72 FLRA No. 90

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

0-NG-3525

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

September 9, 2021

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

I. Statement of the Case

This case involves a dispute over proposals related to the Agency's implementation of a peer coaching initiative. 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] For the reasons that follow, we find that the Union filed a grievance alleging unfair labor practices (ULPs) that concerns issues directly related to the Union's petition for review (petition). Accordingly, we dismiss the petition without prejudice.

II. Background

The Agency notified the Union of its intent to implement an initiative involving peer coaching. The Union invoked impact and implementation bargaining over the initiative and submitted several proposals. The parties agreed on several proposals, which the Agency incorporated into a memorandum of understanding (MOU). However, the Agency asserted that four of the Union's proposals were nonnegotiable. It then implemented the initiative along with the proposals upon which the parties had reached agreement while negotiating the MOU.

On August 14, 2020, the Union filed a petition concerning the four proposals. Subsequently, the Agency filed its statement of position (statement), and the Union filed a response to the statement (response), to which the Agency filed a reply. On September 15, 2020, the Union filed a grievance alleging that the Agency violated Article 47 of the parties' collective-bargaining agreement (Article 47),[2] and § 7116(a)(1), (5), and (8) of the Statute[3] by unilaterally implementing the initiative.

On September 23, 2020, the Agency filed a motion to dismiss the Union's petition (motion) based on the grievance. An Authority representative then conducted a post-petition conference with the parties pursuant to § 2424.23 of the Authority's Regulations.[4]

III. Analysis and Conclusion: The Authority's Regulations require dismissal of the petition.

The Agency asserts in its motion that the "[t]he Union . . . filed a grievance alleging [a ULP] concerning issues directly related to its [petition]."[5] Consequently, the Authority's Office of Case Intake and Publication issued an order on October 20, 2020, (order) directing the Union to show cause why the petition should not be dismissed pursuant to § 2424.30(a) of the Authority's Regulations[6] because it may be directly related to a pending grievance.[7]

[1] 5 U.S.C. § 7105(a)(2)(E).

[2] As relevant here, Article 47 states that "[u]nless otherwise permitted by law, no changes will be implemented by the [e]mployer until proper and timely notice has been provided to the Union, and all negotiations have been completed including any impasse proceedings." Agency Mot. to Dismiss (Mot.), Attach. 1 (Grievance).

[3] 5 U.S.C. § 7116(a)(1), (5) and (8).

[4] 5 C.F.R. § 2424.23.

[5] Mot. at 4. The Agency requested leave under § 2429.26 of the Authority's Regulations, *5 C.F.R.* § 2429.26, to file its motion along with attachments, which included the Union's grievance. *Id.* at 1-4. Although the Authority's Regulations do not provide for the filing of supplemental submissions, § 2429.26 of the Regulations provides that the Authority may, in its discretion, grant leave to file "other documents" when appropriate. 5 C.F.R. § 2429.26. Because the grievance attached to the Agency's motion affects resolution of the subsequent order to show cause, Oct. 20, 2020 Order to Show Cause (Order), we find it appropriate to consider this attachment. *See, e.g.*, *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 66 FLRA 712, 714 (2012) (Member Beck dissenting on other grounds). In addition, because consideration of the remainder of the Agency's motion would not alter our decision concerning whether the petition is directly related to the grievance, we assume, without deciding, that the supplemental submission is properly before us. *U.S. DHS, U.S. CBP*, 69 FLRA 412, 414 (2016) (Member Pizzella concurring).

[6] 5 C.F.R. § 2424.30(a).

[7] Order at 1-2.

In its response to the order, the Union concedes that the grievance alleges ULPs, but argues that it is not directly related to the petition because the grievance alleges that the Agency violated Article 47 and the Statute[8] by "unilaterally severing and implementing only those provisions that were tentatively agreed to by the parties," while the petition "challenges the [Agency's] assertion that four of the proposals are illegal."[9]

Section 2424.30(a) provides that where the "exclusive representative files . . . a grievance alleging [a ULP] under the parties' negotiated grievance procedure, and the . . . grievance concerns issues directly related to the petition for review[,] the . . . Authority will dismiss the petition for review . . . without prejudice to the right of the exclusive representative to refile the petition for review after the . . . grievance has been resolved administratively . . . ."[10]

Here, the pending grievance alleges that the Agency violated Article 47 and the Statute by unilaterally implementing the initiative "during the pendency of negotiations."[11] Specifically, the grievance alleges that the Agency violated:

> Article 47 and committed [ULPs] under 5 U.S.C. § 7116(a)(1), (5), and (8) by engaging in bad faith bargaining and expressing its intent to unilaterally implement the [initiative] before the [p]arties have reached an agreement. In addition, the [Agency] violated Article 47 and committed [ULPs] under 5 U.S.C. § 7116(a)(1), (5), and (8) by insisting on piecemeal bargaining of mandatory subjects of bargaining.[12]

The pending grievance therefore concerns, in part, whether the Agency erroneously implemented the initiative before completing bargaining. It follows that in resolving the grievance, an arbitrator could determine that the Agency had no obligation to bargain over the proposals presented in the petition,[13] thereby rendering the issues raised in the Union's negotiability appeal moot. Consequently, the Union's petition and its grievance are directly related.[14]

The Union argues that even if its petition and grievance are found to be directly related, the petition should not be dismissed because the grievance was resolved administratively when the parties agreed to hold it in "abeyance."[15] The Authority has found that, *when a union withdraws*, or the *Authority resolves a ULP claim* related to a petition, the Authority will consider the petition because the ULP claim "has been resolved administratively."[16] However, the Authority has not previously found that a grievance alleging ULPs has been resolved administratively when the parties agree to hold it in abeyance. Accordingly, we reject the Union's argument on this point.

