

71 FLRA No. 213

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 53
NATIONAL VETERANS AFFAIRS COUNCIL
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

0-NG-3464
0-NG-3465

DECISION AND ORDER
DISMISSING PETITIONS FOR REVIEW

November 20, 2020

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

I. Statement of the Case

These cases are before the Authority on negotiability appeals filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute). The appeals each involve the negotiability of one proposal. Under the circumstances, the Authority finds it appropriate to consolidate these cases in the interest of expeditious processing.¹

II. Background

The dispute in this case arose during the parties' negotiations over a successor term agreement. The first proposal at issue concerns fitness for duty examinations (Article 19). The second proposal concerns official time (Article 48).

On October 22, 2019, the Union requested that the Agency provide it with a written allegation of nonnegotiability for Article 19. And on October 24, 2019, the Union requested a written allegation of

nonnegotiability for Article 48. When the Agency did not respond within ten days, the Union filed petitions for review on November 22, 2019. The Authority docketed the petition concerning Article 19 as 0-NG-3464 and the petition concerning Article 48 as 0-NG-3465.

On January 8, 2020, the Agency filed a "Motion for Leave to File an Additional Submission" (motion for leave) along with a "Motion to Expedite and Dismiss" (motion to dismiss) in each case.² In both motions for leave, the Agency asserts that "extraordinary circumstances" warrant consideration of its motion to dismiss because the Agency "never made any allegation, contention, statement, nor have they taken the position that the relevant proposal is nonnegotiable nor that it is permissively negotiable."³ The Agency further alleges that the submissions "identified in 5 C.F.R. Part 2424" will not provide an adequate opportunity to address the issue.⁴

The Agency filed a timely statement of position in each case, asserting that it had not declared either proposal nonnegotiable. The Union filed a response in each case. In its response for 0-NG-3465, the Union attached, as evidence of a written allegation, correspondence from Agency representatives to the Union regarding the implementation of three Executive Orders.⁵ The Agency did not file a reply to the Union's response in either case.

Subsequently, the Authority's Office of Case Intake and Publication (CIP) issued an order in each case directing the Union to show cause why its petitions should not be dismissed because it appeared there was no negotiability dispute. CIP also directed the Union to provide evidence of a pending grievance that might be "directly related" to its petition.⁶

The Union filed timely responses to the orders (SCO responses), which are substantively identical. In its SCO responses, the Union alleges that the Agency stated during negotiations that the proposals were nonnegotiable. It also claims that the Agency's failure to respond to the Union's requests for a written allegation

² 0-NG-3464, Mot. for Leave; 0-NG-3465, Mot. for Leave.

³ 0-NG-3464, Mot. for Leave at 1; 0-NG-3465, Mot. for Leave at 1.

⁴ 0-NG-3464, Mot. for Leave at 1; 0-NG-3465, Mot. for Leave at 1.

⁵ 0-NG-3465, Resp. to Agency Statement of Position (Statement), Attach. D (official notification regarding the implementation of the Executive Orders); 0-NG-3465, Resp. to Statement, Attach. F (supplement to the official notification); see also 0-NG-3465, Resp. to Statement, Attach. E (email to Union stating that combining bargaining over implementation of the Executive Orders with term negotiations was a permissive subject).

⁶ 0-NG-3464, Order to Show Cause (SCO) at 2.

¹ E.g., *NFFE*, 21 FLRA 1105, 1105 (1986) (consolidating two negotiability petitions); *AFGE, Local 3748, AFL-CIO*, 20 FLRA 495, 495 n.* (1985) (same).

constituted a “constructive allegation of nonnegotiability.”⁷ The Union did not provide any evidence of a written allegation of nonnegotiability in either case.

The Union also asserts that its two pending grievances are not directly related to its petitions. On this point, the Union states that a December 11, 2019 national grievance concerns only the Agency’s repudiation of ground rules and failure to respond to requests for information.⁸ Regarding a December 10, 2019 national grievance, the Union explains that the grievance addresses unilateral implementation of three Executive Orders at midterm, whereas the petition concerns a successor-term proposal.⁹

III. Analysis and Conclusion: The Union’s petitions do not satisfy the conditions governing review of negotiability issues.

As discussed previously, the Union’s petitions concern two proposals. However, the Agency asserts that it “never made any allegation, contention, [or] statement” that the proposals are nonnegotiable.¹⁰ And the Agency does not now contend that either proposal is contrary to law, rule, or regulation or permissively negotiable.¹¹

Under § 7117 of the Statute and § 2424.2 of the Authority’s Regulations, the Authority will consider a petition for review only where there is a negotiability dispute.¹² The regulations define a “[n]egotiability dispute” as a “disagreement between a[] [union] and an agency concerning the legality of a proposal or provision.”¹³

Here, the Agency never explicitly alleged that Article 19 and Article 48 are nonnegotiable. Although the Union disagrees,¹⁴ it did not provide evidence to demonstrate that the Agency made any such allegation. Moreover, to the extent that the Agency made any oral assertion during bargaining that the proposals are nonnegotiable, it effectively withdrew those allegations by both abandoning them before us now¹⁵ and not

arguing that those proposals are contrary to any law, rule, or regulation.¹⁶ Accordingly, we find that there is no disagreement between the Union and the Agency over the negotiability of either Article 19 or Article 48.

