

71 FLRA No. 237

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 170
(Union)

and

UNITED STATES
DEPARTMENT OF DEFENSE
DEFENSE CONTRACT MANAGEMENT AGENCY
(Agency)

0-NG-3469

DECISION AND ORDER
ON NEGOTIABILITY ISSUE

December 29, 2020

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

Decision by Member Abbott for the Authority

I. Statement of the Case

With this case, we again remind the federal labor relations community that the burden of demonstrating mootness is heavy and falls on the party urging mootness,¹ and that arguments will be deemed waived if a party fails to support them.²

This case involves a dispute over a Memorandum of Understanding (MOU) between the parties. 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).³

For the reasons that follow, we find the proposal within the duty to bargain. Accordingly, we grant the petition.

¹ See *AFGE, Local 1164*, 65 FLRA 924, 925 (2011) (*Local 1164*) (citing *AFGE, Council 238*, 64 FLRA 223, 225 (2009)).

² See *AFGE, Council 170*, 71 FLRA 1220 (2020) (*Council 170*) (Member DuBester concurring); *AFGE, Local 3430*, 71 FLRA 881, 885-86 (2020) (*Local 3430*) (Member Abbott concurring); 5 C.F.R. § 2424.32(c)(1).

³ 5 U.S.C. § 7105(a)(2)(E).

II. Background

This petition for review (petition) concerns one proposal concerning the return rights of full-time representatives.⁴ The Union requested a written declaration of non-negotiability from the Agency over the proposals, and the Agency responded stating that the proposal was nonnegotiable because it interfered with management's right to assign personnel.⁵

On December 4, 2019, the Union filed the petition with the Authority.⁶ On February 7, 2020, the Authority issued an Order to Show Cause directing the Agency to show cause why the Authority should not find that the Agency's failure to respond to the Union's petition was a concession that the proposals are negotiable.⁷ The Agency responded to the Order to Show Cause, stating that it had not filed its statement because the Union's service of the petition on the Agency was defective.⁸ Based on the Agency's response, the Authority issued an order directing the Union to correct the procedural deficiency by serving its petition on the Agency by certified mail, first-class mail, or commercial delivery.⁹ The Union cured the procedural deficiency by serving the petition on the Agency via commercial delivery on March 12, 2020.¹⁰ Subsequently, the Agency filed its statement of position (statement).

Thereafter, an Authority representative conducted a post-petition conference (PPC) with the parties pursuant to § 2424.23 of the Authority's Regulations.¹¹ The Union filed a response to the statement (response), and the Agency filed a reply to the response (reply).

⁴ Pet., Attach., Proposal at Issue at 1; Pet. at 3-4.

⁵ Pet., Attach. 2, Agency's Written Allegation of Nonnegotiability at 1.

⁶ Pet. at 7.

⁷ Order to Show Cause at 2.

⁸ Agency's Response to Order to Show Cause at 1. The Agency argues in its response to the Order to Show Cause that the Union's petition should be dismissed because the Union failed to serve the petition to the Agency within fifteen days of the Agency's written allegation of nonnegotiability. *Id.* at 2. The time limits for filing a petition for review require the Union to file a petition of review *with the Authority* within fifteen days of the Agency's written allegation of nonnegotiability. See 5 C.F.R. § 2424.21(a). The time limits for filing a petition for review do not apply to the service requirement, which is pursuant to a separate regulation. See 5 C.F.R. § 2424.22(d).

⁹ Order to Correct Procedural Deficiency at 1-2.

¹⁰ March 2020 Statement of Service.

¹¹ 5 C.F.R. § 2424.23.

III. Preliminary Matter: The petition is not moot.

The Agency asserts in its reply that the Union's petition is moot because "the [proposal] exhibits a lack of understanding of civilian personnel laws and regulations."¹² Specifically, the Agency asserts that the Union admitted that it is "not seeking to bargain,"¹³ and the proposal concerns a process that "already exists in regulations and policy. . . ."¹⁴ In supporting its assertion that the matter is moot, the Agency cites to the PPC record and two Authority cases.¹⁵

The Authority will find a petition moot where the issues that led to the filing of a petition have been resolved, or where there is no longer a dispute between the parties.¹⁶ Furthermore, the burden of demonstrating that a petition is moot falls on the party urging mootness.¹⁷

We disagree with the Agency's claim that the Union no longer desires to bargain. The Agency claims the Union made this admission during the PPC.¹⁸ After reviewing the PPC record, we do not see any statement made by the Union stating that it is no longer seeking to bargain.¹⁹ The two Authority cases cited by the Agency²⁰ also fail to demonstrate that the petition is moot, because both cases are distinguishable from the instant dispute.²¹ Finally, other than making a general assertion that the issue involved in the proposal is provided for in regulations and policy, the Agency fails to provide or cite to such regulation or policy.²²

¹² Reply at 2.

¹³ *Id.*

¹⁴ *Id.* We note that the Union proposed a conditional withdrawal in its response. Response Br. at 1-2 (proposing to withdraw the petition if the Agency agreed to be bound by specific portions of its statement). However, the Agency refused this offer. Reply at 1 ("The Agency declines to accept this conditional withdrawal . . .").

