71 FLRA No. 227

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 779
(Union)

and

UNITED STATES
DEPARTMENT OF THE AIR FORCE
SHEPPARD AIR FORCE BASE
(Agency)

0-NG-3448

_____

DECISION

December 14, 2020

_____

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

I. Statement of the Case

In this case, we find that the Union's petition for review (petition) seeks review of one proposal based on an unsolicited allegation of nonnegotiability made by the Agency. Because the petition was filed more than fifteen days after the Agency provided the unsolicited allegation of nonnegotiability, the petition is untimely. Thus, we dismiss the petition without prejudice to the Union's right to refile.

II. Background

In March 2018, the Agency notified the Union that it intended to implement changes to the dress code. The parties then engaged in bargaining and mediation over the dress code, but were unable to reach agreement on whether "shorts" were prohibited attire.[1] On October 30, the Agency stated in an email that the parties had reached impasse and that it planned to implement the dress code on November 8, 2018 (the October email).

On November 2, 2018 the parties exchanged emails regarding the apparent bargaining impasse and the Agency stated that it would implement the dress code (November email). Specifically, the Agency stated that "[m]anagement's rights to assign work[] and to determine the technology, methods, and means of performing work is not subject to the employees not wanting to comply."[2] The Union then filed a request for assistance with the Federal Service Impasses Panel (the Panel) on November 16, 2018.[3]

In a decision issued April 4, 2019, the Panel stated that the Agency had raised a negotiability issue, alleging in its post-hearing brief that the Union's proposal "interferes with management's right to proscribe the method and means of performing work."[4] The Panel directed the parties to provide case law addressing the negotiability of the Union's proposal. When neither party did so, the Panel withdrew jurisdiction over the Union's proposal.[5]

The Union then filed its petition for review on May 10, 2019. As part of its petition, the Union noted that there was a related Panel proceeding and attached the October 30 email as the Agency's written allegation that the proposal is nonnegotiable.

On July 5, 2019, the Authority's Office of Case Intake and Publication (CIP) issued a deficiency order requiring the Union to serve the proper Agency-head designee and Agency representative. The response was due on July 19, 2019. On July 22, 2019, after contacting CIP regarding technical problems, the Union filed its response and served a copy of its petition on the proper Agency-head designee and Agency representative.[6]

On November 18, 2019, CIP issued an order requiring the Union to show cause why its petition should not be dismissed (order) because (1) the October email did not demonstrate that the Agency had declared a proposal nonnegotiable and (2) the Union had not shown that it had requested a written allegation and waited more than ten days without an Agency response. The order also directed the Union to provide the exact wording of its proposal.

On December 2, 2019, the Union timely filed its response to the order. In its response, the Union provided

[1] Pet., Attach. at 1.

[2] Union Resp. to Order to Show Cause (Order) at 1.

[3] *In the Matter of U.S. Dep't of Air Force, Sheppard Air Force Base*, 19 FSIP 10, at 1, 3 (2019).

[4] *Id.* at 4 (emphasis omitted).

[5] *Id.* at 4-5.

[6] The deficiency order stated that a failure to timely comply with the order "may result in dismissal" of the Union's petition. Deficiency Order at 2. However, the subsequent Order did not direct the Union to show cause why its petition should not be dismissed for failure to timely comply with the deficiency order. Because the Union did not have an opportunity to address that issue in its response to the Order, and the Authority's Regulations do not require dismissal of a petition for untimely compliance with a deficiency order, we consider the Union's petition.

the proposal's wording and the November email as evidence of the Agency's written declaration of nonnegotiability.

III. Analysis and Conclusion: The Union's petition must be dismissed.

Under § 7117 of the Federal Service Labor-Management Relations Statute (the Statute), and § 2424.2 of the Authority's Regulations, the Authority will consider a petition for review of a negotiability dispute only when it has been established that the parties are in dispute as to whether a proposal is inconsistent with law, rule, or regulation.[7] A union may file a petition for review with the Authority: (1) within fifteen days after receiving a written allegation concerning the duty to bargain from the Agency; or (2) after ten days if the Union requests that the Agency provide it with a written allegation concerning the duty to bargain and the Agency does not respond.[8] Absent either condition, the petition is not properly before the Authority and must be dismissed.[9]

Here, the record does not show that the Union requested that the Agency provide it with a declaration that its proposal was non-negotiable. However, in the November email, the Agency alleged that the Union's proposal concerned the Agency's right to determine the technology, methods, and means of performing work, a permissive subject of bargaining under § 7106(b)(1) of the Statute. The Authority has held that, under the Authority's Regulations, "when an agency contends 'that a proposal is bargainable only *at its election*,' '[a] *negotiability dispute exists*.'"[10] Therefore, we find that the November email was an unsolicited allegation that the Union's proposal concerned a permissive subject of bargaining. Consequently, the Union could file a petition to challenge that allegation.[11]

The remaining question is whether the Union's petition is timely. Under § 2424.11(c) of the Authority's Regulations, a union is not required to file a negotiability petition in response to an agency's unsolicited allegation of nonnegotiability, but if it chooses to do so, it must file within fifteen days.[12] Therefore, the Union was not required to file its petition after receiving the November email and could instead elect to ignore the Agency's unsolicited allegation and continue bargaining.[13]

