

71 FLRA No. 169

NATIONAL FEDERATION
OF FEDERAL EMPLOYEES
INTERNATIONAL ASSOCIATION
OF MACHINISTS AND
AEROSPACE WORKERS
FEDERAL DISTRICT 1
FEDERAL LOCAL 1998
(Union)

and

UNITED STATES
DEPARTMENT OF STATE
CONSULAR AFFAIRS
PASSPORT SERVICES
(Agency)

0-NG-3457

DECISION AND ORDER
DISMISSING NEGOTIABILITY APPEAL

July 20, 2020

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

I. Statement of the Case

In this case, we find that the Union’s petition for review fails to present issues that the Authority can resolve under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute).¹ Accordingly, we dismiss the petition without prejudice to the Union’s right to refile a negotiability appeal at a later date, should it choose to do so, provided that the conditions for review of such an appeal are met.

II. Background

The Union requested to negotiate a memorandum of agreement (MOA) covering procedures for random audits of bargaining-unit employees. The Agency refused to bargain over the proposed MOA at the local level, and the Union responded by filing a local grievance. The Agency processed the grievance as a step three national grievance and denied it.

Thereafter, the Union requested, in writing, a written allegation of nonnegotiability for the MOA on December 16, 2019.² The Agency did not respond. The Union filed its petition for review on January 10, 2020,³ submitting the MOA as seven proposals.

On January 23, the Authority’s Office of Case Intake & Publication (CIP) issued an order to show cause (January 23 Order) directing the Union to show cause why its petition should not be dismissed because there appeared to be a grievance “directly related” to the Union’s petition.⁴ In a February 14 response, the Union submitted correspondence indicating that the grievance had been withdrawn and, therefore, there were no grievances or other pending proceedings related to the petition.^{5,6}

In its statement of position (statement), the Agency argues that the Union’s petition is deficient because the Union, contrary to the parties’ agreement, attempted to bargain the proposals for random auditing procedures at the local rather than the national level of recognition.⁷ Because the Agency rejected the Union’s request to bargain below the national level of recognition, the Agency asserts that the petition presents only a bargaining-obligation dispute.⁸

On March 4, CIP issued a second order to show cause (March 4 Order) directing the Union to show cause why the Authority should consider the Union’s petition because it appeared to exclusively present a bargaining-obligation dispute that the Authority will not consider in

² Pet., Attach. 2, Request for Written Allegation of Nonnegotiability at 1.

³ Unless otherwise noted, all dates referenced hereafter occurred in 2020.

⁴ Jan. 23, 2020 Order to Show Cause (Jan. 23 Order) at 1-2; see 5 C.F.R. § 2424.30(a) (where a party files a grievance concerning issues “directly related” to the petition for review, the Authority “will dismiss the petition”).

⁵ Union Resp. to Jan. 23 Order, Attach., Withdrawal of Final-Step Grievance. The Union was granted an extension until Feb. 14 to file its response to the Jan. 23 Order. Feb. 13, 2020 Extension of Time Order at 1. Therefore, the Union’s response to the Jan. 23 Order is timely.

⁶ On February 20, the Agency requested leave to file, and did file, a reply to the Union’s response to the January 23 Order. The Authority’s Regulations provide that the Authority may, in its discretion, grant leave to file “other documents” as it deems appropriate. 5 C.F.R. § 2429.26. We find the existing record sufficient to resolve the issues presented in the petition. Accordingly, the Agency’s request for leave is denied, and we do not consider the Agency’s reply. See *U.S. Dep’t of the Treasury, IRS, Wage & Inv. Div., Austin, Tex.*, 70 FLRA 924, 930 n.62 (2018) (Member DuBester, concurring in part and dissenting in part).

⁷ Statement Br. at 3-4.

⁸ *Id.*

¹ 5 U.S.C. § 7105(a)(2)(E).

a negotiability proceeding.⁹ On March 17, the Union filed a timely response to the March 4 Order in which it argued that the Authority should consider the petition because the Agency did not respond to the Union's request for a written allegation of nonnegotiability, and there was no longer a pending grievance related to the petition.¹⁰

III. Analysis and Conclusion: The Authority is without jurisdiction to review the Union's petition.

Under § 7117 of the Statute and § 2424.2 of the Authority's Regulations, the Authority will consider a petition for review of a negotiability dispute only when it has been established that the parties are in dispute as to whether a proposal is inconsistent with law, rule, or regulation.¹¹ In contrast to a negotiability dispute, a bargaining-obligation dispute is a disagreement between a union and an agency concerning whether, in the specific circumstances of a particular case, the parties must bargain over a proposal that otherwise may be negotiable.¹² If a case involves *only* a bargaining-obligation dispute, then the Authority will *not* resolve that dispute in a negotiability proceeding.¹³ Instead, the Authority will dismiss the petition, or the portion of the petition, that presents only a bargaining-obligation dispute.¹⁴

