

73 FLRA No. 88

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 32
(Union)

and

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
(Agency)

0-NG-3611

DECISION AND ORDER
ON NEGOTIABILITY ISSUES

March 6, 2023

Before the Authority: Susan Tsui Grundmann,
Chairman, and Colleen Duffy Kiko, Member

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 dispute involves a proposal requiring the Agency to maintain the status quo of maximum telework – which began due to the COVID-19 pandemic (pandemic) – until the parties complete bargaining over bargaining-unit employees' (employees) return to the worksite. For the following reasons, we find the Agency has not demonstrated that the proposal is outside the duty to bargain.

II. Background

The parties began negotiating employees' return to the worksite after being on maximum telework due to the pandemic. As relevant here, the Union submitted a proposal concerning employees' telework status pending completion of bargaining on the matter. The Agency's allegation of nonnegotiability stated that “[w]hile [the proposal] is not negotiable – we are working . . . to

develop a response.”² On April 28, 2022,³ the Union filed the instant petition for review (petition).

Subsequently, the Authority's Office of Case Intake and Publication (CIP) issued an order directing the Union to serve the petition on the correct Agency representative. The Union filed a timely response to that order, indicating that it served the petition on the designated Agency representative and the Agency head on May 13.

The Union expressed interest in resolving the matter with the assistance of the Authority's Collaboration and Alternative Dispute Resolution Office (CADRO).⁴ A CADRO representative contacted the Agency and made multiple attempts to discern the Agency's interest in alternative dispute resolution (ADR). On either June 2 or 9, the Agency notified CADRO of its “final decision” not to use CADRO's services.⁵

On July 8, the Agency filed a statement of position (statement), which included a motion for an extension of time to file the statement for the period between June 20 and July 8 based on “exceptional circumstances,” as discussed further below.⁶ In its statement, the Agency indicates that when it responded on July 6 to the Authority's order directing it to appear for a post-petition conference (conference), CIP informed it that the deadline for the statement had “run on June 13, 2022.”⁷

On July 13, an Authority representative conducted a conference with the parties. On July 21, the Agency requested leave to file, and did file, a supplemental submission to correct the conference record (record). Thereafter, the Union filed a response to the Agency's statement and a motion for summary judgment (response). The Agency filed a reply to the response.

III. Preliminary Matters

A. The Agency fails to establish extraordinary circumstances warranting a waiver of the expired time limit for filing its statement.

¹ 5 U.S.C. § 7105(a)(2)(E).

² Pet., Attach.1, Extract of Agency Response (Allegation) at 1.

³ All dates hereafter occurred in 2022.

⁴ Pet. at 3.

⁵ The exact date of the Agency's decision to decline CADRO is unclear. An exhibit attached to the Agency's statement of position (Statement), Ex. A (ADR Emails) at 2, shows that the

Agency declined ADR on June 2 (“The Agency is not interested in ADR for this case.”), but the Agency asserts, in its statement and reply briefs that it declined ADR on June 9. Statement Br. at 2; Reply Br. at 5.

⁶ Statement Br. at 1-2.

⁷ *Id.* at 2.

Consistent with § 7117(c)(3) of the Statute,⁸ § 2424.24(b) of the Authority's Regulations requires the Agency to file a statement within thirty days "after the date the head of the agency receives a copy of the petition."⁹ Here, the Agency states that it received the petition on May 19.¹⁰ Based on that date, the Agency's statement was due no later than June 20. The Agency filed its statement on July 8.¹¹

As part of its statement, the Agency also filed a motion requesting an "extension of time" until July 8 to file the statement, citing, in relevant part, § 2429.23 of the Authority's Regulations.¹² Section 2429.23(a) concerns extensions of time limits and § 2429.23(b) concerns waivers of expired time limits.

Section 2429.23(a) requires that a request for an extension of time "be . . . received . . . [no] later than five (5) days *before* the established time limit for filing."¹³ The Agency's request was received after the statement's due date and, thus, is not a timely filed request for an *extension* of time.

