71 FLRA No. 84

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1502
(Union)

and

UNITED STATES
DEPARTMENT OF THE ARMY
MADIGAN ARMY MEDICAL CENTER
FORT LEWIS, WASHINGTON
(Agency)

0-NG-3447

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DECISION AND ORDER
DISMISSING PETITION FOR REVIEW

December 9, 2019

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

I. Statement of the Case

In this case, we find that the Union prematurely filed its petition for review (petition). Thus, we dismiss the petition without prejudice, as prematurely filed, with the right to refile.

II. Background

The parties were negotiating their term collective-bargaining agreement (agreement). As they conducted their negotiations, the sessions were summarized daily on a form that captured the logistics of the sessions, the topics on the table, and, only very generally, what was said as each side made proposals and counter-proposals. This summary was labeled as "Minutes." [1] On May 1 and 2, 2019, the parties negotiated over Article 5, Union proposal 36; both days' minutes summarized management statements that it considered proposal 36 to be non-negotiable. The minutes for May 2, 2019, show that the Union orally requested a written non-negotiability statement, and management responded by referring to the parties' ground rules, which management interpreted to provide that such negotiability determinations would be made later by another office.

Thereafter, the Union requested, in writing, a written allegation of non-negotiability via an email on May 7, 2019.[2] The Agency responded via email on May 7, 2019, again deflecting the request by stating that the Union's request "does not require a written allegation of nonnegotiability."[3] The Agency further stated that "all disputed language on the issue of negotiability" would be "compiled as a single package."[4] The Union filed its petition for review on May 9, 2019.

On June 14, 2019, the Authority issued an order to show cause because the Union's petition appeared to be premature. On June 28, 2019, the Union filed a timely response to the Authority's order.

III. Analysis and Conclusion: The Union's petition is prematurely filed.

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.[5]

Further, 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.[6] Absent either condition, the petition is not properly before the Authority and must be dismissed.[7]

In its response to the show-cause order, the Union asserts that the May 2, 2019 meeting minutes constituted the written allegation of non-negotiability.[8] The Union argues that the Agency had no intention of reconsidering the proposal, but rather, had already alleged that the proposal was nonnegotiable.[9] The Union further relies on language in the Agency's May 7, 2019,

[1] Pet., Attach. 2, May 2, 2019 Meeting Minutes at 1.

[2] Pet., Attach. 1, May 7, 2019 Email Request at 1.
[3] *Id.*
[4] *Id.*
[5] 5 U.S.C. § 7117; 5 C.F.R. § 2424.2(c).
[6] 5 C.F.R. § 2424.21.
[7] *See NFFE, Local 2050*, 33 FLRA 877, 877-78 (1989) (citing *Indep. Letterman Hosp. Workers' Union*, 29 FLRA 456, 456-57 (1987)).
[8] Union's Response to Show-Cause Order at 1.
[9] *Id.*

email that states "we have made note in the minutes to this issue."[10]

In this case, even though the Union requested the declaration of non-negotiability during negotiations on May 2, 2019, the Agency did not provide one. We cannot accept a broad summary of statements made during a negotiation session, here labeled as "minutes," as a written declaration of non-negotiability by an agency.[11] As well, despite the Union's request for a written declaration of non-negotiability in the May 7, 2019 email, the Agency refused to provide one. The Agency's email response that "all disputed language on the issue of negotiability" would be "compiled as a single package"[12] does not satisfy the requirement for a written allegation because the Agency did not declare the proposals nonnegotiable.[13]

Per the Authority's Regulations, the Union had to wait for the ten-day period to lapse from its unfulfilled demand for a declaration of non-negotiability to file its petition for review, or wait until the Agency responded with a written allegation declaring the proposal nonnegotiable.[14] Because the Union's petition was filed only two days after sending the email request for a written allegation, the petition was prematurely filed.[15]

IV. Order

The Authority dismisses the Union's petition without prejudice with the right to refile in accord with § 2424.21(b) of the Authority's Regulations.[16]

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[10] *Id.*
[11] *AFGE, Local 1692*, 39 FLRA 572, 574 (1991) ("[W]hatever may have transpired in oral exchanges between the parties is not material to the resolution of a negotiability appeal."); *see also* 63 Fed. Reg. 66405, 66407 (1998) (stating the Authority's intention, in revising its negotiability Regulations, to retain procedures for both requesting and providing allegations of nonnegotiability in writing).
[12] Pet., Attach. 1, May 7, 2019 Email Request at 1.
[13] *IFPTE, Local 89*, 45 FLRA 938, 941-42 (1992) (*Local 89*) (dismissing a petition, without prejudice, because the agency did not allege that the proposal conflicted with law, rule, or regulation); *NFFE, Local 1363*, 19 FLRA 812, 812-13 (1985) (*Local 1363*) (same).
[14] 5 C.F.R. § 2424.21 (a)-(b).
[15] *Local 89*, 45 FLRA at 942; *Local 1363*, 19 FLRA at 812-13.
[16] *Local 89*, 45 FLRA at 942; *Local 1363*, 19 FLRA at 813; 5 C.F.R. § 2424.21 (b).

