71 FLRA No. 233

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
PATENT AND TRADEMARK OFFICE
(Agency)

0-NG-3485

_____

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

December 23, 2020

_____

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

I. Statement of the Case

In this case, we consider the negotiability of a proposal that would permit certain employees to use official time in excess of the limits set by Executive Order 13,837 (EO 13,837).[1] The Union argues that executive orders cannot restrict the Union's right to negotiate official time under § 7131(d) of the Federal Service Labor-Management Relations Statute (the Statute).[2] We affirm the Authority's holding in *POPA* that EO 13,837 is afforded the force and effect of law.[3] And because the proposal conflicts with EO 13,837, we find it nonnegotiable and dismiss the Union's petition for review.

II. Background

During bargaining over a successor collective-bargaining agreement, the parties exchanged several proposals regarding ground rules for negotiations. On December 19, 2019, the Union requested a written allegation of nonnegotiability from the Agency over a proposal governing official time for members of the Union's bargaining team. The Agency responded on January 2, 2020, stating that it would not be declaring the proposal nonnegotiable at that time. On February 28, 2020, the Union filed the petition with the Authority.

Thereafter, an Authority representative conducted a post-petition conference with the parties pursuant to § 2424.23 of the Authority's Regulations.[4] The Agency filed a statement of position, the Union filed a response to the statement, and the Agency filed a reply to the response.

III. Preliminary Matter: The Union's petition is timely.

Because the Union filed its February 28, 2020 petition more than fifteen days after receiving the Agency's January 2, 2020 response, the Authority's Office of Case Intake and Publication ordered the Union to show cause why the Authority should not dismiss the petition as untimely.[5] Replying to the show-cause order, the Union noted that the Agency had failed to respond to its request for a written allegation of nonnegotiability within ten days of receiving it.[6] The Union further asserted that while the Agency ultimately responded on January 2, 2020, the Agency did *not* take a position as to the negotiability of the proposal.[7]

Under § 2424.21(a) of the Authority's Regulations, a petition "must be filed within fifteen . . . days . . . [of a]n agency's written allegation that the [union's] proposal is not within the duty to bargain."[8] However, the regulations also permit a union to file a petition "at any time" if the agency does not respond to the union's request for a written allegation of nonnegotiability "within ten . . . days."[9]

Consistent with the above, we find that the Agency's failure to respond within ten days of receiving the Union's request for a written allegation of nonnegotiability permits the Union to file a petition for review "at any time" under the Authority's Regulations.[10] Further, there is no dispute that the Agency did not provide the Union with an allegation of nonnegotiability in its January 2, 2020 response.[11] Thus, under § 2424.21(a) of the Authority's Regulations, the Union

[1] Exec. Order No. 13,837, *Ensuring Transparency, Accountability, and Efficiency in Taxpayer-Funded Union Time Use*, 83 Fed. Reg. 25,335 (May 25, 2018) (EO 13,837).
[2] 5 U.S.C. § 7131(d).
[3] *POPA*, 71 FLRA 1223, 1224-26 (2020) (*POPA*) (Member DuBester dissenting).
[4] 5 C.F.R. § 2424.23.
[5] Order to Show Cause at 2.
[6] Union Reply to Order to Show Cause at 2.
[7] *Id.* at 4.
[8] 5 C.F.R. § 2424.21(a).
[9] *Id.* § 2424.21(b).
[10] *Id.*; *see Nat'l Educ. Ass'n, Overseas Educ. Ass'n, Fort Bragg Ass'n of Educators*, 53 FLRA 898, 900-01 (1997) (finding negotiability petition timely filed where the agency failed to respond to the union's request for a written allegation of nonnegotiability within ten days).
[11] *See* Union Reply to Order to Show Cause at 4.

was not required to file its petition within fifteen days of that date.[12] Accordingly, the Union's petition is timely.[13]

IV. Proposal

A. Wording of Proposal

> VI.A a. employees may spend more than one quarter of their paid time on official time; b. employees who have spent one quarter of their paid time on official time may continue to use official time for any authorized purpose, including purposes other than those covered by sections 7131(a) or 7131(c); and c. any official time in excess of one quarter of an employee's paid time in a fiscal year shall not count toward any limitation on official time, unless the union and the employer have agreed upon such a limitation.[14]

