

**73 FLRA No. 2**

NATIONAL LABOR RELATIONS BOARD  
PROFESSIONAL ASSOCIATION  
(Union)

and

NATIONAL LABOR RELATIONS BOARD  
(Agency)

0-NG-3554  
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DECISION AND ORDER  
DISMISSING NEGOTIABILITY APPEAL

May 26, 2022  
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Before the Authority: Ernest DuBester, Chairman, and  
Colleen Duffy Kiko and Susan Tsui Grundmann,  
Members

**I. Statement of the Case**

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),<sup>1</sup> and concerns sixty-seven proposals submitted by the Union during bargaining over the parties' successor collective-bargaining agreement. For the reasons that follow, the Union's petition is dismissed, without prejudice to the right to refile, for failing to meet the conditions governing review of negotiability appeals.

**II. Background**

The Union filed its petition for review (petition) with the Authority on November 19, 2020. The Union attached to the petition, as the Agency's allegation of nonnegotiability, a brief that the Agency had submitted to the Federal Service Impasses Panel (the Panel) concerning the proposals. On November 23, 2020, the Agency filed a

motion to dismiss the petition, stating that "[t]o the extent that the Union believes the Agency raised negotiability allegations during [Panel] proceedings, . . . the Agency withdraws [its] allegations pursuant to 5 U.S.C. § 7117(c)(3)(A)."<sup>2</sup>

On February 25, 2021, the Authority issued an order directing the Union to show cause why the petition should not be dismissed for failure to meet the conditions governing review of negotiability appeals. On March 10, 2021, the Union filed a response to the Authority's order.<sup>3</sup> In its response, the Union argues that the Agency asserted in its filing with the Panel that the Union proposals at issue are outside the duty to bargain and that the Agency did not amend or withdraw that filing.<sup>4</sup>

**III. Analysis and Conclusion**

Under § 7117 of 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.<sup>5</sup> The regulations define a "[n]egotiability dispute" as a "disagreement between a[ ] [union] and an agency concerning the legality of a proposal or provision."<sup>6</sup> 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.<sup>7</sup>

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 currently asserting that any of the proposals are contrary to law, rule, or regulation or permissively negotiable. Instead, the Union argues that the Agency previously declared the Union's proposals outside the duty to bargain before the Panel.<sup>8</sup>

However, in its motion, the Agency "[withdrew] the allegations pursuant to . . . § 7117(c)(3)(A)" of the Statute.<sup>9</sup> To the extent that the Agency previously declared any of the Union's proposals nonnegotiable, it has withdrawn those challenges by withdrawing its allegations of nonnegotiability before the Authority.<sup>10</sup>

<sup>1</sup> 5 U.S.C. § 7105(a)(2)(E).

<sup>2</sup> Mot. at 1.

<sup>3</sup> Additionally, on April 8, 2021, the parties filed a joint statement informing the Authority that litigation is currently pending in "Federal District Court" related to the instant negotiability petition. Joint Statement at 1.

<sup>4</sup> Union's Resp. to Show-Cause Order (Resp.) at 1.

<sup>5</sup> 5 U.S.C. § 7117; 5 C.F.R. § 2424.2.

<sup>6</sup> 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").

<sup>7</sup> See, e.g., *Pro. Airways Sys. Specialist, MEBA/NMU*, 53 FLRA 1246, 1248-49 (1998).

<sup>8</sup> Resp. at 1.

<sup>9</sup> Mot. at 1-2.

<sup>10</sup> See *AFGE*, 71 FLRA 1196, 1197 (2020) (*AFGE*) (then-Member DuBester concurring); *NTEU*, 46 FLRA 444, 445 (1992) (*NTEU*); see also *NFFE, Loc. 1998, IAMAW*, 71 FLRA 417, 417-18 (2019) (*NFFE*) (Member Abbott dissenting in part) (citing *AFGE, Loc. 1164*, 49 FLRA 1408, 1411 (1994) (finding a negotiability appeal not appropriate for resolution because the

Consequently, there is no dispute between the Union and the Agency concerning the legality of the proposals. Therefore, we find that the conditions for a negotiability appeal before the Authority have not been met and we dismiss the petition, without prejudice to the Union's right to refile.<sup>11</sup>

#### IV. Decision

We dismiss the Union's petition, without prejudice to the right to refile.

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agency did not allege, before the Authority, that the proposal was "inconsistent with law, rule or regulation").

<sup>11</sup> See *AFGE*, 71 FLRA at 1197 (dismissing petition, without prejudice, where agency did not argue before the Authority that proposals were contrary to law, rule, or regulation); *AFGE, Council 53, Nat'l VA Council*, 71 FLRA 1124, 1125 (2020) (Member Abbott dissenting) (same); *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, Loc. 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. Pro. Nurses Ass'n, Loc. 2707*, 34 FLRA 71, 71-72 (1989) (dismissing petition, without prejudice, where agency withdrew its allegation of nonnegotiability before the Authority)); *NTEU*, 46 FLRA at 445 (dismissing petition without prejudice to the union's right to refile an appeal if the conditions governing review are met).