

71 FLRA No. 152

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS
LOCAL 1002
(Union)

and

UNITED STATES
DEPARTMENT OF ENERGY
SOUTHWESTERN POWER ADMINISTRATION
TULSA, OKLAHOMA
(Agency)

0-NG-3442

DECISION AND ORDER
DISMISSING PETITION FOR REVIEW

June 4, 2020

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

I. Statement of the Case

Where a petition for review concerns a proposal that is not substantively changed from one that had previously been alleged to be nonnegotiable by the agency, the effect of the petition is to seek review of the previous allegation. Because the Union submitted proposals containing only minor modifications from those previously declared nonnegotiable, we find that the Union failed to file a timely petition for review (petition). Thus, we dismiss the petition.

II. Background

The dispute in this case concerns two Union proposals involving the Agency's pay practices.

The petition indicates that the Union had previously filed a related petition concerning fifteen proposals, docketed as case number 0-NG-3388.¹ In that case, the Union requested a written allegation of nonnegotiability in a letter dated May 11, 2017.² The Agency provided a written allegation declaring the proposals nonnegotiable in a letter dated October 26,

2017.³ On November 22, 2017, the Union appealed the Agency's allegation by filing the petition in 0-NG-3388. The parties then engaged in mediation with the Authority's Collaboration and Alternative Dispute Resolution (CADR) program. Subsequently, the Union requested to withdraw its petition without reserving its right to refile that petition.⁴ The Authority granted the withdrawal request.

Later, the Union presented the Agency with the two proposals at issue and requested a written allegation of nonnegotiability. On March 5, 2019, the Agency provided a written allegation stating that it had previously declared the two proposals nonnegotiable in the October 26, 2017 letter. In response, the Union filed this petition on March 19, 2019.

Because it appeared that the petition was effectively seeking review of the Agency's 2017 allegation of nonnegotiability, the Authority's Office of Case Intake and Publication issued an order on July 23, 2019 directing the Union to show cause why its petition should not be dismissed as untimely (the order). Specifically, the order noted that the proposals contained only "minor modifications" and, therefore, were not "substantively changed" from the proposals previously declared non-negotiable.⁵ The Union filed a timely response to the order on August 6, 2019.

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

When a union has requested a written allegation from the agency concerning the duty to bargain, the time limit for filing a petition for review of negotiability issues is fifteen days after service of an agency's allegation of nonnegotiability on a union.⁶ The time limit for filing a petition may not be extended or waived by the Authority.⁷

In addition, where a petition for review concerns a dispute as to a proposal that is not substantively changed from one that had previously been alleged to be nonnegotiable by an agency, the effect of the petition is to seek review of the previous allegation.⁸

¹ 0-NG-3442, Pet. at 3-4.

² 0-NG-3442, Union's Resp. to Show Cause Order at 2-3.

³ 0-NG-3442, Pet., Attach. 1, Agency's Written Allegation at 2; 0-NG-3388, Pet., Attach. 1, Agency's Written Allegation at 1.

⁴ 0-NG-3388, Union's Mot. to Withdraw Petition at 1.

⁵ Order at 2, 4.

⁶ 5 C.F.R. § 2424.21(a)(1).

⁷ *Id.* § 2429.23(d).

⁸ *AFGE, Nat'l Council of EEOC Locals No. 216*, 71 FLRA 300, 302 (2019) (*AFGE EEOC*) (Member DuBester concurring, in part, and dissenting, in part); *NFFE, Local 422*, 50 FLRA 541, 542 (1995) (*NFFE*); *NAGE, RI-100*, 41 FLRA 752, 752-54 (1991) (*NAGE*).

As relevant here, the order directed the Union to show that the proposals in the instant case were substantively changed from two proposals in 0-NG-3388. As the order explained, if the proposals were not substantively changed, then the Union was seeking review of the Agency's October 26, 2017 declaration of nonnegotiability.⁹ In this regard, 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."¹⁰ The Union's response to the order does not address the substance of the proposals, let alone explain or otherwise provide evidence to show that the proposals in the instant petition were substantively changed from those previously alleged to be nonnegotiable. Therefore, we find that the Union has not demonstrated that the proposals contained in the instant petition are substantively changed from those in the 0-NG-3388 petition.¹¹

It follows that the Union's petition in this case essentially seeks review of the Agency's October 26, 2017 written allegation of nonnegotiability. The Union neither filed the instant petition within fifteen days of receiving this written allegation, nor retained the right to refile its earlier petition. Accordingly, the Union's right to file a petition for review concerning the proposals was extinguished on July 2, 2019, when its withdrawal request was granted by the Authority.¹²

In reaching this conclusion, we reject the Union's argument that it should be permitted to file its petition for review "at any time" because the Agency failed to respond to the Union's May 11, 2017 written request for an allegation of nonnegotiability within ten days.¹³ The Union bases this argument upon

§ 2424.21(b) of the Authority's Regulations, which states that "[i]f the agency has not served a written allegation on the exclusive representative within ten (10) days after the agency's principal bargaining representative has received a written request for such allegation . . . then the petition may be filed at any time."¹⁴

However, this provision does not govern the outcome of cases, such as the one before us, where an agency has actually served the union with a solicited written allegation of non-negotiability. Under these circumstances, the Union – as noted – was required to file its petition for review "within fifteen (15) days after the date of service" of the written allegation.¹⁵ Thus, the Union's deadline for filing a petition for review was fifteen days from November 8, 2017.

Consequently, the Union's petition is untimely.

IV. Order

We dismiss the petition.

⁹ Order at 4.

¹⁰ *AFGE EEOC*, 71 FLRA at 300.

¹¹ *NFFE*, 50 FLRA at 542-43 (where union does not dispute that proposals are not substantively changed from those that had previously been alleged to be nonnegotiable by agency, the Authority views proposals as substantively unchanged); *NAGE*, 41 FLRA at 753 (same).

¹² 5 C.F.R. § 2424.21(a)(1); see *NFFE*, 50 FLRA at 543; *NAGE*, 41 FLRA at 754. The Union's reliance on *Laborers' Int'l Union of N. Am., AFL-CIO-CLC, Local 1267*, 14 FLRA 686 (1984) (*Local 1267*) is unavailing. In *Local 1267*, the Authority permitted the Union to refile its petition because the Authority did not take any action before receiving the Union's request for withdrawal. Here, the Authority conducted a post-petition conference on January 24, 2018, issued a record of that conference on January 26, 2018, and the parties participated in the Authority's CADR program before the Union withdrew its petition in 0-NG-3388. See 0-NG-3388, Order & Notice of Rescheduled Post-Petition Conference (Jan. 10, 2018); 0-NG-3388, Record of Post-Petition Conference (Jan. 26, 2018).

¹³ Union's Resp. to Order at 2-3.

¹⁴ 5 C.F.R. § 2424.21(b).

¹⁵ *Id.* § 2424.21(a)(1); see *AFGE, Local 3407*, 41 FLRA 265, 269 (1991).