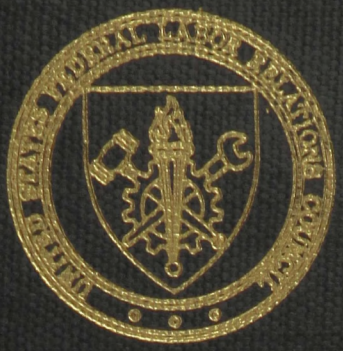

DECISIONS AND INTERPRETATIONS OF THE FEDERAL LABOR RELATIONS COUNCIL

Volume 4

7 S.R. Horn

DECISIONS AND INTERPRETATIONS OF THE FEDERAL LABOR RELATIONS COUNCIL

Including decisions on appeals, interpretations of Executive Order 11491, statements on major policy issues, and selected information announcements.

Volume 4

(Cite as: 4 FLRC—)

January 1, 1976 through December 31, 1976

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Jan. 1, 1976-
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PART II.

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January 1, 1976 through December 31, 1976

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APPEALS DECISIONS

January 1, 1976 through December 31, 1976

United States Air Force, 380th Combat Support Group, Plattsburgh Air Force Base, N.Y., A/SLMR No. 557. The Assistant Secretary dismissed the 19(a)(1) and (4) complaint of the individual complainant, Mary J. Pemberton, a steward of Local 368, National Federation of Federal Employees, concluding, in pertinent part, that the Assistant Regional Director improperly issued a Notice of Hearing in this matter on an allegation raised in the pre-complaint charge but not contained in the complaint. NFFE appealed to the Council on behalf of the complainant, alleging, in substance, that the decision of the Assistant Secretary was arbitrary and capricious and raised a major policy issue.

Council action (January 13, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and did not present a major policy issue. Accordingly, the Council denied review of NFFE's appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

January 13, 1976

Mr. John Helm, Staff Attorney
National Federation of Federal
Employees
1737 H Street, NW.
Washington, D.C. 20006

Re: United States Air Force, 380th Combat Support Group, Plattsburgh Air Force Base, N.Y., A/SLMR No. 557, FLRC No. 75A-106

Dear Mr. Helm:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case the Complainant, Mary J. Pemberton, steward of Local 368, National Federation of Federal Employees (the union), first filed a pre-complaint charge with the United States Air Force, 380th Combat Support Group, Plattsburgh Air Force Base, New York (the activity). The charge alleged that she had been harassed by an activity official and had been denied a union representative upon her request during a meeting with the activity, in violation of section 19(a)(1) and (4) of the Order. Ms. Pemberton subsequently filed a formal complaint against the activity with the Assistant Regional Director (ARD) alleging that she had been "harassed, abused, berated and browbeat . . . unjustly and unmercifully" because she had appealed a prior reprimand and had filed a previous unfair labor practice charge against the activity. The ARD dismissed the Complainant's allegation of harassment under section 19(d) of the Order*/ because she had filed a prior grievance over the same matter.

He issued a Notice of Hearing, however, concerning a possible violation of the Complainant's right to union representation at the meeting with activity officials.

---

*/ Sec. 19. Unfair labor practices.

. . . . . .

(d) . . . Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. . . .

The Assistant Secretary, in agreement with the Administrative Law Judge, dismissed the complaint in its entirety. The Assistant Secretary concluded, in pertinent part, that "the [ARD] improperly issued a Notice of Hearing in this matter on an allegation which was not alleged in the complaint," because "an allegation of 'harassment' based on discriminatory considerations and an allegation of 'denial of representation' are clearly separate and distinct causes of action which, for the purposes of adjudication, must be separately and affirmatively alleged in a complaint."