Under § 2429.23(b), with certain exceptions not relevant here, the Authority "may waive any expired time limit . . . in extraordinary circumstances."¹⁴ Section 2429.23(b) also provides that a "[r]equest for a waiver of time limits shall state the position of the other part[y]."¹⁵ As such, the Authority has denied waiver requests that did not state the other parties' positions, as well as requests that did not establish extraordinary circumstances.¹⁶

Here, the Agency's motion does not state the Union's position,¹⁷ but asserts that extraordinary circumstances exist because it had a "good faith" belief "that the negotiability proceeding was being held in abeyance and its deadlines were tolled while the Agency was considering the request from CADRO to redirect that

dispute to ADR," based on communications with CADRO's representative.¹⁸

The record does not establish that the Agency was given any misinformation concerning filing deadlines. The Agency submits a copy of an email exchange, but that exchange does not mention abeyance or otherwise suggest that filing deadlines were tolled while the Agency considered ADR.¹⁹ Even if it had, the Authority has repeatedly held that parties are responsible for knowing statutory and regulatory filing requirements, and reliance on misinformation from an Authority representative does not constitute extraordinary circumstances.²⁰ Consequently, the Agency's argument does not present extraordinary circumstances justifying a waiver.²¹

Further, even assuming the Agency notified CADRO on June 9 of its "final decision" not to use ADR,²² the Agency still had eleven days until the June 20 deadline to file its statement. The Agency does not explain why it could not have timely requested an extension of time, or have timely filed its statement, where it was otherwise able to act "quickly . . . to complete" the statement in the two-day period after being advised by a CIP representative that the statement was untimely.²³

Based on the foregoing, we find no extraordinary circumstances justify waiving the expired time limit for the Agency to file its statement. Accordingly, we do not consider the Agency's untimely statement.²⁴

B. We do not consider the response or the reply, but we do consider the Agency's supplemental submission (submission).

Section 2424.24(a) of the Authority's Regulations requires the Agency, in its *statement*, to "supply *all* arguments and authorities in support of its

⁸ 5 U.S.C. § 7117(c)(3) ("On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition . . . , the agency shall . . . file with the Authority [its] statement . . . setting forth in full its reasons supporting [its] allegation [of nonnegotiability.].").

⁹ 5 C.F.R. § 2424.24(b).

¹⁰ Statement Br. at 1.

¹¹ *Id.* at 2.

¹² *Id.* at 1-2.

¹³ 5 C.F.R. § 2429.23(a) (emphasis added).

¹⁴ *Id.* § 2429.23(b).

¹⁵ *Id.*

¹⁶ *AFGE, Loc. 1858*, 73 FLRA 296, 297 (2022) (*Local 1858*) (citing *U.S. DOJ, Fed. BOP, Metro. Corr. Ctr., N.Y.C., N.Y.*, 67 FLRA 442, 444 (2014) (Member Pizzella dissenting on other grounds)).

¹⁷ In its response, the Union "asks the Authority to deny the Agency's motion for a request for an extension, for failure to make the request timely." Resp. Br. at 1.

¹⁸ Statement Br. at 2.

¹⁹ *Id.* at 1-2; ADR Emails at 2.

²⁰ *U.S. Info. Agency*, 49 FLRA 869, 872 (1994) (*Info*) (citing *U.S. Dep't of the Interior, Bureau of Indian Affs., Billings Area Off., Billings, Mont.*, 39 FLRA 238, 240 (1991)) ("Misinformation by an agent of the Authority as to the date for filing exceptions to an arbitration award does not constitute extraordinary circumstances warranting reconsideration of the Authority's order dismissing those exceptions."); *see also U.S. Dep't of HUD, Wash., D.C.*, 34 FLRA 307, 309 (1990) (declining to find extraordinary circumstances where party alleged it relied on misinformation from an Authority representative).

²¹ *Local 1858*, 73 FLRA at 298; *Info*, 49 FLRA at 872.

²² Statement Br. at 1-2; *see also id.* at 1 n.1; ADR Emails at 2.

²³ Statement Br. at 2.