B. Meaning of Proposal

In its petition, the Union explains that the proposal is intended to preclude the Agency from capping the amount of official time, under § 7131(d) of the Statute, that bargaining-unit employees can use "to prepare for bargaining, mediation, and impasse[,] . . . or any other representational purpose."[15] According to the Union, the proposal would require the Agency to allow employees to use official time "without any . . . caps or limits . . . and notwithstanding the provisions of EO 13,837."[16] The Agency agreed with the Union's explanation of the meaning and operation of the proposal as stated in the petition and confirmed at the post-petition conference.[17]

C. Analysis and Conclusion: The Proposal is nonnegotiable.

The Agency argues that the proposal is nonnegotiable because it "expressly and directly" conflicts with EO 13,837, Section 4(a)(ii).[18] A proposal will be found outside the duty to bargain when it is contrary to law.[19] In *POPA*, the Authority reaffirmed that executive orders are "accorded the force and effect of law" when enacted pursuant to statutory authority.[20] As EO 13,837 was enacted pursuant to the President's authority under 5 U.S.C. § 7301 to regulate the federal civil service, any proposal inconsistent with EO 13,837 is nonnegotiable.[21]

Section 4(a)(ii) of the EO mandates that employees "spend at least three-quarters of their paid time, measured each fiscal year, performing agency business."[22] In addition, for employees "who have spent one-quarter of their paid time in any fiscal year on non-agency business," the EO permits those employees to

---

[12] *See* 5 C.F.R. § 2424.21(a) (stating that a petition for review must be filed within fifteen days after the date of service of an agency's "written allegation that the [union's] proposal *is not within the duty to bargain*" (emphasis added)).

[13] In its statement of position, the Agency alleges that the Union's proposal is outside the duty to bargain. *E.g.*, Statement of Position (Statement) at 10 ("[T]o the extent . . . [the] proposal directly contravenes the terms of [EO] 13,837, it is . . . nonnegotiable."). Therefore, even though the Agency's January 2, 2020 response did not allege that the proposal was outside the duty to bargain, the Agency's contention that the proposal is nonnegotiable in its statement establishes that the petition presents a negotiability dispute appropriate for the Authority to review. *See NFFE, IAMAW, Fed. Dist. 1, Fed. Local 1998*, 71 FLRA 889, 890 (2020) ("[T]he Authority will consider a petition for review of a negotiability dispute only when . . . the parties are in dispute as to whether a proposal is inconsistent with law, rule, or regulation." (citing 5 U.S.C. § 7117; 5 C.F.R. § 2424.2)); *cf. POPA*, 56 FLRA 69, 70 (2000) (Chairman Wasserman dissenting in part; Member Cabaniss dissenting in part) (dismissing certain proposals that the agency did not declare nonnegotiable in either a written allegation of nonnegotiability or statement of position).

[14] Record of Post-Pet. Conference (Record) at 2. At the post-petition conference, the Union stated that the proposal, as set forth in the petition, incorrectly referenced § "7121(c)," instead of § 7131(c) of the Statute. Record at 2; Pet. at 4. Accordingly, the Union clarified subsection b. to read, in relevant part: "sections 7131(a) or 7131(c)." Record at 2. In the absence of any objection from the Agency, we consider the proposal clarified. *Id.* (noting that the Agency "did not object to the correction"); *see AFGE, AFL-CIO, Local 2361*, 57 FLRA 766, 766 n.3 (2002) (Chairman Cabaniss concurring) (citing *Ass'n of Civilian Technicians, Inc., Heartland Chapter*, 56 FLRA 236, 236 n.1 (2000)).

[15] Pet. at 4 (stating that "[t]his proposal means that bargaining[-]unit employees will not have a cap on the amount of [§] 7131(d) time they may use").

[16] *Id.*; Record at 2.

[17] Record at 2.

[18] Statement at 10.

[19] *NTEU*, 68 FLRA 334, 339-40 (2015); *NTEU*, 52 FLRA 1265, 1271-72 (1997); *NTEU*, 49 FLRA 973, 978-79 (1994); *AFGE, Dep't of Educ. Council of AFGE Locals*, 38 FLRA 1068, 1081-83 (1990) (Member Talkin dissenting as to other matters).

[20] *POPA*, 71 FLRA at 1224 (citing *NFFE, Local 15*, 30 FLRA 1046, 1070 (1988); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 273 n.5 (1974)).