The Assistant Secretary also rejected the Complainant's argument that the pre-complaint charge, containing an allegation of denial of union representation by the activity, must be read into her complaint. In his view, while the regulations of the Assistant Secretary governing the filing of a complaint should be liberally construed, they could not be so liberally construed "as to read into a complaint allegations contained in a pre-complaint charge but not contained in the subsequently filed complaint." The Assistant Secretary concluded:

> Thus, in the processing of unfair labor practice cases the failure of a complainant to include in its complaint specific allegations of unfair labor practices previously contained in its pre-complaint charge will be considered to be attributable to the parties' informal resolution of those matters. In my view, to construe a complaint as automatically containing the allegations contained in the pre-complaint charge as, in effect, argued here by the Complainant, would be to render the prescribed process of informal resolution meaningless.

In your appeal on behalf of the Complainant, you allege, in substance, that the decision of the Assistant Secretary is arbitrary and capricious because it does not respond to the issue of whether the activity's actions against the Complainant at the meeting violated sections 1(a) and 19(a)(1) of the Order. You also allege that the Assistant Secretary's decision that the ARD improperly issued a Notice of Hearing raises a major policy issue as to "whether the Assistant Secretary's regulations have been construed liberally, pursuant to Section 206.9, so as to protect the rights of the parties." In essence, you contend that the Assistant Secretary's interpretation of his regulations was overly technical and rigid in the circumstances of this case.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious and does not present a major policy issue.

With respect to your contention that the Assistant Secretary's decision was arbitrary and capricious, it does not appear in the circumstances of this case that the Assistant Secretary acted without reasonable justification in not considering the issue of whether the activity's actions

against the Complainant violated the Order. In this regard, it should be noted that, as the ARD dismissed these allegations based on section 19(d), and such dismissal was not appealed by the union, they were not before the Assistant Secretary in the matter brought to hearing. Nor, in the circumstances presented herein, does the Council find that a major policy issue is presented by the Assistant Secretary's refusal to incorporate into a complaint an allegation contained in the pre-complaint charge but not contained in the subsequently filed complaint. As noted by the Assistant Secretary, the requirement for a pre-complaint charge and the Assistant Secretary's related procedures had their inception in the Study Committee Report and Recommendations, August 1969, Labor-Management Relations in the Federal Service (1975), which led to the issuance of the Order. Thus, the Report and Recommendations provided for "informal attempts to resolve the complaints [of unfair labor practices] . . . by the parties" and indicated that if "informal attempts are unsuccessful in disposing of the complaints," the matter could be referred to the Assistant Secretary for resolution. In this regard, as the Report clearly intends that the formal complaint filed with the Assistant Secretary reflect unresolved matters which were not disposed of during the parties' attempts to resolve the pre-complaint charge, the Assistant Secretary's conclusion that the failure to include in a complaint specific allegations contained in the pre-complaint charge will be considered to be attributable to the parties' informal resolution of those matters, does not raise a major policy issue warranting review in the circumstances of the case. Nor is a major policy issue raised by the Assistant Secretary's interpretation and application of his regulations herein, since there is no showing that such interpretation or application was inconsistent with the Order in the circumstances of this case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and presents no major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

W. C. Walker
Air Force

Internal Revenue Service, Austin Service Center, Austin, Texas, Assistant Secretary Case No. 63-4995 (G&A). This appeal arose from a decision of the Assistant Secretary, who, upon the filing of an Application for Decision on Grievability and Arbitrability by the National Treasury Employees Union (NTEU), held, in pertinent part, that in the circumstances of this case, the threshold question of determining whether the placing of a seasonal employee in nonduty status for reasons other than workload is an adverse action and thus subject to advisory arbitration under the parties' negotiated agreement should be resolved through the negotiated procedure. The Council accepted the agency's petition for review on the ground that a major policy issue under section 13(d) of the Order, as interpreted and applied by the Council in its decision in Department of the Navy, Naval Ammunition Depot, Crane, Indiana and Local 1415, American Federation of Government Employees, AFL-CIO, FLRC No. 74A-19 (Report No. 63), was presented by the decision of the Assistant Secretary (Report No. 67).

