

72 FLRA No. 80

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 918
(Union)

and

UNITED STATES
DEPARTMENT OF HOMELAND SECURITY
FEDERAL PROTECTIVE SERVICE
(Agency)

0-NG-3526

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

July 9, 2021

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

I. Statement of the Case

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).¹ The petition for review (petition) involves one proposal. For the reasons that follow, we find that the proposal is bargainable only at the election of the Agency. Accordingly, because the Agency has refused to bargain over the proposal and the Union fails to demonstrate that the proposal is otherwise negotiable, we dismiss the Union's petition.

II. Background

On January 16, 2020, the Agency formally notified the Union that it wanted to renegotiate the terms of the parties' 2011 collective-bargaining agreement (CBA). Consequently, because the Agency provided the Union with this formal notice, the 2011 CBA expired and the parties began to negotiate the ground rules for bargaining a new CBA. The Agency declared one of the Union's proposals to be nonnegotiable after the Union requested a written declaration of nonnegotiability. Thereafter, the Union filed the instant petition with the Authority on July 10, 2020. At issue in the petition is a

proposal that reinstates the terms of the 2011 CBA until a new CBA goes into effect.

An Authority representative conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority's Regulations.² The Agency subsequently filed a statement of position (statement).³

III. The Proposal**A. Wording**

In accordance with Article 43(A) of the 2011 CBA between NPPD and AFGE Local 918, the automatic renewal of the CBA will not occur in 2020 because FPS Management furnished written notice to the Union on January 16, 2020 citing its desire to renegotiate the CBA. However, the 2011 CBA will remain in full force and effect until the new CBA is effective. The parties recognize this provides for continuity of operations and continues known expectations of the bargaining unit until the new CBA becomes effective.⁴

B. Meaning

At the PPC, the Union explained that "NPPD" refers to the National Protection and Programs Directorate, a former department of the Agency.⁵ Moreover, because of organizational changes, bargaining-unit employees directly report to the Agency and not NPPD.⁶ Additionally, the parties agreed that the 2011 CBA is no longer in effect because the Agency formally notified the Union of its desire to negotiate a new CBA.⁷ The parties agreed that the proposal requires the entire 2011 CBA to remain in effect—including both

² 5 C.F.R. § 2424.23.

³ On September 10, 2020, the Authority's Office of Case Intake and Publication (CIP) issued a procedural deficiency order (PDO) directing the Union to serve the Agency-head designee with the petition by September 24, 2020. PDO at 1-2. The Union then served the Agency-head designee on September 10, 2020 and cured all deficiencies. The PDO also noted that "the prescribed period for the Agency to file a statement of position on the Union's petition will not begin until the Agency-head's designee receives the Union's petition in this matter." PDO at 2. Therefore, the Agency's statement—filed on October 26, 2020—is also timely. Record of Post-Petition Conference (Record) at 2.

⁴ Pet., Attach. 2 at 1; Pet., Attach. 3, Memorandum of Agreement at 1.

⁵ Record at 2.

⁶ *Id.* at 2 n.5.

⁷ *Id.* at 2.

¹ 5 U.S.C. § 7105(a)(2)(E).

its mandatory and permissive subjects—until a successor CBA goes into effect.⁸

C. Analysis and Conclusion

The Agency argues that the proposal is non-negotiable because it is a permissive subject of bargaining that is negotiable only at the election of the Agency.⁹ Specifically, the Agency asserts that it has a unilateral right under the Statute—once an agreement expires—to terminate permissive subjects of bargaining under § 7106(b)(1) of the Statute.¹⁰ Therefore, because the waiver of a right under the Statute is itself a permissive subject of bargaining, the Agency argues that the proposal encompasses a permissive subject of bargaining and that it is non-negotiable as the Agency has elected to not bargain over the proposal.¹¹

For the reasons below, resolving the Agency’s permissive argument fully disposes of the proposal, so we need not address the Agency’s remaining arguments.

