

67 FLRA No. 71

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

and

FEDERAL DEPOSIT
INSURANCE CORPORATION
(Agency)

0-NG-3175

DECISION AND ORDER
ON A NEGOTIABILITY ISSUE

February 24, 2014

Before the Authority: Carol Waller Pope, Chairman, and
Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

The Union filed a negotiability appeal (the petition). The main question before us is whether we should dismiss the petition because it: (1) requests an advisory opinion under § 2429.10 of the Authority's Regulations;¹ and (2) does not present a negotiability dispute under § 2424.2 of the Authority's Regulations.² Because the Union concedes that it is not seeking to bargain over the wording in the petition, the answer is yes.

II. Background

The parties planned to negotiate a new term agreement. Before term negotiations, they executed a ground-rules agreement, which states, in pertinent part:

The parties agree that they will not pursue the involvement of the [Authority] in any negotiability disputes between them over contract proposals until they have attempted to settle these matters voluntarily. If the parties are unable to settle these disputes, the Union reserves the right to file a negotiability appeal.³

¹ 5 C.F.R. § 2429.10

² *Id.* § 2424.2.

³ Union's Resp. to Order to Show Cause (Union's Show-Cause Resp.) at 1.

The parties reached impasse on a number of proposals, including two proposals relevant here. Stated generally, the proposals required the Agency to consider applications from bargaining-unit employees before considering applications from others when filling vacancies in the unit. At the direction of the Federal Service Impasses Panel, the parties brought their dispute to an interest arbitrator. Before the interest arbitrator, the Agency claimed that the proposals were nonnegotiable. Although the Union disputed the Agency's claim, it did not file a negotiability appeal at that time. The interest arbitrator declined to rule on the negotiability of the proposals and did not order the parties to adopt them. The parties then executed a collective-bargaining agreement (the CBA), which provides, as relevant here, that when there are vacancies, the Agency will consider applications from bargaining-unit employees and others simultaneously.

About a month after the CBA's execution, and over the course of several days, the parties exchanged emails regarding the proposals. In one of the emails, the Agency asserted to the Union that a negotiability appeal would be "untimely and moot."⁴ In a subsequent email, the Union asked the Agency for an allegation of nonnegotiability, but the Agency did not respond to the Union's request. About six months after the last of these emails, the Union filed the petition at issue here.

Subsequently, the parties participated in an Authority-facilitated post-petition conference to discuss issues raised by the petition. At the post-petition conference, the Union decided to combine the proposals, as follows:

Section 3.A.

The Parties agree that the goal is to fill all position vacancies with the best qualified candidates available, taking into consideration the EMPLOYER's long-term needs and affirmative employment obligations. The Parties further agree that the Employer has the right, at its discretion, to fill vacant positions by recruiting eligible candidates through the announcement of such vacancies within the FDIC and by concurrently recruiting from any other appropriate recruiting source by an appropriate means, e.g., OPM competitive examining referrals, reinstatements, reassignments, advertisements. If the EMPLOYER determines to fill a vacant

⁴ Union's Show-Cause Resp., Ex. 7.

bargaining[-]unit position, the position will be announced internally so that bargaining[-]unit employees have the opportunity to apply and be considered for the position. The Employer, however, may simultaneously post vacancy announcements for, and separately rate, rank and assess, as applicable, both internal and external applicants for vacancies in the bargaining unit.⁵
Section 3.B.

The Employer will give first consideration to bargaining[-]unit employees for vacancies in the bargaining unit. In that regard, a certificate listing the Best Qualified (BQ) bargaining[-]unit candidates will be referred first to the selecting official for final consideration. The selecting official is not permitted to review and/or consider non-bargaining[-]unit candidates or external applicants at any grade for which a position is announced prior to making a final determination regarding the selection or non-selection of bargaining[-]unit candidates on the BQ certificate. Once the selecting official has made final selection or non-selection determinations regarding bargaining[-]unit candidates, the non-bargaining[-]unit and external candidates may then be referred for consideration.⁶

At the post-petition conference, the Agency argued that the parties' dispute was moot. The Authority's Office of Case Intake and Publication then issued an order to the Union to show cause why the petition should not be dismissed because it was requesting an advisory opinion. The Union responded to the order, and the Agency replied to the Union's response. In addition, the Agency filed a statement of position, the Union filed a response to that statement, and the Agency filed a reply to the Union's response.