The principal dispute between these parties is whether the Agency is required to bargain with the Union over the implementation of a national auditing program at the local level. The Union submitted proposals for bargaining at the local level, and the Agency

communicated to the Union that it would not bargain over its random auditing procedures below the national level.¹⁵ The bargaining of proposals below the level of recognition is a permissive subject, and a party's refusal to bargain at a certain level of recognition presents only a bargaining-obligation dispute.¹⁶ Because the Agency declined to bargain the Union's proposals solely because they were raised at the local level, the proposals raise only a bargaining-obligation dispute rather than a negotiability dispute.¹⁷

The Authority's March 4 Order directed the Union to show that the proposals presented a negotiability dispute and not a bargaining-obligation dispute exclusively. In its response, the Union contends that the petition raises a negotiability dispute because the Union's request for a written allegation remains unanswered, and there are no pending proceedings related to the petition. However, the Agency has not disputed the negotiability of the proposals in either a written allegation or its statement of position, thus there is no dispute appropriate for resolution in a negotiability appeal.¹⁸ Therefore, the Union's arguments fail to demonstrate that there is a dispute as to whether any of the proposals are inconsistent with law, rule, or regulation.¹⁹

Consequently, the Union's proposals present only a bargaining-obligation dispute. The issues raised by the Union's petition would be more appropriately addressed either through the Statute's unfair-labor-practice provisions or through whatever mechanisms the parties may have adopted in their

⁹ March 4, 2020 Order to Show Cause (Mar. 4 Order) at 2.

¹⁰ Union Resp. to Mar. 4 Order at 2 (citing *NTEU*, 59 FLRA 978 (2004)).

¹¹ 5 U.S.C. § 7117; 5 C.F.R. § 2424.2.

¹² 5 C.F.R. § 2424.2(a); see *NATCA*, 62 FLRA 174, 182 (2007) (*NATCA*) ("[I]t is well established that there is no statutory obligation to bargain below the level of recognition."); see also *NAGE, Local RI-109*, 61 FLRA 588, 592 (2006) (dismissing petition where only a bargaining-obligation dispute was present, and the proposals were negotiable only at the election of the agency).

¹³ 5 C.F.R. § 2424.2(d) ("An appeal that concerns only a bargaining obligation dispute may not be resolved under this part."); see, e.g., *AFGE, Local 1164*, 65 FLRA 924, 927 (2011) (*Local 1164*) (dismissing proposal that presented only a bargaining-obligation dispute); *NATCA, Local ZHU*, 65 FLRA 738, 741 (2011) (*Local ZHU*) (same); *Antilles Consol. Educ. Ass'n*, 61 FLRA 327, 331 (2005) (same).

¹⁴ *NTEU & NTEU, Chapter 71*, 4 FLRA 796, 797-98 (1980) (*NTEU, Chapter 71*); *AFGE, AFL-CIO, Council of Social Sec. Dist. Office Locals*, 4 FLRA 584, 587 (1980) (*AFGE, Council*); see also *NAGE, Branch No. 11*, 12 FLRA 625, 625 (1983) (*Branch No. 11*) (dismissing petition where the only dispute before the Authority was whether the Agency had a local bargaining obligation).

¹⁵ Statement Br. at 1-2; Statement, Ex. 1, Oct. 21 Email at 1 ("[The Agency] is not interested in negotiating at the local level.").

¹⁶ *NATCA*, 62 FLRA at 182; see also *U.S. FDA, Ne. & Mid-Atl. Regions*, 53 FLRA 1269, 1273-74 (1998) (affirming that parties to a national agreement may authorize local negotiations, but such negotiations are a permissive subject of bargaining); *DOD Dependents Schs.*, 12 FLRA 52, 53 (1983) (denying exception to arbitrator's award because the agency had no obligation under the Statute to bargain locally with a union exclusively recognized at the national level).

¹⁷ *NTEU, Chapter 71*, 4 FLRA at 797-98; *AFGE, Council*, 4 FLRA at 587; see also *Branch No. 11*, 12 FLRA at 625 (dismissing petition where the only dispute before the Authority was whether the Agency had a local bargaining obligation).

¹⁸ See *IFPTE, Local 89*, 45 FLRA 938, 941-42 (1992) (dismissing a petition, without prejudice, because the agency did not allege that the proposal conflicted with law, rule, or regulation); see also *AFGE, Local 1502*, 71 FLRA 468, 469 (2019) (Member DuBester dissenting) (dismissing a petition because the Agency did not provide, in writing, any arguments disputing the negotiability of the Union's proposals).

¹⁹ 5 U.S.C. § 7117; 5 C.F.R. 2424.2; see also *Local 1164*, 65 FLRA at 927; *Local ZHU*, 65 FLRA at 741.

collective-bargaining agreement to handle such disputes.²⁰

IV. Order

We dismiss the petition for review without prejudice to the Union's right to file a negotiability appeal at a later date, should it choose to do so, provided that the conditions for review of such an appeal are met.

²⁰ See *Branch No. 11*, 12 FLRA at 625; *NTEU, Chapter 71*, 4 FLRA at 797-98; *AFGE, Council*, 4 FLRA at 587.