Council action (January 15, 1976). The Council held that, based upon section 13(d) of the Order, as interpreted and applied in Crane, that the matter before the Assistant Secretary was not resolved as required by section 13(d). Accordingly, pursuant to section 2411.18(b) and (c) of its rules of procedure, the Council set aside the decision of the Assistant Secretary and remanded the case to him for reconsideration and decision consistent with the Council's decision.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Internal Revenue Service, Austin
Service Center, Austin, Texas

and

National Treasury Employees
Union

Assistant Secretary Case
No. 63-4995 (G&A)
FLRC No. 74A-81

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary who, upon the filing of an Application for Decision on Grievability and Arbitrability by the National Treasury Employees Union (NTEU), held that, under the circumstances of the case, the question of whether the matter in dispute was subject to advisory arbitration under the agreement, as well as a finding on the merits, involves questions concerning the interpretation and application of the agreement and should be resolved through the negotiated grievance procedure.

The underlying circumstances of the case, as established by the entire record in the matter, briefly stated, are as follows: On February 14, 1974, a career seasonal employee with the Internal Revenue Service (IRS) filed a grievance alleging that a letter of reprimand had been improperly placed in his personnel folder for reasons other than the promotion of the efficiency of the service, and that, in violation of Article 30 of the negotiated agreement,[1/] he had not been returned to active duty status in 1973 though the agency's workload was sufficient to require such action. NTEU asserted before the agency that this failure or refusal to return the employee to active duty status constituted a suspension for greater than 30 days and was thus an adverse action. NTEU demanded the withdrawal of the letter of reprimand, expungement of it from the employee's official personnel folder and that the employee be made whole for the failure to call him to duty in 1973.

Subsequently the Center Director agreed to withdraw the letter of reprimand but stated that the "make whole" demand was neither

1/ Article 30 of the agreement between IRS and NTEU, in effect at the time here involved, provides in pertinent part:

> No Bargaining Unit employee will be the subject of an adverse or disciplinary action except for reasons which will promote the efficiency of the service.

grievable nor arbitrable under Articles 30, 32 or 33 of the collective bargaining agreement between IRS and NTEU.2/ An Application for Decision on Grievability and Arbitrability was filed with the Assistant Secretary by NTEU and the Assistant Regional Director for Labor-Management Services, Kansas City Region, found that the Application had not been timely filed under the Regulations of the Assistant Secretary and therefore dismissed it. On review the Assistant Secretary reversed the finding of the Assistant Regional Director, finding that the application was timely filed, and further concluded:

> With respect to the question of arbitrability . . . in the circumstances of this case, both the threshold question of determining whether the placing of a seasonal employee in non-duty status for reasons other than workload is an adverse action and thus subject to advisory arbitration under Article 31 of the negotiated agreement, as well as a finding on the merits, involve questions concerning the interpretation and application of the negotiated agreement and should be resolved through the negotiated procedure. (Emphasis supplied.)

The agency appealed the decision to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues and requested a stay of the Assistant Secretary's decision. The union filed an opposition to the appeal and to the request for a stay.

The Council decided that a major policy issue under section 13(d) of the Order (as interpreted and applied by the Council in its decision in Department of the Navy, Naval Ammunition Depot, Crane, Indiana and Local 1415, American Federation of Government Employees, AFL-CIO, FLRC No. 74A-19 (February 7, 1975), Report No. 63) is presented by the decision of the Assistant Secretary that "in the circumstances of this case . . . the threshold question of determining whether the placing of a seasonal employee in nonduty status for reasons other than workload is an adverse action and thus subject to advisory arbitration under Article 31 of the negotiated agreement . . . should be resolved through the negotiated procedure." The Council also determined that the issuance of a stay was warranted and granted the agency's request. Both parties filed briefs on the merits.

2/ The pertinent provisions of Article 30 of the agreement are quoted in note 1, supra. Article 32 sets forth the grievance procedure and Article 33 sets forth the agreement between the parties regarding arbitration. In addition, Article 31 of the agreement provides for advisory arbitration of adverse actions.