Member DuBester, dissenting:

I disagree with the majority's decision to dismiss the petition on the ground that it is premature. Rather, I would find that the petition was timely filed.

Under §§ 2424.11(c) and 2424.21(a)(1) of the Authority's Regulations, when an agency provides a union "with an unrequested written allegation" of non-negotiability, the union may file a petition within fifteen days of receiving that unsolicited allegation.[1] The regulations do not require that the Agency's written position be in any particular format.[2]

Here, immediately after the parties' May 1 and 2, 2019 bargaining sessions, the Agency provided the Union with written minutes of each session. In the minutes for the May 1 session, the Agency stated that the Union's proposal was "to be excluded due to [a] determination [that it is] non-negotiable per 5 [U.S.C. §] 7106(a)(1)."[3] And, in the May 2 minutes, the Agency wrote that the "Union requested [a] non[]negotiable statement [from the Agency] in writing" regarding the proposal at issue and indicated that the Agency would seek "negotiability guidance" from the Agency head.[4] Nevertheless, the Agency reiterated its position in the May 2 minutes that "[m]anagement declares the Union proposal . . . a violation of a management right to determine its internal security measures."[5]

While the majority dismisses the minutes as "a broad summary of statements made during a negotiation session,"[6] the majority's characterization ignores that the Agency explicitly declared – in the minutes that it prepared and delivered to the Union – the proposal non-negotiable because it conflicts with management's right to determine internal security under § 7106(a)(1) of the Federal Service Labor-Management Relations Statute.[7] Under these circumstances, the minutes constitute an unrequested written allegation by the Agency that the Union's proposal is non-negotiable. And, the Union therefore acted properly under the Authority's regulations by filing its petition within fifteen days of receiving this allegation.[8]

This conclusion is consistent with the Agency's own expressed understanding that the minutes constituted a written record of its position regarding the negotiability of the Union's proposal.[9] And the Union's timely filing of its petition is consistent with Authority precedent encouraging the parties' expeditious processing of negotiability disputes.[10]

The Union filed its petition seven days after receiving the minutes, well within fifteen days of receiving this unrequested written allegation of non-negotiability. Accordingly, I would find the petition timely filed and review the petition on the merits.

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[1] 5 C.F.R. § 2424.11(c) ("If an agency provides an exclusive representative with an unrequested written allegation concerning the duty to bargain, then the exclusive representative may . . . file a petition for review under this part"); 5 C.F.R. § 2424.21(a)(1) ("A petition for review must be filed within fifteen (15) days after the date of service of . . . [a]n agency's written allegation that the exclusive representative's proposal is not within the duty to bargain.").

[2] *See* 5 C.F.R. §§ 2424.11(c), 2424.21(a)(1); *id.* § 2424.2(i) ("Written allegation concerning the duty to bargain means an agency allegation that the duty to bargain in good faith does not extend to a proposal.").

[3] Resp. to Show Cause Order (Resp.), Attach. 2, May 1, 2019 Meeting Minutes at 1.

[4] Resp., Attach. 3, May 2, 2019 Meeting Minutes (May 2 Minutes) at 1; *see also* Resp., Attach. 4, Email from Agency's Rep. to Union's Rep. (May 7, 2019, 2:17 P.M.) (Agency Email) at 1 (stating that, per the parties' ground rules agreement, a party "may request guidance" if "either [p]arty declares an issue or issues non-negotiable").

[5] May 2 Minutes at 1.

[6] Majority at 3.

[7] 5 U.S.C. § 7106(a)(1).

[8] While the Authority has not previously addressed whether meeting minutes may constitute a written allegation of non-negotiability, this is not a novel conclusion. For instance, the U.S. Supreme Court has recognized that minutes may serve as a written record establishing a party's position where no particular format is required by statute. *See T-Mobile, S., LLC v. City of Rosewell*, 574 U.S. 293, 135 S.Ct. 808, 810, 815-16, 818 (2015) (holding that meeting minutes constitute an "acceptable form" of "written record" evidencing a locality's decision and reasoning under the Telecommunications Act).

[9] Agency Email at 1 (stating that the Agency did not need to provide a further written allegation of non-negotiability to the Union because "[it had] made note in the minutes to this issue").

[10] *E.g.*, *AFGE, AFL-CIO, Local 1858*, 10 FLRA 499, 501 (1982) (finding that an allegation of non-negotiability made as part of a prehearing brief in a Federal Service Impasses Panel proceeding was an unsolicited allegation from which the union could file a negotiability appeal); *see* 5 U.S.C. § 7117(c)(6).