²⁴ *NTEU*, 72 FLRA 752, 753 (2022) (*NTEU*) (Chairman DuBester concurring in relevant part, dissenting in part on other grounds) (finding statement untimely and declining to consider it).

position.”²⁵ As discussed above, we do not consider the Agency’s untimely statement. However, the Authority has held that it will consider arguments raised in an allegation of nonnegotiability when an agency fails to timely file its statement.²⁶ Here, the Agency’s allegation of nonnegotiability only states that “[w]hile [the proposal] is not negotiable – we are working . . . to develop a response.”²⁷ Therefore, the Agency’s allegation provides no arguments as to why the proposal is outside the duty to bargain.

Section 2424.25(a) of the Authority’s Regulations provides that the purpose of a union response is for the union “to inform the Authority and the agency why, despite the agency’s arguments in its statement of position, the proposal . . . is within the duty to bargain or not contrary to law, respectively, and whether the union disagrees with any facts or arguments in the agency’s statement of position.”²⁸ Here, the Union’s response addresses arguments made in the Agency’s untimely statement.²⁹ Because we do not consider the Agency’s statement and the Agency’s allegation of nonnegotiability contains no explanation as to why the proposal is outside the duty to bargain, there are no legal arguments before the Authority to which the Union must respond. Accordingly, we do not consider the Union’s response.³⁰

The limited purpose of an agency reply is for an agency to explain why it “disagrees with any facts or arguments made for the first time in the [union’s] response.”³¹ As we do not consider the Union’s response, we also do not consider the Agency’s reply.³²

However, the record both states that the parties may file objections to its content in a supplemental

submission and directs the parties to file such objections in their subsequent filings to the Authority.³³ In both its submission and its reply, the Agency raises objections to the record.³⁴ Because we do not consider the Agency’s reply, we find it appropriate to consider the Agency’s submission.

IV. The Proposal

A. Proposal

1. Wording

Data (RS has improved 147%) has shown OPM bargaining unit employees were more productive during this pandemic and for that reason OPM bargaining unit employees should remain on current pandemic schedules until bargaining is complete on return to the building[.]³⁵

2. Meaning

The Union explains that the proposal’s purpose and operation is to maintain the status quo of maximum telework for approximately 700 employees in multiple program offices in the Washington, D.C. metropolitan area until the parties reach a memorandum of agreement (MOA) – or, absent an agreement, until the Federal Service Impasses Panel (FSIP) issues a decision – regarding employees’ return to their physical worksites.³⁶ The Union further explains that the phrase “until bargaining is complete” means until there is a signed MOA or a FSIP decision concerning the terms of

because a union is entitled to reserve its legal arguments for its response. *AFGE, Loc. 1547*, 64 FLRA 642, 643 n.4 (2010) (*Loc. 1547*) (Member Beck dissenting in part on other grounds) (citations omitted). Here, however, there are no legal arguments to which the Union must respond in order to preserve its position that the proposal is negotiable. Thus, the circumstances under which the Authority might nevertheless consider a response, even in the absence of a statement of position, are not present in this case.

³¹ 5 C.F.R. § 2424.26(a).

³² See *AFGE, Loc. 4052*, 65 FLRA 720, 721 (2011) (finding “no reason for the Authority to consider the reply” where it did not consider response (citing *IFPTE, Loc. 29, Goddard Eng’rs, Scientists & Technicians Ass’n*, 61 FLRA 382, 383 (2005))).

³³ Record (Rec.) at 3.

³⁴ Reply Br. at 1.

³⁵ Pet. at 4.

³⁶ Rec. at 2. The parties agreed that “building” referred to “the physical worksite or duty stations” and that “RS” refers to the “retirement services” office within the Agency. *Id.* The Agency stated that, contrary to the description in the record, all of the relevant program offices are located in the same building in Washington, D.C. Submission at 3 n.1.

²⁵ 5 C.F.R. § 2424.24(a) (emphasis added).

