments at the Atlanta office with employees who work at the Charleston office, then the Agency must first select from a pool of “first time[.]” volunteers.³¹ “First timers” are employees who have not performed temporary-duty assignments assisting with passport counter work at the Atlanta office during the year prior to the Agency soliciting volunteers.³² If any “slots” remain after the Agency selects from the pool of “first timers,” then the Agency must offer the remaining slots equally to the entire pool of non-“first timers.”³³ Non-“first timers” are those employees who have performed temporary-duty work at the Atlanta office during the year prior to the Agency’s solicitation.³⁴ The Union clarified that “BUEs requesting to participate for other BUEs” refers to the possibility of non-first timers volunteering for any remaining slots after “first timers” have been selected.³⁵

The Agency agreed with the Union’s explanation of the meaning and operation of the proposal.³⁶

C. Analysis and Conclusion: The Agency raises only a bargaining-obligation dispute with regard to Proposal 3.

The Agency argues that it already negotiated and resolved the content of Proposal 3, as evidenced by a local December 2010 memorandum of agreement (MOA), which addresses temporary duty assignments to the Atlanta office.³⁷ Thus, the Agency maintains that because the proposal is covered by an existing agreement, it does not have a duty to bargain.³⁸

In response, the Union states that it disagrees with the Agency’s statement of position regarding

²⁸ Record at 3.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 3-4.

³⁴ *Id.* at 4.

³⁵ Pet., Attach. 1 at 2; Record at 4.

³⁶ Record at 4.

³⁷ SOP at 3 (citing *U.S. Dep’t of HHS, SSA, Balt., Md.*, 47 FLRA 1004 (1993)).

³⁸ *Id.* at 2-3.

Proposal 3 “claiming only . . . a bargaining[-]obligation dispute[,] . . . as opposed to the [Agency’s] initial response.”³⁹

Despite the Union’s objection that the Agency appears to have proffered a different reason in its statement of position than it gave in its earlier declaration of nonnegotiability, § 2424.24 of the Authority’s Regulations requires an agency to set forth only at this stage its “full . . . position” for the Authority to consider.⁴⁰ Therefore, the Agency is not limited to objections or arguments communicated to the Union before the Union filed its petition for review.⁴¹

However, the Agency’s only claim regarding Proposal 3 is that the Agency does not have a duty to bargain because Proposal 3 is “covered by” the local MOA.⁴² Thus, the Agency raises only a bargaining-obligation dispute.⁴³ The Authority’s Regulations specify that a negotiability dispute “that concerns *only* a bargaining[-]obligation dispute may *not* be resolved [in a negotiability proceeding].”⁴⁴ Therefore, because the only issue raised by the Agency with regard to Proposal 3 is a bargaining-obligation dispute, we dismiss the petition as to Proposal 3.⁴⁵

V. Order

We dismiss the Union’s petition.

³⁹ Resp. at 17.

⁴⁰ 5 C.F.R. § 2424.24(c)(2).

⁴¹ See Pet., Attach. 1 (emails between the Union and the Agency regarding the Agency’s objections to the proposals); see also *NAIL, Local 7*, 67 FLRA 654, 654 (2014) (stating that “an agency is not bound by the legal arguments it raises at a post-petition conference . . . [but] must supply all of its arguments in its statement of position”).

⁴² SOP at 2.

⁴³ See 5 C.F.R. § 2424.2(a)(1) (an example of a bargaining-obligation dispute is a claim that a “proposal concerns a matter that is covered by a collective[-]bargaining agreement”).

⁴⁴ 5 C.F.R. § 2424.2(d) (emphasis added); see also *NFFE, IMAW, Fed. Dist. 1, Local 1998*, 69 FLRA 626, 627 (2016) (“[W]here a proposal involves only a bargaining-obligation dispute, that dispute may not be resolved in a negotiability proceeding.”).

⁴⁵ See *NATCA, Local ZHU*, 65 FLRA 738, 741 (2011) (dismissing the petition with regard to proposals that raised only bargaining-obligation disputes); *Antilles Consol. Educ. Ass’n*, 61 FLRA 327, 331 (2005) (dismissing a petition as to a proposal where the agency only raised a bargaining-obligation dispute).

Member DuBester, concurring:

Based on the record before us, I agree with the decision to dismiss the Union's petition.