65 FLRA No. 194

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 1164
(Union)

and

SOCIAL SECURITY ADMINISTRATION
ROSLINDALE, MASSACHUSETTS
(Agency)

0-NG-3093

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DECISION AND ORDER
ON NEGOTIABILITY ISSUES

June 16, 2011

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, 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 (the Statute).[1] The appeal involves the negotiability of two proposals concerning the relocation of the Agency's Roslindale, Massachusetts Field Office (Field Office). The Agency filed a statement of position (SOP) to which the Union filed an untimely response (response).[2]

For the reasons that follow, we find that the proposals are outside the duty to bargain. Accordingly, we dismiss the petition for review (petition).

1. In response to the Authority's Order to Show Cause of March 9, 2011 (Order of March 9, 2011), the Union stated that two unfair labor practice charges filed in connection with this case, in Case Nos. BN-CA-11-0140 and BN-CA-11-0075, had been withdrawn and resolved, respectively. *See* Union's Response to Order of March 9, 2011 at 1-2.

2. For the reasons set forth in the Authority's Order dated April 8, 2011, the Union's response was untimely filed and will not be considered.

II. Background

On May 13, 2010, the Agency provided notice to the Union of its decision to relocate the Field Office. SOP at 1. The parties reached an agreement on all matters concerning the relocation except for two Union proposals that are the subject of the petition at issue here. *Id.*

III. Preliminary Issues

A. The Union's petition was timely filed.

The Agency claims that the Union's petition should be dismissed because it was untimely filed. SOP at 1-3. The record in this case indicates that the Agency provided the Union with an unsolicited written allegation of nonnegotiability (allegation). *See* Order to Show Cause of October 19, 2010 (Order of October 19, 2010) at 2. Subsequently, the Union requested an allegation from the Agency. *See* Union's Response to Order of October 19, 2010, Attach. 1, Union's e-mail of August 13, 2010. The Agency did not respond to the Union's request, claiming that it had already provided an allegation and that it was not required to support its allegation with specificity until it filed its statement of position. SOP at 2-3.

A union is not required to respond to an agency's unsolicited allegation. *See* 5 C.F.R. § 2424.11(c); *AFGE, Local 3369*, 49 FLRA 793, 794 (1994). Rather, the union may ignore the unsolicited allegation and instead elect to request a written allegation from the agency. *See id.* at 795. If an agency does not provide a written allegation in response to a union's written request, then a petition for review filed by the union is not subject to the time limits set forth in § 2424.21 of the Authority's Regulations, and the union may file its petition at any time. *See* 5 C.F.R. § 2424.21(b); *AFGE, AFL-CIO, Local 2052*, 30 FLRA 837, 839 (1987).

Here, the Union chose not to respond to the Agency's unsolicited allegation and instead requested an allegation. As the Agency did not provide an allegation in response to the Union's written request, the Union was not required to file its petition within any particular time frame. Consequently, the Union's petition was timely filed.

B. The Union's petition is not moot.

In its unsolicited allegation of nonnegotiability, the Agency indicated that it would implement the

office relocation process. *See* Petition, Attach., Agency's July 29, 2010 Allegation. Noting that proposals that address events that have already occurred are moot, the Authority ordered the parties to show cause why the Union's petition should not be dismissed as moot. *See* Order of October 19, 2010 at 2. In its response to the Order, the Union asserts that its petition is not moot because the construction of the building has not been completed and the office relocation has not yet occurred. *See* Union's Response to Order of October 19, 2010 at 3-4. The Agency did not dispute the Union's assertion that the petition is not moot.

Section 2429.10 of the Authority's Regulations states that the Authority will not issue advisory opinions. *See* 5 C.F.R. § 2429.10. Thus, where the issues that led to the filing of a negotiability petition for review have been resolved, or where there is no longer a dispute between the parties, the Authority will dismiss the petition for review as moot. *See AFGE, Nat'l Veterans Admin. Council*, 41 FLRA 73, 74 (1991) (citing *AFGE, Local 85*, 32 FLRA 210, 211-12 (1988)). Mootness, therefore, is a threshold jurisdictional issue. *See AFGE, Council 238*, 64 FLRA 223, 225 (2009) (citing *Ass'n of Civilian Technicians, Show-Me Army Chapter*, 59 FLRA 378, 380 (2003)). The burden of demonstrating mootness is heavy and falls on the party urging mootness. *Id*.