²⁶ *NTEU*, 72 FLRA at 753 (citing *AFGE, Loc. 997*, 66 FLRA 499, 499-500 (2012)). Chairman Grundmann acknowledges that, under extant precedent, the Authority will consider statements raised in an allegation when an agency has failed to timely file a statement. She reserves judgment on whether that precedent is rightly decided. However, in order to form a majority opinion and avoid an impasse in the resolution of this case, she agrees to apply that precedent. For the reasons discussed below, she also agrees that the assertions in the Agency’s allegation do not demonstrate that the proposal is outside the duty to bargain.

²⁷ Allegation at 1. The Agency attached, as an exhibit to its statement, a subsequent allegation asserting that the proposal was nonnegotiable because it affected management’s rights to assign work and direct employees under § 7106(a)(2)(A) and (B) of the Statute. However, because we do not consider the Agency’s statement, we do not consider this exhibit.

²⁸ 5 C.F.R. § 2424.25(a).

²⁹ Resp. Br. at 3-6.

³⁰ 5 C.F.R. § 2424.25(a); see *AFGE, Loc. 3354*, 54 FLRA 807, 808 n.1 (1998) (declining to consider union response where agency statement of position was untimely). The Authority has previously noted that “[w]here no [statement of position] is considered, the Authority may nevertheless consider a response”

such a return.³⁷ The Union also explains that “improved 147%” refers to the increase in productivity by the Agency’s retirement services office while employees were on maximum telework.³⁸

The Agency disagrees with several of the Union’s explanations.³⁹ However, where, as here, parties dispute aspects of a proposal’s meaning, the Authority will find it unnecessary to resolve those disputes if they do not affect the negotiability analysis.⁴⁰

3. Analysis and Conclusion

An agency’s “[f]ailure to raise and support an argument will, where appropriate, be deemed a waiver of such argument.”⁴¹ As discussed previously, the Agency’s allegation of nonnegotiability merely states that the proposal “is not negotiable,” without elaboration,⁴² and we do not consider the more specific arguments in the Agency’s untimely statement and its reply. Therefore, the Agency fails to support its nonnegotiability argument, and we conclude that the proposal is within the Agency’s duty to bargain.⁴³

V. Order

The Agency shall, upon request, or as otherwise agreed to by the parties, bargain over the proposal.

³⁷ Rec. at 2.

³⁸ *Id.*

³⁹ The Agency disputes what “147%” references, *id.*, the meaning of “until bargaining is complete,” *id.*, and whether the proposal is intended “to bargain the frequency of telework.” Submission n at 3.

⁴⁰ See, e.g., *Antilles Consol. Educ. Ass’n*, 73 FLRA 282, 283 n.4 (2022); *AFGE, Council of Prison Locs. 33, Loc. 506*, 66 FLRA 819, 828 n.9 (2012), *enforced in part, rev’d and remanded in part on other grounds sub nom. U.S. DOJ, Fed. BOP, Fed. Corr. Complex, Coleman, Fla. v. FLRA*, 737F.3d779 (D.C. Cir. 2013), *decision on remand, AFGE, Council of Prison Locs. 33, Loc. 506*, 67 FLRA 694 (2014); *NTEU*, 60 FLRA 219, 222 (2004).

⁴¹ 5 C.F.R. § 2424.32(c)(1); see *AFGE, Loc. 940*, 71 FLRA 415, 415-16 (2019) (*Local 940*) (citing 5 C.F.R. § 2424.32(c)(1)) (finding agency waived argument that proposal was contrary to law where agency failed to file a statement of position and its allegation of nonnegotiability failed to support assertion that proposal was contrary to § 7106(a)(2)(B) of the Statute); see also *Loc. 1547*, 64 FLRA at 642-43 (finding union conceded proposals were nonnegotiable because Authority did not consider untimely response to agency’s statement of position); *AFGE, Loc. 801*, 64 FLRA 62, 64 (2009) (same).

⁴² Allegation at 1.

⁴³ *AFGE, Council 170*, 72 FLRA 250, 251 (2021) (Chairman DuBester concurring) (finding proposals within duty to bargain where agency failed to support argument that proposals were nonnegotiable); *Local 940*, 71 FLRA at 415-16 (granting petition for review where agency failed to file statement of position and thus waived argument that proposal was nonnegotiable).