

71 FLRA No. 229

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
(Union)

and

UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS
(Agency)

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DECISION AND ORDER
DISMISSING PETITIONS FOR REVIEW

December 21, 2020

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

I. Statement of the Case

On September 2, 2020, the Authority issued an order directing the Union to show cause why the above-captioned cases should not be dismissed for failure to meet the conditions governing review of negotiability appeals. The Union filed a timely response to the Authority's order. For the reasons that follow, the Union's petitions are dismissed, without prejudice to the right to refile, for failing to meet the conditions governing review of negotiability appeals.

II. Background

The record indicates that the Union filed twenty separate negotiability appeals with the Authority on July 5, 2020. Each of the Union's twenty appeals contain one proposal and all twenty proposals are related. On August 7, 2020 the Agency filed a motion and a statement of position (statement) for each petition.¹ In its statement, the Agency withdrew its allegation of nonnegotiability for all of the proposals involved in these cases.² Further, the Agency stated that it "[w]aive[s] all challenges to the negotiability of the proposals . . . identified in this case."³

On September 16, 2020, the Union filed a response to the Authority's show-cause order. In its response, the Union argues that the Agency's "waiver of its allegations constitutes a concession that the Union's proposals are negotiable."⁴ The Union further argues that the same proposals are pending before the Federal Service Impasses Panel and that the Union is prejudiced by the Agency waiving its allegation because bargaining cannot continue if its petitions are dismissed.⁵

III. Analysis and Conclusion

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.⁶ The regulations define a "[n]egotiability dispute" as a "disagreement between a[] [union] and an agency concerning the legality of a proposal or provision."⁷ The Authority may dismiss a petition for review when the agency does not allege that a proposal is inconsistent with any law, rule, or regulation.⁸

The Union's response to the Authority's show-cause order does not identify how the conditions governing the review of negotiability appeals are met. The Union fails to present any evidence that the Agency is contending that any of the proposals are contrary to law, rule, or regulation or permissively negotiable. Instead, the Union argues that since the Agency conceded

¹ The Agency filed identical statements for each case.

² Statement at 4.

³ *Id.*

⁴ Union's Resp. to Show-Cause Order at 3.

⁵ *Id.* at 6.

⁶ 5 U.S.C. § 7117; 5 C.F.R. § 2424.2.

⁷ 5 C.F.R. § 2424.2(c) (also stating that a "negotiability dispute exists when a[] [union] disagrees with an agency contention that . . . a proposal is outside the duty to bargain").

⁸ *See, e.g., Prof'l Airways Sys. Specialist MEBA/NMU*, 53 FLRA 1246, 1248-49 (1998).

that the proposals are negotiable, the Authority should order the Agency to bargain.⁹

As set forth in § 7117(c) of the Statute, an agency “shall file . . . a statement withdrawing the allegation[,] or setting forth in full its reasons for supporting the allegation.”¹⁰ The Authority has held that when an agency does not present arguments in its statement of position regarding the negotiability of the proposals, it is effectively withdrawing its allegation of nonnegotiability.¹¹

In its statement, the Agency “[w]aive[d] all challenges to the negotiability of the proposals . . . identified in this case.”¹² To the extent that the Agency previously declared any of the Union’s proposals nonnegotiable it has withdrawn those challenges¹³ by abandoning them before the Authority.¹⁴ Because there is no dispute between the Union and the Agency concerning the legality of the proposals, the conditions for a negotiability appeal have not been met.

IV. Decision

The Authority dismisses the Union’s petitions without prejudice¹⁵ to the right to refile.¹⁶

⁹ Union’s Resp. to Show-Cause Order at 3 (citing *U.S. Dep’t of VA, Phila. Reg’l Office*, 71 FLRA 415 (2019) (*VA Phila.*)). However, in *VA Phila.*, the Agency did not withdraw its allegation of nonnegotiability and, therefore, a negotiability dispute remained before the Authority. Because the Agency failed to support its allegation by responding to an Authority show-cause order or filing a statement of position, the Authority found that the Agency had waived its argument that the proposal was contrary to law. 71 FLRA at 415-16.

¹⁰ 5 U.S.C. § 7117(c).

¹¹ *AFGE, Council 53, Nat’l VA Council*, 71 FLRA 1124, 1125 (2020) (*AFGE*) (Member Abbott dissenting); see *AFGE, Local 2031*, 56 FLRA 32, 32 n.3 (2000) (citing *NFFE, Local 2050*, 36 FLRA 618, 618 n.1 (1990)).

¹² Statement at 4.

¹³ *Id.*

¹⁴ See *AFGE*, 71 FLRA at 1125; *NFFE, Local 1998, IAMAW*, 71 FLRA 417, 417-18 (2019) (*NFFE*) (Member Abbott dissenting in part) (citing *AFGE, Local 1164*, 49 FLRA 1408, 1411 (1994) (finding a negotiability appeal not appropriate for resolution because the agency did not allege, before the Authority, that the proposal was “inconsistent with law, rule or regulation”)).

¹⁵ Member Abbott notes that the Order allowing a right to refile, much like an emu’s wings, serves no purpose, at least no purpose that promotes efficiency. By permitting a right to refile, the dispute between the parties will continue until the Union refiles another petition, which will raise the same issues that we have before us. Member Abbott would dismiss the petition but with no right to refile.

¹⁶ See *AFGE*, 71 FLRA at 1125 (dismissing petition, without prejudice, where agency did not argue before the Authority that proposals were contrary to law, rule, or regulation); *NFFE*, 71 FLRA at 418 (citing *AFGE, Nat’l Border Patrol Council*, 42 FLRA 935, 936-37 (1991) (dismissing petition, without prejudice, where agency had not alleged that “any specific proposal” was nonnegotiable and did not argue before the Authority that any proposal was contrary to law, rule, or regulation); *AFSCME, Local 3097*, 42 FLRA 412, 450 (1991) (finding that the “conditions governing review of negotiability issues ha[d] not been met” where it was unclear whether the agency had made an allegation of nonnegotiability, and it did not argue before the Authority that the proposal was nonnegotiable); *Fed. Prof’l Nurses Ass’n, Local 2707*, 34 FLRA 71, 71-72 (1989) (dismissing petition, without prejudice, where agency withdrew its allegation of nonnegotiability before the Authority)).

Member DuBester, concurring:

While I feel constrained by Authority precedent to agree with the majority's decision to dismiss the petition without prejudice to the Union's right to refile, I would be remiss if I did not acknowledge the concerns raised by the Union in its response to the show cause order.