In its Order of October 19, 2010, the Authority gave the parties an opportunity to show cause why the Union's petition should not be dismissed as moot. *See* Order of October 19, 2010 at 2. The record shows that the Union responded by asserting that its petition was not moot because the construction of the building has not been completed and the office relocation has not yet occurred. *See* Union's Response to Order of October 19, 2010 at 3-4. The record also shows that the Agency did not respond to the Authority's Order or dispute, in its SOP, the Union's claim that the petition was not moot. Accordingly, we find that the Agency has not met its burden of demonstrating that the petition is moot. *See NAGE, Local R1-109*, 61 FLRA 593, 596 (2006) (agency burden not met where agency failed to demonstrate that union's proposals were moot). Consequently, we find that the Union's petition is not moot.

IV. Proposal 3

A. Wording

> The final floor plan approved by the parties is attached to this [Memorandum of Understanding (MOU)]. A plotted floor plan identifying the employees[']seat/workstation locations will be provided to the Union when available. The floor plan will include a platform and ramp reception area similar to the current platform/ramp reception area. It will also have an FEI and backend workstation areas.

Petition at 3.

B. Meaning

The proposal describes the configuration of an office floor plan. Under the proposal, employees would have a separate Front End Interviewing (FEI) area where interviews with the public would take place. Petition at 4; Record of Post-Petition Conference (Record) at 1. The floor plan also describes a back-end area, away from the noise of the reception and interviewing areas, where the employees' work stations would be located in an atmosphere more conducive to concentration. Petition at 4.

The Union describes the FEI area as having windows built into a barrier wall with a raised reception counter and a platform with a ramp. This would allow employees who serve the public all day to remain seated in ergonomically correct workstations raised above ground level for added safety. *Id.* In the alternative, the Union suggests that the FEI area remain the same, but without the raised platform and ramp reception counter. *Id.* As the Union's explanation of Proposal 3's meaning is not inconsistent with its plain wording, we adopt it for purposes of determining Proposal 3's negotiability. *E.g.*, *NATCA*, 64 FLRA 161, 162 (2009).

C. Positions of the Parties

1. Union

The Union argues that the proposed floor plan would provide a less stressful environment for employees, and would be more conducive to privacy, safety, efficiency, and productivity. Petition at 5.

The Union claims that the privacy of the barrier wall would safeguard the public's confidential information. *Id.* The Union also asserts that the barrier wall would provide a safer environment because it would prevent the general public from accessing the area where employees work on claims and where they may have files and other confidential case information displayed on their desks. *Id.* In

addition, the Union argues that the backend area would provide a less stressful and noisy area that would be more conducive to efficiency and productivity. *Id.* at 5-6. The Union further asserts that the barrier wall would protect employees from direct contact with the public, safeguarding them from possible infectious diseases. *Id.* at 6.

The Union requests that Proposal 3 be severed into three parts, with the proposal's last two sentences each standing alone. *Id.* at 7.

2. Agency

The Agency argues that the proposal affects the Agency's rights to determine the methods and means of performing work under § 7106(b)(1) and to assign work under § 7106(a)(2)(B) of the Statute. SOP at 5-6. The Agency further claims that the proposal is not a procedure or an appropriate arrangement under § 7106(b)(2) and (3) of the Statute, respectively. *Id.* at 7-9. With regard to the Union's severance request, the Agency argues that there exist no grounds to sever the proposal. *Id.* at 10.

D. Analysis and Conclusions

A party's failure to respond to an argument or assertion raised by the other party will, where appropriate, be deemed a concession to such argument or assertion. *See* 5 C.F.R. § 2424.32(c)(2). Consistent with this regulation, when a union does not dispute an agency's claim that a proposal affects the exercise of management's rights, and does not argue that the proposal constitutes an exception to management's rights, the Authority will find that the proposal is outside the duty to bargain. *E.g.*, *AFGE, Local 4052*, 65 FLRA 720, 722 (2011).

Here, the Union does not argue in the petition either that the proposal does not affect a management right or that the proposal is within the duty to bargain as an exception to management's rights.[3] Accordingly, consistent with § 2424.32 and the above-cited precedent, we find that the Union has conceded that the proposal is contrary to management's rights under § 7106(a) of the Statute.[4] *See AFGE, Local 4052*, 65 FLRA at 722. Consequently, we find that the proposal is outside the duty to bargain.[5]

V. Proposal 27

A. Wording

> This agreement will be effective upon Head of Agency approval per 5 U.S.C. [§] 7114. If any portion of this agreement is rejected[,] that portion will be reopened for bargaining within thirty (30) days of the Union's receipt of the notice of rejection. Such notice will be considered received when in the possession of the Union Chief Negotiator.