We therefore dismiss the Union’s petitions, without prejudice to the right to refile, if the conditions governing review of negotiability issues are satisfied.¹⁷ Because we dismiss the Union’s petitions on the basis that they do not present a negotiability dispute, we find it unnecessary to resolve whether the grievances are “directly related” to the petitions.¹⁸

IV. Order

We dismiss the petitions without prejudice to the Union’s right to refile.

⁷ 0-NG-3464 SCO Resp. at 3-5; 0-NG-3465 SCO Resp. at 4-6.

⁸ 0-NG-3465, SCO Resp. at 6-8.

⁹ *Id.* at 8-9.

¹⁰ 0-NG-3464, Mot. for Leave at 1; 0-NG-3465, Mot. for Leave at 1.

¹¹ See 0-NG-3464, Statement at 3-11; 0-NG-3465, Statement at 3-11.

¹² 5 U.S.C. § 7117; 5 C.F.R. § 2424.2; see, e.g., *AFGE, Local 1164*, 65 FLRA 924, 927 (2011).

¹³ 5 C.F.R. § 2424.2(c) (also stating that a “negotiability dispute exists when a[] [union] disagrees with an agency contention that . . . a proposal is outside the duty to bargain”).

¹⁴ 0-NG-3464, SCO Resp. at 2-4; 0-NG-3465, SCO Resp. at 4.

¹⁵ 0-NG-3464, Statement at 3-11; 0-NG-3465, Statement at 3-11.

¹⁶ See *NFFE, Local 1998, IAMAW*, 71 FLRA 417, 417-418 (2019) (Member Abbott dissenting in part) (citing *AFGE, Local 1164*, 49 FLRA 1408, 1411 (1994) (finding a negotiability appeal not appropriate for resolution because the agency did not allege, before the Authority, that the proposal was “inconsistent with law, rule or regulation”)).

¹⁷ See *id.* at 418 (citing *AFGE, Nat’l Border Patrol Council*, 42 FLRA 935, 936-37 (1991) (dismissing petition, without prejudice, where agency had not alleged that “any specific proposal” was nonnegotiable and did not argue before the Authority that any proposal was contrary to law, rule, or regulation); *AFSCME, Local 3097*, 42 FLRA 412, 450 (1991) (finding that the “conditions governing review of negotiability issues ha[d] not been met” where it was unclear whether the agency had made an allegation of nonnegotiability, and it did not argue before the Authority that the proposal was nonnegotiable); *Fed. Prof’l Nurses Ass’n, Local 2707*, 34 FLRA 71, 71-72 (1989) (dismissing petition, without prejudice, where agency withdrew its allegation of nonnegotiability before the Authority)); see also *AFGE, Local 1692*, 39 FLRA 572, 574 (1991) (“[W]hatever may have transpired in oral exchanges between the parties . . . is not material to the resolution of a negotiability appeal.”) (citation omitted).

¹⁸ 5 C.F.R. § 2424.30(a) (the Authority will dismiss a negotiability appeal without prejudice where the union has filed “a grievance alleging an unfair labor practice under the parties’ negotiated grievance procedure, and the . . . grievance concerns issues directly related” to a negotiability appeal); see *NTEU*, 62 FLRA 267, 268 (2007).

Member Abbott, dissenting:

The majority's decision is quite successful if its purpose is to take a dispute off the Authority's docket and proverbially kick the can down the road. However, it is not at all successful if, as the Federal Service Labor-Management Relations Statute (the Statute) suggests, our purpose is to "facilitate[] and encourage[] the amicable settlement" of disputes that are festering between the parties.¹

Thus, I do not agree with the majority's decision to dismiss this case and allow the Union the right to refile these negotiability disputes. Either there is a dispute over a proposal or there is not. Here, the parties cannot agree whether or not there is a dispute or the meaning of the purported proposals. There has been a lot of back-and-forth over such weighty matters as who said what to whom and when and, if by golly there is a dispute to be found, whether the parties must bargain over them. Only when every step of this fiasco is paid for by the American taxpayer would the parties bring such a vague and disarrayed matter to a federal adjudicative body such as the Authority.

Under the Statute, the Authority is charged with "provid[ing] leadership in establishing policies and guidance relating to matters under this chapter"² and, as I mentioned above, to bring closure and finality to disputes – not to leave the parties with the impression that they can do this time and again perpetually *just because they can*. Without a doubt, my colleagues have the prerogative to provide a meaningless answer. But just because they have that prerogative does not mean the exercise of that prerogative serves any meaningful purpose – the non-answer resolves nothing and does not promote an effective and efficient government.

Under these circumstances, where the Union brings an ill-defined matter to us, the only appropriate course is to dismiss the petition with prejudice.

¹ 5 U.S.C. § 7101 (a)(1)(C).

² *Id.* § 7105(a)(1).