

**72 FLRA No. 39**

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 3525  
(Union)

and

UNITED STATES  
DEPARTMENT OF JUSTICE  
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW  
BUREAU OF IMMIGRATION APPEALS  
(Agency)

0-NG-3491

DECISION AND ORDER  
ON NEGOTIABILITY ISSUES

April 22, 2021

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

Decision by Member Abbott for the Authority

**I. Statement of the Case**

With this case, we again remind the federal labor relations community that where a proposal addresses an event that has already occurred, we will find that the proposal is moot and dismiss the petition for review (petition).<sup>1</sup>

This case involves a dispute over the implementation of new Performance Work Plans (PWP). This matter is before the Authority on a negotiability appeal filed by the Union under § 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (Statute).<sup>2</sup> For the reasons that follow, we find the proposals moot. Accordingly, we dismiss the petition.

**II. Background**

This petition contains three proposals requesting the implementation date of the new PWPs be delayed until the new rating period begins,<sup>3</sup> until the

<sup>1</sup> See *NATCA, Loc. Zhu*, 65 FLRA 738, 739 (2011) (*Loc. Zhu*) (citations omitted).

<sup>2</sup> 5 U.S.C. § 7105(a)(2)(E).

<sup>3</sup> Pet. at 4 (Proposal 1 provides: “In an effort to facilitate any briefing or negotiation, we submit as an initial proposal to

“stay-at-home orders . . . are lifted,”<sup>4</sup> or until training has occurred.<sup>5</sup> The Union requested a written declaration of non-negotiability from the Agency over the proposals. The Agency responded stating that the proposals were nonnegotiable because they “infringe[d] on a management right,” and were outside the duty to bargain.<sup>6</sup>

On April 22, 2020, the Union filed the petition with the Authority.<sup>7</sup> On May 29, 2020, the Agency submitted a Motion to Dismiss (Motion) asserting that the proposals at issue were moot, and therefore, the petition should be dismissed.<sup>8</sup> Based on the Motion, the Authority issued an Order to Show Cause (Order) directing the Union to show cause why the Authority should not dismiss the petition as moot.<sup>9</sup> Before the Union responded to the Order, an Authority representative conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority’s Regulations.<sup>10</sup> During the PPC, both parties agreed the PWPs were implemented on April 15, 2020.<sup>11</sup> Subsequently, the Union responded to the Order, stating that the petition was not moot because the Agency “has not engaged . . . in the actual substantive work of implementing the PWPs.”<sup>12</sup> The Agency did not file a statement of position.

**III. Proposals 1, 2, and 3 are moot.**

The Agency argues the three proposals are moot because they all involve delaying an event that has already occurred—the implementation of new PWPs.<sup>13</sup> The Authority has found a proposal moot and dismissed the petition when it addresses an event that has already occurred.<sup>14</sup>

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postpone implementation of the PWPs in total until the new rating period begins October 1, 2020.”)

<sup>4</sup> *Id.* at 5 (Proposal 2 provides: “In the alternative, we propose that the PWP implementation be postponed until the stay-at-home orders for the [D.C. Metropolitan] area are lifted and the safety risks are mitigated as a result of the COVID-19 global health pandemic.”)

<sup>5</sup> *Id.* at 8 (Proposal 3 provides: “[B]efore any implementation, training must be mandated for managers required to implement the PWPs and staff on the new performance standards.”)

<sup>6</sup> Pet., Attach. 1, Agency’s Written Allegation of Nonnegotiability at 1.

<sup>7</sup> Pet. at 15.

<sup>8</sup> Mot. to Dismiss (Mot.) at 1-4.

<sup>9</sup> Order to Show Cause at 2.

<sup>10</sup> 5 C.F.R. § 2424.23.

<sup>11</sup> PPC Record (Record) at 1.

<sup>12</sup> Response to Order to Show Cause (Response) at 2.

<sup>13</sup> Mot. at 2.

<sup>14</sup> See *Loc. Zhu*, 65 FLRA at 739 (citing *NTEU, Chapter 207*, 58 FLRA 409, 410 (2003) (Chairman Cabaniss dissenting); *IFPTE, Loc. 35*, 54 FLRA 1384, 1387-88 (1998) (Member Wasserman dissenting); *NFFE, Loc. 1482*, 45 FLRA 52, 65-66 (1992)).