¹⁵ Reply at 2.

¹⁶ *Local 1164*, 65 FLRA at 925 (citing *AFGE, Nat'l Veterans Admin. Council*, 41 FLRA 73, 74 (1991)).

¹⁷ *Id.* (citations omitted).

¹⁸ Reply at 2.

¹⁹ See generally Record.

²⁰ Reply at 2 (citing *U.S. DHS, CBP, U.S. Border Patrol, Laredo Sector*, 70 FLRA 921 (2018) (*Laredo*) (Member DuBester concurring); *NTEU*, 67 FLRA 280 (2014)).

²¹ See *Laredo*, 70 FLRA at 922 (finding an award moot because there was no longer a dispute between the parties as the grievant was offered and accepted a transfer to the requested duty station); see *NTEU*, 67 FLRA at 282 (finding the petition moot because the Union "expressly stated that it is 'not seeking to bargain over the [claimed] proposal'" (emphasis added)).

²² Reply at 2. We note that the Agency claims its written allegation of nonnegotiability provides the regulation and/or policy addressing the issue in the proposal. *Id.* However, that document does not provide any regulation or policy. See Pet.,

Accordingly, the Agency has failed to demonstrate that the petition is moot.²³

IV. Proposal 1

A. Wording of Proposal 1

The parties agree to the following in reference to return rights for Council 170 Full Time Representatives: 1. The position of record is the billet the employee encumbered as identified in DCPDS. This is work dependent and that billet should be in the same location as it was before the employee took on the union duties as after. However, mission changes over time and thus a location could likewise change. In that case if the billet moves the employee occupying that billet would move.²⁴

B. Meaning of Proposal 1

At the PPC, the Union explained that the term "full-time representative" (FTR) refers to Union officers who are authorized 100% official time to perform Union representational activities, that "billet" refers to a document containing job duties, qualifications, and GS-grade that is serialized to the employee, and that "DCPDS" stands for Defense Civilian Personnel Data System.²⁵ The Agency agreed with the Union's explained meaning of these terms.²⁶

In regards to the operation of the proposal, the parties agreed that the proposal permits FTRs to work where their previous billet was located, and that the proposal applies to employees who cease working as FTRs.²⁷ Furthermore, the parties agreed that the Agency would retain discretion to change the returning employee's location if the employee's billet moved due to mission requirements.²⁸

Attach. 2, Agency's Written Allegation of Nonnegotiability at 1.

²³ See *Nat'l Air Traffic Controllers Ass'n, Local ZHU*, 65 FLRA 738, 745 (2011) (denying agency's mootness argument because it was based on a faulty premise); *NAGE, Local R1-109*, 64 FLRA 132, 133 (2009) (Member Beck dissenting on other grounds) (denying a mootness argument because the party failed to cite to any basis in the record for supporting the argument).

²⁴ Pet., Attach., Proposal at Issue at 1; Pet. at 3-4.

²⁵ Record at 2.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

C. Analysis and Conclusion

The Agency argues the proposal is nonnegotiable because it interferes with management rights.²⁹ Specifically, the Agency states that “[it] reserves the right to determine internal security practices, to assign work and to determine the personnel by which [A]gency operations will be conducted as defined in § 7106(a).”³⁰ The Agency failed to provide any arguments supporting its position or explanation of how the proposal interfered with a specific management right.³¹ Therefore, for the same reasons discussed in *AFGE, Council 170*, we again find that the Agency has waived its argument that the proposal interferes with management rights.³² Because this is the only reason the Agency asserted the proposal was nonnegotiable,³³ we are again constrained to find that the proposal is within the duty to bargain.³⁴

V. Order

We grant the Union’s petition.

Member DuBester, concurring:

I agree with the Order granting the Union’s petition.

²⁹ Statement Br. at 2; *see also* Statement Form at 4-5.

³⁰ Statement Br. at 2.

³¹ *Id.*; *see also* Statement Form at 4-5.

³² *Council 170*, 71 FLRA at 1221 (finding that “an agency ‘has the burden of raising and supporting arguments that the proposal . . . is outside the duty to bargain or contrary to law’”) (quoting 5 C.F.R. § 2424.32(b)); *id.* (finding that “an agency fails to meet its regulatory burden when it merely cites a law or regulation without explaining how a particular proposal conflicts with that law or regulation”) (citations omitted); *id.* (finding the “Authority’s Regulations provide[] that ‘[f]ailure to raise *and support* an argument will . . . be deemed a waiver of such argument’”) (quoting 5 C.F.R. § 2424.32(c)(1)).

³³ Statement Br. at 2. We note that the Agency also makes an unsupported assertion in its reply, arguing that the Union is “insist[ing] they be given an ‘advisory role’ in management determinations regarding the [FTR] returning to their prior duties.” Reply at 2. The Agency fails to cite to any portion of the record where the Union asked to be given an advisory role. To the extent this assertion is an argument that the proposal interferes with management’s rights, we find the Agency’s assertion unsupported. *Supra* n.31.

³⁴ *See Council 170*, 71 FLRA at 1221.