Opinion

As noted above, the Council concluded that the decision of the Assistant Secretary in this case presents a major policy issue under section 13(d) of the Order, as interpreted and applied by the Council in its decision in Crane, 74A-19 supra. In that case the Council pointed out that under the express language in sections 6(a)(5) and 13(d) of the Order:3/

> . . . in any dispute referred to the Assistant Secretary concerning whether a grievance is on a matter subject to a negotiated grievance procedure, the Assistant Secretary must decide whether the dispute is or is not subject to the negotiated grievance procedure, just as an arbitrator would if the question were referred to him. In making such a determination, the Assistant Secretary must consider relevant provisions of the Order, including section 13, and relevant provisions of the negotiated agreement, including those provisions which describe the scope and coverage of the negotiated grievance procedure, as well as any substantive provisions of the agreement which are being grieved. Further, the Assistant Secretary must also consider " . . . existing . . . laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual . . . ."

3/ Section 6(a)(5) of the Order provides that the Assistant Secretary shall:

> (5) decide questions as to whether a grievance is subject to a negotiated grievance procedure or subject to arbitration under an agreement as provided in section 13(d) of this Order.

Section 13(d) provides, in part:

> (d) Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision.

The foregoing sections are cited as amended by E.O. 11838. While the subject decision of the Assistant Secretary was decided under the Order prior to amendment by E.O. 11838, the Order was not changed in respects which are material in this case. Further, while section 13(d) now requires that disagreements between the parties on questions of whether a grievance is on a matter subject to a statutory appeal procedure be referred to the Assistant Secretary for decision, there was no such explicit requirement in the Order at the time this matter was before the Assistant Secretary. However, this change is not material to the resolution of this case since the matter was taken to the Assistant Secretary for resolution.

In applying these general principles to the case before us, we find that the decision does not reflect that necessary determinations have been made and that the proper standard has been used for determining whether the matter in dispute was subject to the negotiated grievance procedure. Thus, there was no finding regarding whether or not the grievance is on a matter subject to the negotiated grievance procedure. In this case NTEU asserted that the failure of the agency to return the employee to an active duty status for reasons other than workload constituted a suspension for greater than 30 days and was thus an adverse action subject to advisory arbitration under Article 31 of the collective bargaining agreement. The threshold question for decision by the Assistant Secretary, then, is whether such an action is an adverse action. This question was not decided and hence there was no decision on whether the grievance is on a matter subject to the negotiated grievance procedure, these matters instead being passed on to the arbitrator for resolution. As we indicated in the Crane decision, where an "arbitrability" dispute is referred to the Assistant Secretary, either by operation of the Order or by voluntary agreement of the parties, he must resolve that dispute; he may not pass it on to an arbitrator for resolution. Accordingly, based upon section 13(d) of the Order, as interpreted and applied in Crane, 74A-19, the Assistant Secretary's decision must be set aside on the basis that the matter before him was not resolved as required by section 13(d).

Conclusion

For the foregoing reasons and pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision that the question of whether the placing of a seasonal employee in a nonduty status for reasons other than workload is an adverse action and thus subject to advisory arbitration under Article 31 of the negotiated agreement should be resolved through the negotiated procedure.

Pursuant to section 2411.18(c) of the Council's rules of procedure, we hereby remand this case to the Assistant Secretary for reconsideration and decision consistent with our decision herein.

By the Council.

Henry B. Frazier III
Executive Director

Issued: January 15, 1976

Tennessee Valley Authority, A/SLMR No. 509. The Assistant Secretary found, in pertinent part, that the Tennessee Valley Authority (TVA) had violated section 19(a)(1) and (2) of the Order by reason of its disparate discipline against TVA employees, discharging some employees and not others, where the disparate discipline was based solely on membership in Local 760 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (UA). The Assistant Secretary ordered TVA, among other things, to take certain affirmative actions, including the offer of reinstatement and backpay to certain of the complainants.