III. Analysis and Conclusions: We dismiss the petition based on the Union's assertion that it does not seek to bargain.

The Union states that it already has bargained over the wording at issue here (the claimed proposal) "exhaustively" and that it is "not seeking to bargain over

the [claimed] proposal."⁷ Nevertheless, the Union asserts that the Authority can resolve the petition on the merits, arguing:

The interest arbitrator refused to rule on the negotiability of the [claimed] proposal. [The Union] is merely seeking the ruling it bargained for when the parties executed the ground rules that clearly state the Union reserves the right to file a negotiability appeal. For whatever reason, [the Agency] is of the opinion that where an interest arbitrator fails to address the negotiability of a union proposal, the union automatically waives its right to obtain a ruling from the [Authority], regardless of what the ground rules expressly say and irrespective of the case law holding that any waiver by a party must be clear and unmistakable.⁸

The Agency contends that the Union: (1) "acknowledges that it does not seek to bargain over the [claimed p]roposal";⁹ and (2) "concedes [that this] is not a live . . . dispute."¹⁰ Therefore, the Agency argues, the Union has acknowledged that it is requesting an advisory opinion.¹¹

Under § 2429.10 of the Authority's Regulations, the Authority will not issue advisory opinions.¹² As such, the Authority does not resolve disputes that have become moot.¹³ The burden of demonstrating mootness is heavy and falls on the party arguing it.¹⁴ Generally, a dispute becomes moot when the parties no longer have a legally cognizable interest in the dispute's outcome.¹⁵ In the context of negotiability appeals, a dispute becomes moot when the issuance of a bargaining order would serve no purpose.¹⁶ Consistent with those principles, the Authority has declined to determine the negotiability of

⁷ Resp. at 7.

⁸ *Id.* (internal quotation marks omitted).

⁹ Agency's Reply at 5.

¹⁰ *Id.* at 6.

¹¹ *See id.*

¹² 5 C.F.R. § 2429.10.

¹³ *NTEU*, 52 FLRA 1265, 1279 (1997) (Chair Segal concurring as to other matters).

¹⁴ *E.g.*, *U.S. DOJ, Fed. BOP, Metro. Det. Ctr., Guaynabo, P.R.*, 59 FLRA 787, 790 (2004).

¹⁵ *SSA, Bos. Region (Region 1), Lowell Dist. Office, Lowell, Mass.*, 57 FLRA 264, 268 (2001) (Member Wasserman dissenting in part) (citing *U.S. Small Bus. Admin.*, 55 FLRA 179, 183 (1999)).

¹⁶ *See NTEU*, 52 FLRA at 1279.

⁵ Record of Post-Pet. Conference at 2.

⁶ Pet. at 2.

matters that unions did not seek to actually bargain over.¹⁷

Here, the Union has expressly stated that it is “not seeking to bargain over the [claimed] proposal.”¹⁸ In fact, there is no dispute that the parties have agreed to a different process where the Agency will consider applications from bargaining-unit employees and others simultaneously.¹⁹ As such, resolving the petition would serve no purpose – it would result in an advisory opinion.²⁰ And because the Union does not seek to bargain, the Union’s claim that the interest arbitrator “failed to address” certain matters²¹ does not change the fact that resolving the petition would result in an advisory opinion.

In addition, under § 2424.2(c) of the Authority’s Regulations, a negotiability dispute is defined, as relevant here, as a “disagreement . . . concerning the legality of a proposal.”²² Section 2424.2(e) of the Authority’s Regulations defines a “proposal” as a “matter offered for bargaining.”²³ Because the Union is not seeking to bargain, the claimed proposal is not *now* a “matter offered for bargaining.”²⁴ In other words, the claimed proposal is not a “proposal” within the meaning of § 2424.2(e). As there is no “disagreement . . . concerning the legality of a *proposal*,”²⁵ this case does not present a “negotiability dispute” within the meaning of § 2424.2(c).²⁶ And the Authority dismisses petitions, or portions of petitions, that do not present negotiability disputes.²⁷

¹⁷ See, e.g., *Ass’n of Civilian Technicians, Old Hickory Chapter*, 55 FLRA 811, 812 n.6 (1999) (*ACT*) (Member Wasserman dissenting) (denying union’s request to “clarify . . . that the contract term at issue *would be negotiable* if the word ‘pending’ were removed”); *AFGE, Local 1864*, 45 FLRA 691, 695 (1992) (*Local 1864*) (stating that a determination of the negotiability of proposals based on “speculation that they might be submitted in future negotiations” would result in an advisory opinion).