[21] *Id.* at 1224-26; *see* 5 U.S.C. § 7301 ("The President may prescribe regulations for the conduct of employees in the executive branch."). As in *POPA*, 71 FLRA at 1226 n.37, we note that even if the EO did not have the "force and effect of law," the EO's official-time provisions would constitute a "[g]overnment-wide rule" under 5 U.S.C. § 7117(a).

[22] EO 13,837, 83 Fed. Reg. at 25,337.

"continue to use [official] time in that fiscal year" but only for "purposes covered by [§§] 7131(a) or 7131(c) of [the Statute]."[23] And when an employee spends "time in excess of one-quarter of [his or her] paid time . . . to perform non-agency business in a fiscal year[, that excess time] shall count toward the [one-quarter] limitation . . . in subsequent fiscal years."[24]

By permitting employees to "spend *more than one quarter* of their paid time on official time,"[25] the Union's proposal plainly conflicts with the EO's requirement that employees spend "*at least three-quarters* of their paid time . . . performing agency business."[26] In addition, to the extent that the EO allows employees to spend more than one-quarter of their paid time in any fiscal year on non-agency business, the EO (1) restricts further official-time use to purposes covered by §§ 7131(a) and 7131(c),[27] and (2) mandates that any additional official time count toward the employees' one-quarter limit in the subsequent fiscal year.[28] In direct conflict, the proposal authorizes such employees to use official time for purposes "*other than* those covered by sections 7131(a) or 7131(c),"[29] and it precludes official time over the one-quarter limit from "count[ing] toward any [subsequent] limitation."[30] Finally, the Union effectively concedes that its proposal is inconsistent with the EO, stating that the proposal is intended to govern the use of official time "notwithstanding the provisions of EO 13,837."[31] For these reasons, we conclude that the proposal is contrary to EO 13,837.

The Union argues that the proposal is negotiable because EO 13,837 cannot interfere with the duty to bargain over official time under § 7131(d) of the Statute.[32] This argument was considered and rejected in *POPA*, where the Authority held that the official-time provisions in EO 13,837 are consistent with § 7131(d).[33] And the President's directive that federal "employees shall spend at least three-quarters of their paid time . . . performing agency business or attending necessary training"[34] falls clearly within his statutory discretion to "prescribe regulations for the conduct of employees in the executive branch" under 5 U.S.C. § 7301.[35] Accordingly, we reject the Union's argument and conclude that the proposal is outside the duty to bargain.[36]

V. Order

We dismiss the Union's petition.

[23] *Id.*
[24] *Id.*
[25] Record at 2 (emphasis added).
[26] EO 13,837, 83 Fed. Reg. at 25,337 (emphasis added).
[27] *Id.*
[28] *Id.*
[29] Record at 2 (emphasis added).
[30] *Id.*; Pet. at 4.
[31] Pet. at 4; *see also* Record at 2 (noting that the parties agreed that the proposal "would require the Agency to allow official time in excess of the caps or limits provided in Executive Order 13,837").
[32] Resp. at 5-8.
[33] *POPA*, 71 FLRA at 1225 (holding that EO 13,837's provisions requiring agencies to ensure that official time is authorized only in reasonable and necessary amounts and that employees use at least three-quarters of their paid time performing agency business are "consistent with § 7131 of the Statute, which provides that official time shall be granted 'in any amount *the agency and the exclusive representative involved agree* to be reasonable, necessary, and in the public interest'" (quoting 5 U.S.C. § 7131(d))).
[34] EO 13,837, 83 Fed. Reg. at 25,337.
[35] *POPA*, 71 FLRA at 1225.
[36] *Id.* at 1228 (finding that a proposal establishing rules for official time was nonnegotiable because it directly conflicted with Section 4(a)(ii) of EO 13,837).

Member DuBester, dissenting:

Relying upon its decision in *POPA*,[1] the majority once again concludes that a proposal concerning official time is outside the duty to bargain because it conflicts with Executive Order (EO) 13,837. And once again, the majority reaches this conclusion notwithstanding that the provisions of EO 13,837 upon which it relies are inconsistent with the language and purpose of the Federal Service Labor-Management Relations Statute. Accordingly, for the reasons I expressed in *POPA*,[2] I dissent.

[1] *POPA*, 71 FLRA 1223 (2020) (Member DuBester dissenting).
[2] *Id.* at 1231-34 (Dissenting Opinion of Member DuBester).