Finally, the Union states that "if the Authority finds that the [p]arties' agreement to hold the ULP-grievance in abeyance is insufficient to administratively resolve the ULP-grievance," it "requests leave to withdraw the ULP-grievance without prejudice so the [p]arties can have resolution on the negotiability of the proposals at issue."[17] Because we find that the Authority lacks the authority to grant the Union's request, we deny it.

Consequently, we dismiss the Union's petition without prejudice to the Union's right to refile the

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[8] Nov. 3, 2020 Resp. to Order to Show Cause (Resp.) at 5.

[9] *Id.* at 1. In its response, the Union contends that the Agency's motion improperly relies on statements made by the Union during informal settlement discussions. *Id.* at 4. However, because our determination that the grievance is directly related to the petition is based on the wording of the grievance itself, not the statements referenced by the Union, we need not address whether the Agency properly relied on those statements in its motion. *See supra* note 5.

[10] 5 C.F.R. § 2424.30(a).

[11] Grievance at 1.

[12] *Id.* at 2.

[13] *E.g.*, *NTEU*, 62 FLRA 267, 268 (2007) (Chairman Cabaniss dissenting, in part, on other grounds) (explaining that "where a ULP has been alleged, either through statutory ULP procedures or through a negotiated grievance procedure, those procedures are considered to be 'better suited to resolving the entire dispute' than is the negotiability procedure" and noting that at the time the petition was filed, a pending grievance supported dismissal of the petition under § 2424.30(a)) (quoting 63 Fed. Reg. 66,410 (Dec. 2, 1998)).

[14] *AFGE, Loc. 1502*, 70 FLRA 423, 424 (2018) (finding ULP charge directly related to proposals where ULP proceeding could render issue moot); *NTEU*, 69 FLRA 355, 356 (2016) (same).

[15] Resp. at 5; *see* Resp., Ex. 3.

[16] 5 C.F.R. § 2424.30(a); *NAIL, Loc.* 5, 67 FLRA 85, 86 (2012). We note that the cases upon which the Union relies for this argument apply a regulation that pre-dates the issuance of § 2424.30(a), which "replace[d] and significantly change[d]" its predecessor. 63 Fed. Reg 48,130-01 (Sept. 9, 1998). Under the previous regulation, where an exclusive representative filed both a petition and a related grievance alleging a ULP, it was required to select which action should be processed first, and the Authority would ordinarily hold the non-selected action in abeyance. However, with the enactment of § 2424.30(a), an exclusive representative "no longer ha[s] the ability to select which [action] should be processed first." *Id.*; *see* 63 Fed. Reg. 66,405. Thus, to the extent that the Union claims that holding the grievance in "abeyance" amounts to selecting which action should proceed first, the Authority's regulations no longer permit that election, and instead require that the petition be dismissed.

[17] Resp. at 6.

petition at a later time if it is able to meet the conditions governing the Authority's review of negotiability issues.[18]

IV. Decision

We dismiss the petition without prejudice.

[18] In its statement, the Agency asserted that one of the Union's proposals should be dismissed because it raised only a bargaining-obligation dispute. Statement at 17-20. Because we dismiss the Union's petition on the basis that it is "directly related" to the grievance, we find it unnecessary to resolve the Agency's argument. *Cf. AFGE, Council 53, Nat'l VA Council*, 71 FLRA 1124, 1126 (2020) (Member Abbott dissenting) ("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.").

Member Abbott, concurring:

I agree with my colleagues that § 2424.30(a) of the Authority's Regulations[1] indicates that the parties' must resolve their grievance before we will rule on the negotiability of the proposals.

Nonetheless, it seems to me that the regulation's requirement – that arbitrators, as in this case and administrative law judges (ALJs) in statutory unfair-labor-practice cases, must get the first go in determining whether a provision or proposal is or is not negotiable – amounts to an improper delegation of our statutory mandate to "resolve[] issues relating to the duty to bargain in good faith."[2] While the Federal Service Labor-Management Relations Statute identifies specific functions that may be delegated to regional directors[3] and ALJs,[4] no similar allowance is found that can be read to permit the Authority to delegate its statutory obligation to resolve bargaining and negotiability disputes to ALJs and certainly not to arbitrators.

The process adopted by the Authority with § 2424.30(a) is not just cumbersome, it abdicates one of our central statutory duties. The fact of the matter is that our answer to the question of whether or not the proposals advanced by the Union are negotiable, necessarily resolves the question of whether the Agency has a duty to bargain.

Although I join my colleagues here because of our regulation's requirement, I believe that we open a door that permits any party to challenge an adverse determination by an arbitrator or an ALJ concerning the negotiability of any proposal as an improper delegation of a responsibility that lies solely with the Authority.

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[1] 5 C.F.R. § 2424.30(a) ("[W]here an exclusive representative files . . . a grievance alleging an unfair labor practice under the parties' negotiated grievance procedure, and the charge or grievance concerns issues directly related to the petition for review filed pursuant to this part, the Authority will dismiss the petition for review.").

[2] 5 U.S.C. § 7105(a)(2)(E).

[3] *Id.* § 7105(e)(1) ("The Authority may delegate to any regional director its authority under this chapter – (A) to determine whether a group of employees is an appropriate unit; (B) to conduct investigations and to provide for hearings; (C) to determine whether a question of representation exists and to direct an election; and (D) to supervise or conduct secret ballot elections and certify the results thereof.").

[4] *Id.* § 7105(e)(2) ("The Authority may delegate to any [ALJ] appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.").