

64 FLRA No. 27

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 238
(Union)

and

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
(Agency)
0-NG-2827

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

October 29, 2009

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This case 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 (the Statute) and concern the negotiability of six proposals. Initially, the petition for review was dismissed without prejudice when the Union informed the Authority that a related unfair labor practice (ULP) charge and a related grievance alleging a ULP had been filed. Later, after the ULP was dismissed and an award issued on the grievance, the Union filed a request asking the Authority to reinstate the petition. As both the “ULP charge and the grievance [were] resolved” the Authority “reopen[ed] the negotiability appeal.” November 7, 2006 Order at 2 (November 7 Order). During the same time, the Agency filed exceptions to the arbitrator’s award on the grievance.¹

1. Simultaneously with this issuance, a decision on these exceptions was issued on October 29, 2009. *See United States Envtl. Prot. Agency, N.Y., N.Y.*, 64 FLRA No. 28 (October 29, 2009) (*EPA*). Pursuant to § 2429.5 of the Authority’s Regulations, the Authority may take official notice of such matters as would be proper. Because *EPA* involves the same parties and bears upon the disposition of the procedural issue involved here, we take official notice of documents contained in that case that are relevant to the resolution of the instant case. *See, e.g., Social Sec. Admin., Office of Hearings and Appeals, Region II, Buffalo Office of Hearings and Appeals, Buffalo, N.Y.*, 58 FLRA 722, 724 n.6 (2003).

Subsequent to the reinstatement of the appeal, procedural issues arose concerning the timeliness of the request to refile the petition for review and a filing deficiency. For the following reasons, we dismiss the petition for review as untimely.

II. Background

The Union filed a petition for review with the Authority on March 25, 2005. The Agency filed a statement of position (SOP) in response and the Union filed a response (Union Response) to the SOP. The Agency then filed a reply (Reply) to the Union Response.

In its Reply, the Agency asserted that the petition for review should be dismissed as the proposals are “moot.” Reply at 3. Accordingly, the Authority issued an Order to Show Cause on June 17, 2005 (June 17 Order), directing the Union to show cause why its petition for review should not be dismissed. Thereafter, during the processing of the petition, the Union notified the Authority that it had filed a related ULP charge and that it had also filed a grievance which is related to the petition for review. Thereafter, on August 24, 2005, the Authority dismissed the petition for review because it was related to a pending ULP charge and a grievance. *See August 24 Order*. The dismissal was without prejudice to the Union’s right to refile the petition for review after both the ULP charge and the grievance were resolved administratively. 5 C.F.R. § 2424.30(a).

Subsequently, by letter dated October 25, 2006, the Union requested the Authority to resume processing the petition for review. The Union advised the Authority that the ULP charge was resolved on May 19, 2006, when the General Counsel denied its appeal of the Regional Director’s (RD) decision not to issue a complaint in Case No. BN-CA-05-0362.² The Union also advised the Authority that on October 6, 2006, the arbitrator issued an award on the related grievance. Following several orders and responses addressing various procedural issues, the Authority issued an Order to Show Cause (February 23 Order) directing the Union to show cause why its petition should not be dismissed as untimely. The February 23 Order stated that the Union had withdrawn the ULP allegations from the grievance on July 5, 2006 and that “[a]lthough the Agency filed exceptions to the award, it appears that the award does not resolve any ULP allegations.” February 23 Order at 2. Therefore, according to the February 23 Order, the Union’s request to reinstate the petition had to be filed

2. The RD found evidence sufficient to establish a violation by the Agency of its bargaining obligation, but for reasons of “prosecutorial discretion” determined not to issue a complaint.

with the Authority “no later than 30 days from the date the portions of the grievance alleging ULPs were resolved, that is, August 4, 2006.” *Id.* The February 23 Order stated that the Union’s request, however, was filed (postmarked) on October 25, 2006.

The Union filed a timely response to the February 23 Order. The essence of the Union’s response is set out below.

III. Union’s Response to the February 23 Order ³

The Union asserts that the Authority is improperly construing 5 C.F.R. § 2424.30. *See* Response to February 23 Order (February 23 Response) at 2.