Record at 2.

B. Meaning

The term "agreement" in the proposal refers to the MOU that the parties are negotiating, which contains a floor plan to be used upon the relocation of the Field Office. Record at 2. The Union explains that the proposal would provide the Union with the right to reopen any portion of the MOU that is rejected on agency head review. *Id.* As the Union's explanation of Proposal 27's meaning is not inconsistent with its plain wording, we adopt it for purposes of determining Proposal 27's negotiability. *E.g.*, *NATCA*, 64 FLRA at 162.

C. Positions of the Parties

1. Union

The Union asserts that the proposal seeks the right to bargain over issues that are rejected on agency head review. Petition at 8. The Union claims that it wants to preserve the right to bargain appropriate arrangements and procedures to mitigate the adverse impact that the Agency's proposed changes would have on the bargaining unit. *Id.*

3. Consistent with the Authority's Order of April 8, 2011, we do not consider the Union's response. *See* note 2, *supra*.

4. In view of this disposition, there is no need to address the Agency's management rights claim under § 7106(b)(1) of the Statute.

5. We deny the Union's request to sever Proposal 3. In this regard, the Union has not explained, pursuant to § 2424.22(c) of the Authority's Regulations, how Proposal 3 could be severed or demonstrated how potentially severed portions of the proposal could stand alone and be separately negotiable. *See Int'l Ass'n of Machinists & Aerospace Workers*, 59 FLRA 830, 831 n.3 (2004).

2. Agency

The Agency argues that Article 4, Appendix A, Section VI of the parties' collective bargaining agreement (CBA) covers situations and procedures available for re-opening bargaining after the Agency asserts that a Union proposal is nonnegotiable. SOP at 12. The Agency asserts that, as the subject of Proposal 27 is covered by the CBA, it is only negotiable at the election of the Agency. *Id.*

D. Analysis and Conclusions

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. 5 U.S.C. § 7117; 5 C.F.R. § 2424.2.

The Agency's only claim with regard to Proposal 27 is that it is "covered by" Article 4, Appendix A, Section VI of the CBA. SOP at 12. In the absence of an Agency contention that the Union's proposal is outside the duty to bargain because it is inconsistent with law, rule or regulation, it does not appear that there is an issue before the Authority that is appropriate for resolution in a negotiability appeal. *See, e.g., AFGE, Council 214*, 53 FLRA 131, 132 (1997).

Rather, the Agency's claim that the proposal is "covered by" Article 4, Appendix A, Section VI of the CBA raises a bargaining obligation dispute, which is defined in § 2424.2(a) of the Authority's Regulations as a disagreement between an exclusive representative and an agency concerning whether, in the specific circumstances involved in a particular case, the parties are obligated to bargain over a proposal that otherwise may be negotiable. *See* 5 C.F.R. § 2424.2(a). The Authority's Regulations specify that a bargaining obligation dispute includes a claim that a proposal "concerns a matter that is covered by a collective bargaining agreement[.]" 5 C.F.R. § 2424.2(a)(1). Under § 2424.30(b)(2), the Authority has discretion to resolve bargaining obligation issues when they are ancillary to the resolution of whether a proposal is inconsistent with law, rule, or regulation. *See* 5 C.F.R. § 2424.30(b)(2); *AFGE, Local 2143*, 48 FLRA 41, 43-44 (1993) (Member Talkin concurring as to another matter) (claimed existence of duty to bargain questions did not preclude determining negotiability of proposals that were otherwise properly before Authority). However, the Authority's Regulations further specify that a negotiability appeal "that concerns only a bargaining obligation dispute may not be resolved [in a negotiability proceeding]." 5 C.F.R. § 2424.2(d).

As the Agency does not claim that the Union's proposal is outside the duty to bargain because it is inconsistent with law, rule or regulation, there is no issue before the Authority as to Proposal 27 that is appropriate for resolution in a negotiability appeal. *See AFGE, Council 214*, 53 FLRA at 132. Consequently, as the only issue raised by the Agency with regard to Proposal 27 is a bargaining obligation dispute, we dismiss the petition as to Proposal 27. *See Nat'l Air Traffic Controllers Ass'n, Local ZHU*, 65 FLRA 738, 741 (2011).

VI. Order

The petition for review is dismissed.