This case is similar to *NATCA, Local Zhu*.<sup>15</sup> In that case, the Authority dismissed two proposals as moot because the proposals “expressly require[d] the [a]gency to take certain actions prior to [an] implementation” that had already occurred.<sup>16</sup> Here, all three proposals concern delaying the implementation date of the PWPs.<sup>17</sup> During the PPC, both parties agreed that the PWPs had been implemented on April 15, 2020.<sup>18</sup> Therefore, all three proposals address an event that has already occurred—the implementation date of the PWPs.<sup>19</sup> Accordingly, we find the proposals moot and dismiss the petition.

#### IV. Order

We dismiss the Union’s petition.

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Supra* n.3, 4, and 5. At the PPC, the Union modified the wording of Proposals 2 and 3, but these modifications do not change the proposals’ meaning or mootness. *See* Record at 2.

<sup>18</sup> Record at 1. Despite the recorded agreement about the implementation date, the Union argues differently in its response to the Order. Response at 2 (arguing that the Agency “has not engaged . . . in the actual substantive work of implementing the PWPs”). The Authority holds a party to concessions made previously in the record. *See AFGF, Loc. 3342*, 72 FLRA 91, 93 (2021) (emphasizing that the union conceded before the arbitrator that the parties’ agreement gave the agency discretion); *NTEU*, 71 FLRA 1235, 1237 (2020) (then-Member DuBester dissenting) (finding the Union conceded the proposal was inconsistent with the executive order). Therefore, we hold the Union to its concession during the PPC that the PWPs were implemented in April 2020.

<sup>19</sup> At the PPC, the Union modified Proposal 3 and requested that the first sentence of the modified proposal be severed from the second sentence. Because both sentences are moot, we need not resolve the Union’s severance request. *See* Record at 2.

**Chairman DuBester, dissenting:**

I disagree that the Union's petition should be dismissed as moot. It is certainly true that the Authority has dismissed, on mootness grounds, petitions addressing events that have already occurred.<sup>1</sup> But it is also true that the "burden of demonstrating mootness is a heavy one."<sup>2</sup> And based on the limited record before us, I do not believe the Agency has met this burden.

The question of whether the Union's petition is moot was brought to the Authority's attention by the Agency's motion to dismiss. As a result of this motion, the Authority ordered the Union to show cause why its petition should not be dismissed on these grounds. And in its detailed response, the Union, describing several aspects of the Performance Work Plans (PWP) that had yet to be implemented, asserted that the Agency had implemented the PWP "in name only."<sup>3</sup>

The majority barely acknowledges the Union's response. Instead, it appears to conclude that the Union's proposals are moot based solely upon its finding that "[d]uring the [post-petition conference], both parties agreed the PWP were implemented on April 15, 2020."<sup>4</sup> But this finding discounts the specific – and contrary – factual assertions contained in the Union's response to the show cause order.

While I agree that we are entitled to rely upon statements made by a party during a post-petition conference, I also believe that we should examine *all* of the record evidence before concluding that a party has met the heavy burden of establishing that a particular dispute is moot.<sup>5</sup> And having reviewed that evidence, I would deny the Agency's motion to dismiss.

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<sup>1</sup> *NATCA, Loc. Zhu*, 65 FLRA 738 (2011).

<sup>2</sup> *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 59 FLRA 378, 380 (2003).

<sup>3</sup> Response to Order to Show Cause at 4; *see also id.* at 2-3 (describing aspects of the PWP that had yet to be implemented).

<sup>4</sup> Majority at 2.

<sup>5</sup> This is particularly true because, under the circumstances of this case, the Union arguably lacked a way to challenge the post-petition conference (PPC) record. Specifically, the parties were informed at the PPC that "if they wished to object to the content of this record, then they should include any objections in either the statement of position (for the Agency) or the response to the statement of position (for the Union)." PPC Record at 3. But the Agency never filed a statement of position, so it is unclear how the Union could have contested the portion of the PPC record upon which the majority relies other than through its response to the show cause order.