The record indicates that the parties continued the collective-bargaining process by participating in proceedings before the Panel. The Authority has found that an agency's unrequested allegation "made in a . . . brief in the context of a Panel proceeding and served upon the union . . . could constitute an 'allegation' for the purpose of appeal to the Authority."[14] It is unclear from the record when the Agency submitted its post-hearing brief containing its allegation of nonnegotiability to the Panel, but that brief must have been submitted before the Panel issued its decision on April 4, 2019. Thus, the Union's petition, filed on May 10, 2019, was clearly filed more than fifteen days after it received the Agency's unsolicited allegation of nonnegotiability during the Panel proceedings.[15]

Accordingly, we find that the Union's petition is untimely and must be dismissed. However, under Authority precedent,[16] the dismissal is without prejudice to the Union's right to refile.[17] That is, if the matter proposed to be negotiated continues to be in dispute between the parties, the Union may request that the Agency provide it with a written allegation of nonnegotiability and may then file a petition for review in accordance with § 2424.21 of the Authority's Regulations.[18]

IV. Decision

The Union's petition is dismissed without prejudice.

---

[7] 5 U.S.C. § 7117; 5 C.F.R. § 2424.2(c).
[8] 5 C.F.R. § 2424.21.
[9] *See NFFE, Local 2050*, 33 FLRA 877, 877-78 (1989) (citing *Indep. Letterman Hosp. Workers' Union*, 29 FLRA 456, 456-57 (1987)).
[10] *NFFE, Local 1998*, 71 FLRA 417, 420 (2019) (Member Abbott dissenting in part) (citing 5 C.F.R. § 2424.2(c)).
[11] *AFGE, AFL-CIO, Local 1858*, 10 FLRA 499, 501 (1982) (*Local 1858*).
[12] 5 C.F.R. §§ 2424.11(c); 2424.21(a)(1).
[13] *See NFFE, Int'l Ass'n of Machinists & Aerospace Workers, Fed. Dist. 1, Fed. Local 1998*, 69 FLRA 586, 588 (2016) (Member Pizzella concurring, in part, and dissenting, in part).
[14] *Local 1858*, 10 FLRA at 500 (citing *Int'l Bhd. of Elec. Workers, AFL-CIO, Local 121*, 10 FLRA 198, 199 (1982) (stating that "impasse resolution procedures of the Panel operate as one aspect of the collective bargaining process" and therefore, "the [a]gency and the [u]nion herein were involved in the collective bargaining process when the Agency submitted its allegation of nonnegotiability" in its pre-hearing brief).
[15] 5 C.F.R. § 2424.21(a).
[16] Chairman Kiko notes that she joins in this decision because it is consistent with the Authority's Regulations and *Local 1858*. Nevertheless, Chairman Kiko agrees with the dissent that the Authority should reexamine its Regulations, particularly 5 C.F.R. § 2424.21, to ensure that negotiability proceedings are not drawn out indefinitely and inefficiently.
[17] *Local 1858*, 10 FLRA at 501 n.*.
[18] 5 C.F.R. § 2424.21.

Member Abbott, dissenting:

As I have stated before,[1] the Majority's decision is quite successful if its purpose is to take a dispute off the Authority's docket and proverbially kick the can down the road. However, it is not at all successful if, as the statute suggests, our purpose is "to facilitate[] and encourage[] the amicable settlement" of disputes that are festering between the parties.[2]

I do not agree with the Majority's decision to dismiss this case and allow the Union the right to refile this negotiability dispute. The parties have been disputing whether "shorts" were permissible attire since 2018.[3] In 2018, the parties availed themselves of the Federal Service Impasses Panel (the Panel), and the Panel directed the parties to provide case law addressing the negotiability of the Union's proposal. Neither party responded to the Panel's order. Nearly two and a half years later, the parties are no closer to resolution. And, under the Authority's decision today, the Union can bring this dispute back later before the Authority.

Under the Statute, the Authority is charged with "provid[ing] leadership in establishing policies and guidance relating to matters under this chapter."[4] In what appears to be expert gamesmanship by the Union – not responding to the Panel's order, failing to serve the proper Authority representative, missing a filing deadline, and dispute over whether an email was a declaration of nonnegotiability – the Majority's decision determines that, "if the matter proposed to be negotiated continues to be in dispute between the parties, the Union may request that the Agency provide it with a written allegation of nonnegotiability and may then file a petition for review in accordance with § 2424.21 of the Authority's Regulations."[5] So, despite missing another filing deadline, the Majority gives the Union the opportunity to refile should the parties continue to dispute over whether "shorts" constitute permissible attire. Perhaps it is time we reexamine Authority regulations which permit these dilatory tactics used by parties. Accordingly, I dissent and would dismiss the Union's petition with prejudice.

---

[1] *See AFGE, Council 53, Nat'l VA Council*, 71 FLRA 1124 (2020) (Member Abbott dissenting) (holding there was no negotiability dispute and dismissing the Union's petition without prejudice).

[2] *Id.* at 1126 (Dissenting Opinion of Member Abbott) (citing 5 U.S.C. § 7101(a)(2)(C)).

[3] Pet., Attach. at 1.

[4] 5 U.S.C. § 7105(a)(1).

[5] Majority at 4.