¹⁸ Resp. at 7.

¹⁹ See Statement of Position at 4.

²⁰ See *NTEU*, 52 FLRA at 1279; see also, e.g., *ACT*, 55 FLRA at 812 n.6; *Local 1864*, 45 FLRA at 695.

²¹ Union’s Show-Cause Resp. at 12.

²² 5 C.F.R. § 2424.2(c).

²³ *Id.* § 2424.2(e).

²⁴ *Id.*

²⁵ *Id.* § 2424.2(c) (emphasis added).

²⁶ *Id.*

²⁷ See, e.g., *NFFE, Fed. Dist. 1, Local 1998, IAMAW*, 66 FLRA 124, 127 (2011) (*IAMAW*); cf. *NATCA, Local ZHU*, 65 FLRA 738, 741 (2011) (dismissing petition with regard to proposals that raised only bargaining-obligation disputes); *Antilles Consol. Educ. Ass’n*, 61 FLRA 327, 331 (2005) (Chairman Cabaniss dissenting in part) (dismissing petition with regard to a proposal that raised only a bargaining-obligation dispute).

The Union offers three main arguments as to why the Authority can resolve the petition on the merits. First, the Union argues that certain agreements permit the Union to file the petition. Specifically, the Union argues that: (1) under the ground-rules agreement, the Union had a “contractual right” to file the petition;²⁸ and (2) the Agency “implicitly agreed to continue its obligation to bargain” by discussing the proposals with the Union after the CBA went into effect.²⁹ However, the Union cites no law or decision³⁰ indicating that an agreement between the parties permits the Authority to resolve a negotiability appeal when the union does not seek to bargain.³¹ Accordingly, the ground-rules agreement and the Agency’s alleged implicit agreement to bargain do not provide bases for resolving the petition on the merits.

Second, the Union cites *U.S. Department of the Treasury, IRS (IRS)*³² and *U.S. Department of the Interior, Washington, D.C. (Interior)*³³ for the proposition that it “did not waive its right to file a negotiability appeal” when it executed the CBA.³⁴ *IRS* and *Interior* indicate that a union may waive its statutory right to bargain.³⁵ But those decisions do not support a conclusion that the Authority can resolve a petition when the union does not seek to bargain.³⁶ Accordingly, the Union’s reliance on *IRS* and *Interior* is misplaced.

Third, the Union claims that under *NTEU*³⁷ and *U.S. Department of HHS, SSA, Northeastern Program Service Center (SSA)*,³⁸ the Authority can resolve a negotiability appeal as long as an agency has asserted that a proposal is nonnegotiable.³⁹ And the Union claims that the Agency has made such an assertion here.⁴⁰ However, there is no indication that the unions in *NTEU* and *SSA* were not seeking to bargain.⁴¹ Here, by contrast, the Union asserts that it is not seeking to bargain.⁴² Accordingly, neither *NTEU* nor *SSA* supports a conclusion that the Authority can resolve the petition at issue here on the merits.

²⁸ Union’s Show-Cause Resp. at 8; see also *id.* at 1, 9-10.

²⁹ *Id.* at 7; see also *id.* at 8.

³⁰ *Id.* at 8.

³¹ See *IAMAW*, 66 FLRA at 127; *NTEU*, 52 FLRA at 1279.

³² 56 FLRA 906 (2000).

³³ 56 FLRA 45 (2000) (Member Cabaniss dissenting in part).

³⁴ Union’s Show-Cause Resp. at 9; see also *id.* at 10.

³⁵ See *IRS*, 56 FLRA at 912-13; *Interior*, 56 FLRA at 53-54.

³⁶ See *IRS*, 56 FLRA at 912-13; *Interior*, 56 FLRA at 53-54.

³⁷ 40 FLRA 570 (1991).

³⁸ 36 FLRA 466 (1990).

³⁹ See Union’s Show-Cause Resp. at 10 (citing *NTEU*, 40 FLRA at 573).

⁴⁰ *Id.*

⁴¹ See *NTEU*, 40 FLRA at 573; *SSA*, 36 FLRA at 467-68.

⁴² Resp. at 7.

As the Union is requesting only an advisory opinion, and as this case does not present a negotiability dispute, we dismiss the petition.

IV. Order

We dismiss the petition.