The Authority has previously held a party cannot be forced to waive its statutory rights and that a proposal requiring such a waiver constitutes a permissive subject of bargaining.¹² Furthermore, the Authority has repeatedly affirmed that, once an agreement has expired, agencies may elect to no longer be bound by provisions that concern a permissive subject of bargaining and that they may reassert their right to not negotiate said permissive subjects.¹³

Here, the Union has not filed any response to the Agency’s statement.¹⁴ Rather, the Union’s petition asserts that the proposal “seeks only to extend the contract pending negotiations” and that the Agency “fails to identify a valid non-negotiability argument.”¹⁵ However, the Authority’s Regulations clearly state that “[a] negotiability dispute exists when an exclusive representative disagrees with . . . an agency contention that a proposal is bargainable only at its election.”¹⁶ Consequently, the Agency has clearly presented a valid negotiability dispute.¹⁷ Furthermore, the Union’s petition does not otherwise explain how the proposal is negotiable even though it requires adherence to the permissive and mandatory subjects of the parties’ expired CBA.¹⁸ Under § 2424.32(c)(2) of the Authority’s Regulations, a “[f]ailure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion.”¹⁹ Accordingly, because the Union’s petition fails to rebut any of the Agency’s arguments, the Union’s failure to respond to the Agency’s statement results in a concession of the Agency’s claims.²⁰

Therefore, we find that the proposal pertains to a permissive subject of bargaining and that it is bargainable only at the election of the Agency. Additionally, because the Agency has chosen not to bargain over the proposal, it is nonnegotiable.²¹

IV. Order

We dismiss the Union’s petition.

⁸ *Id.*

⁹ Statement at 6-7. Prior to the filing of the petition, the proposal was submitted by the Agency to the Federal Service Impasses Panel (Panel) for resolution and the Agency filed an unfair labor practice (ULP) charge with the Authority alleging that the Union committed a ULP by bargaining to impasse over the proposal. *Id.* at 3. However, the Panel declined to assert jurisdiction because it maintained that “this negotiability appeal will provide a clear conclusion to this legal dispute.” *Id.* Furthermore, the ULP charge was dismissed because the Panel declined to assert jurisdiction over the dispute and the instant appeal would determine whether the Union could bargain to impasse over the proposal. *Id.* Accordingly, because a negotiability dispute is not the proper forum for addressing a ULP claim, we will not address the Agency’s request for us to find that the Union committed a ULP. *Id.* at 10.

¹⁰ *Id.* at 6-7.

¹¹ *Id.*

¹² *MSPB Pro. Ass’n*, 30 FLRA 852, 861-62 (1988) (*MSPB*); see *NTEU v. FLRA*, 399 F.3d 334, 340-43 (D.C. Cir. 2005) (reviewing, with approval, Authority precedent holding that a proposal that requires a party to waive a unilateral right must be a permissive, not mandatory, subject of bargaining).

¹³ *NTEU*, 64 FLRA 982, 985 n.4 (2010) (“Conversely, conditions concerning ‘permissive’ subjects of bargaining, that is, ‘matters which are excepted from the obligation to negotiate by § 7106(b)(1) of the Statute’ or which are ‘outside the required scope of bargaining under the Statute[.]’ do not

continue after the expiration of an agreement.”); *Dep’t of HHS, SSA*, 44 FLRA 870, 878 (1992) (“However, upon the expiration of the agreement, either party may elect [to] no longer to be bound by provisions of the agreement concerning permissive subjects of bargaining, but instead may refuse to negotiate with regard to such subjects.”); *MSPB*, 30 FLRA at 861 (“That is, either party has the right unilaterally to discontinue the practice embodied in a provision which is negotiable only at the agency’s election under section 7106(b)(1) of the Statute or which is outside the required scope of bargaining under the Statute.”); *Adjutant Gen., State of Ohio, Ohio Air Nat’l Guard, Worthington, Ohio*, 21 FLRA 1062, 1070-72 (1986).

¹⁴ Record at 2.

¹⁵ Pet., Attach. 2 at 1.

¹⁶ 5 C.F.R. § 2424.2(c).

¹⁷ Statement at 6-7.

¹⁸ Pet., Attach. 2 at 1.

¹⁹ 5 C.F.R. § 2424.32(c); *AFGE, Council 119*, 72 FLRA 63, 65-66 (2021) (Member Abbott dissenting in part); *Nat’l Nurses United*, 70 FLRA 306, 307 (2017).

²⁰ *AFGE, Council 119*, 72 FLRA at 65; *Nat’l Nurses United*, 70 FLRA at 307.

²¹ *MSPB*, 30 FLRA at 862.