In this regard, the Union contends that it should not be “penalized for the lack of clarity in [the Authority’s August 24] Order[.]” dismissing the initial petition for review without prejudice. *Id.* at 5. The Union asserts that it followed the Authority’s order. The Union contends that it waited until both the ULP charge and the grievance “[were] resolved administratively,” before filing its request to reinstate the instant petition. *Id.* (quoting August 24 Order). In this regard, the Union contends that the “clear and unambiguous wording of . . . 5 C.F.R. § 2424.30 does not require the Union to refile [its petition] until after the grievance is resolved in full”⁴ *Id.* at 5. The Union argues that “[t]here is nothing in [the regulation that indicates] if a ULP issue . . . is resolved or withdrawn before all the issues in the grievance are resolved, the Union must refile its petition for review within 30 days of that event.” *Id.* at 3. The Union asserts that the underlying grievance to the ULP allegation “is still not resolved because the Agency filed an exception” that is pending with the Authority in *EPA*. *Id.* at 5. The Union claims that because the ULPs were resolved and withdrawn “from consideration by the arbitrator on July 5, 2006,” did not mean that the Union was not free to refile its [petition for review] at that time. Rather, according to the Union, it could “only . . . seek reinstatement of its petition for review when *both*

the [ULP] issues raised in the grievance and all other *issues directly related to the petition for review* were resolved. *Id.* at 6 (emphasis in original). The Union thus argues that its request to reinstate its petition is not late, but instead is premature.

The Union also claims that the “clear and unambiguous wording” of 5 C.F.R. § 2424.30(b)(2) required the Authority in its June 17 Order to “inform the Union that it could avail itself of the opportunity to file a ULP or grievance[.]” but the Authority did not do so. *Id.* at 3. The Union thus contends that as the Authority “cannot adhere” to “clear and unambiguous wording” in its regulations, the Authority should not deny the Union the right to have its petition addressed “due to the Union’s misunderstanding of a regulation that does not directly address the situation” presented here. *Id.*

The Union next asserts that the Authority issued the June 17 Order because the Agency claimed that it had no obligation to bargain under the parties’ agreement. Citing *AFGE, Local 3529*, 57 FLRA 172, 176 (2001), the Union asserts that since Authority precedent “precludes the Authority from resolving a contractual bargaining obligation dispute within the negotiability appeal forum[.]” the Authority could have “ignored” the Agency’s mootness claim and issued a negotiability decision or “awaited the ruling of the arbitrator” and then determined whether resolution of the petition was still required. *Id.* at 4. The Union also claims that the petition should not be dismissed because the Authority never ruled on the mootness claim. Additionally, the Union claims that as ground rules for the parties’ negotiations remain outstanding it would be contrary to the requirement that the Statute be interpreted in an effective and efficient manner for the Authority to dismiss the petition for review.

Based on its arguments, the Union requests the Authority to find its petition for review timely filed and place it “in abeyance” until *EPA* is resolved. *Id.* at 7.

IV. Analysis and Conclusions

The Union contends that its request to refile the petition for review is not untimely under § 2424.30(a) of the Authority’s Regulations because § 2424.30 does not require the refiling of the petition until “after the grievance is resolved in full” Response to February 23 Order at 5. We find, for the reasons discussed below, that the petition for review is untimely.

3. The Agency did not file any submissions addressing the timeliness issue. However, it is noted that in *EPA*, the Agency asserted that the “day prior to the [arbitration] hearing, July 5, 2006, the Union dropped [the ULP] claim so that the only issue before the Arbitrator was one of contractual interpretation.” Exceptions in *EPA* at 10 n.8 and Attachment 9, a copy of the Union’s e-mail withdrawing the ULP claim. The Agency asserted that if the time for filing the petition for review is based on the date that the Union withdrew the ULP then it is untimely.

4. The pertinent text of 5 C.F.R. § 2424.30 is set forth in the Appendix to this decision.

Section 2424.30 of the Authority's Regulations establishes procedures for resolving petitions for review that concern both negotiability and bargaining obligations disputes.⁵

The Union asserts that the wording of § 2424.30(a) does not state that the withdrawal of a ULP allegation from a pending grievance triggers the refiling time requirement, and that § 2424.30(a) could be interpreted to mean that a union is not "require[d] . . . to refile [its petition] until after the grievance is resolved in full . . ." Response to February 23 Order at 5. Contrary to the Union's claim, the reference in § 2424.30(a) to "the . . . grievance[.]" encompasses only "a grievance alleging an unfair labor practice under the parties' negotiated grievance procedure[.]" 5 C.F.R. § 2424.30(a). Thus, once a grievance alleging a ULP that "concerns issues directly related to the petition for review" has been "resolved administratively[]" — ULP allegation withdrawn from grievance — the Union has 30 days to refile its petition for review.

In the instant case, on July 5, 2006, the Union withdrew the ULP allegations, which concerned issues "directly related to the [p]etition for [r]eview," from the grievance. As the ULP allegations were withdrawn, the grievance, as it concerns the ULP allegations was resolved administratively within the meaning of § 2424.30(a), and thus the grievance no longer concerned ULP allegations directly related to the petition for review. See, e.g., *NTEU*, 59 FLRA 978, 978 (2004) (withdrawal of ULP allegation precluded the grievance from being directly related to the petition for review). As such, the Union's request to reinstitute the petition is not premature, but is untimely. In this respect, after the Union withdrew the ULP allegations from the grievance on July 5, 2006, the only issues to be decided by the Arbitrator were whether the grievance was arbitrable and the "interpretation of the [parties' collective bargaining] Agreement[.]" *EPA*, award at 3. Although the Agency filed exceptions, the award did not resolve any ULP allegations. See *id.* award at 28 and Agency's exceptions to that award, Attach. 9.

As a result, the Union's request to refile its petition for review had to be filed no later than 30 days from the date when the Union withdrew the ULP allegations from the grievance — July 5, 2006. Thus, in order to be

timely, the Union's request had to be postmarked by the United States Postal Service, filed in person, or received from commercial delivery with the Authority no later than 30 days from the date the ULP allegations were withdrawn — August 4, 2006. See 5 C.F.R. §§ 2424.30(a), 2429.21(b) and 2429.24(e). The Union's request was filed with the Authority by mail (post-marked) on October 25, 2006. Accordingly, the Union's petition for review is untimely filed.

We reject the Union's claim that the Authority's June 17 Order provides a basis for granting its request to refile the petition for review. The Union asserts that the wording of § 2424.30(b)(2) required the Authority in the June 17 Order to inform the Union that it could file a ULP or grievance, but instead the Authority ordered it to show cause why its petition for review should not be dismissed as moot. Section 2424.30(b)(2) of the Authority's Regulations provides, in pertinent part, that "[w]here a bargaining obligation dispute exists . . . the Authority will inform the exclusive representative of any opportunity to file an unfair labor practice charge . . . or a grievance under the parties' negotiated grievance procedure and, where the exclusive representative pursues either of these courses, proceed in accordance with paragraph (a) of this section." 5 C.F.R. 2424.30(b)(2). Mootness is a threshold jurisdictional issue. See *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 59 FLRA 378, 380 (2003). The June 17 Order provided the Union an opportunity to respond to the Agency's assertion that the proposals contained in the petition for review were moot before the Authority ruled on the matter. This order was issued before the Authority was notified that the Union had filed a ULP charge. See August 2 Order. Thus, there is no basis for the Union's claim concerning § 2424.30(b)(2). Moreover, in the April 1, 2005 Order of Notice of Time for Post-Petition Conference to the parties and in the August 2 Order, the Authority informed the Union of the right to file a ULP charge or grievance pursuant to § 2424.30. As to the Union's contention that the Authority could have ignored the Agency's mootness claim or awaited the ruling of the arbitrator, as mentioned above, mootness is a threshold jurisdictional issue. See, e.g., *Int'l Fed'n of Prof'l and Technical Eng'r, Local 35*, 54 FLRA 1384, 1387-88 (1988) (petition for review dismissed where proposal found moot).

Accordingly, the petition for review is dismissed with prejudice.⁶

5. A bargaining obligation dispute arises when the parties disagree on whether there is a duty to bargain over an otherwise negotiable proposal in light of the specific circumstances in that case. A negotiability dispute arises where the parties disagree on the legality of a proposal or provision. See 2424.2 of the Authority's Regulations.

6. In view of this determination, it is unnecessary to address the Union's remaining assertions.

V. Order

The petition for review is dismissed.

APPENDIX

Section 2424.30 of the Authority's Regulations provides, in pertinent part, as follows:

§ 2424.30(a) Procedure through which the petition for review will be resolved.

(a) *Exclusive representative has filed related unfair labor practice charge or grievance alleging an unfair labor practice.* Except for proposals or provisions that are the subject of an agency's compelling need claim under 5 U.S.C. 7117(a)(2), where an exclusive representative files an unfair labor practice charge pursuant to part 2423 of this subchapter or 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. The dismissal will be without prejudice to the right of the exclusive representative to refile the petition for review after the unfair labor practice charge or grievance has been resolved administratively, including resolution pursuant to an arbitration award that has become final and binding. No later than thirty (30) days after the date on which the unfair labor practice charge or grievance is resolved administratively, the exclusive representative may refile the petition for review, and the Authority will determine whether the resolution of the petition is still required.

(b) *Exclusive representative has not filed related unfair labor practice charge or grievance alleging an unfair labor practice.* Where an exclusive representative files only a petition for review under this part, the petition will be processed as follows:

....

(2) *A bargaining obligation dispute exists.* Where a bargaining obligation dispute exists in addition to the negotiability dispute, the Authority will inform the exclusive representative of any opportunity to file an unfair labor practice charge pursuant to part 2423 of this subchapter or a grievance under the parties' negotiated grievance procedure and,

where the exclusive representative pursues either of these courses, proceed in accord with paragraph (a) of this section. If the exclusive representative does not file an unfair labor practice charge or grievance, the Authority will proceed to resolve all disputes necessary for disposition of the petition unless, in its discretion, the Authority determines that resolving all disputes is not appropriate