Petitions for review were filed with the Council on behalf of the individual complainants and by the UA, seeking among other things, to broaden the scope of the Assistant Secretary's remedial order. Additionally, the Assistant Secretary referred the matter of compliance by TVA with his decision and order to the Council.

Subsequently, following a court-approved settlement agreement in a civil action filed in a United States District Court on behalf of all members of Local 760 who were terminated, including those employees who were the subject of the Assistant Secretary's remedial order, the representatives of the complainants and the UA requested that their respective petitions for review be withdrawn. The Assistant Secretary also requested that his referral of the compliance matter be withdrawn.

Council action (January 21, 1976). In light of the above-described circumstances, and without objection by any interested party, the requests by the representatives of the complainants and by the UA to withdraw their respective petitions for review were granted. Additionally, the request of the Assistant Secretary to withdraw his referral of the compliance matter to the Council was granted.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

January 21, 1976

Robert Matisoff, Esq.
O'Donoghue and O'Donoghue
1912 Sunderland Place, NW.
Washington, D.C. 20036

Re: Tennessee Valley Authority, A/SLMR No. 509, FLRC No. 75A-53

Dear Mr. Matisoff:

Reference is made to the telegram of January 13, 1976, requesting that the petition for review filed by you on behalf of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (UA) in the above-entitled case be withdrawn.

In this case, the Assistant Secretary found, in pertinent part, that TVA had violated section 19(a)(1) and (2) of the Order by invoking disparate discipline against employees who had engaged in an improper action, discharging some and merely warning others, where the disparate treatment was solely on the basis of membership in a particular labor organization, namely, Local 760 of the UA. The Assistant Secretary ordered TVA to cease and desist from such discriminatory conduct and to take certain affirmative actions, including the offer of immediate and full reinstatement without prejudice to their seniority or other rights, and the payment of appropriate backpay to 41 of the 75 complainants. He dismissed the complaints filed by the remaining 34 individuals because they were "preference eligible" employees with rights of appeal to the Civil Service Commission and, therefore, he was precluded, by section 19(d) of the Order, from considering the issues raised in their unfair labor practice complaints. (Fifteen of these 34 "preference eligible" employees appealed their discharges to the Civil Service Commission and have been offered reinstatement with backpay and other benefits pursuant to the mandatory recommendations of the Commission.)

Your petition for review, filed with the Council on May 21, 1975, sought to broaden the scope of the Assistant Secretary's remedial order so as to encompass a number of additional employees who allegedly had been discharged by TVA at the same time and for the same reasons, but who had failed to file individual unfair labor practice complaints and therefore had not been included within the scope of the Assistant Secretary's remedial order.

On July 16, 1975, a civil action was filed in the United States District Court for the Northern District of Alabama, Northeastern Division, on

behalf of all members of Local 760 of the UA who were terminated from their employment with TVA as a result of the aforementioned work stoppage, including those employees who were the subject of the Assistant Secretary's remedial order. Thereafter, a settlement agreement was reached in the civil action which provided for reinstatement without loss of seniority and for the payment of money by TVA to certain of the employees who had engaged in the work stoppage, including those employees who were the subject of the Assistant Secretary's remedial order as well as the remaining 19 "preference eligible" employees whose complaints were dismissed. On January 9, 1976, District Judge Seymour H. Lynne issued an Order approving the settlement agreement in full, having found it to be "fair, adequate, reasonable and proper."

In light of the foregoing circumstances, and without objection by any interested party, your request to withdraw the aforementioned petition for review in the instant case is hereby granted.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

R. H. Marquis
TVA

R. Matisoff

J. Jacobs

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

January 21, 1976

Robert L. Potts, Esq.
Potts and Young
107 East College Street
Florence, Alabama 35630

Re: Tennessee Valley Authority, A/SLMR No. 509, FLRC No. 75A-53

Dear Mr. Potts:

Reference is made to your telegram of January 13, 1976, requesting, in effect, that the petition for review filed by you on behalf of certain named individuals in the above-entitled case be withdrawn.

In this case, the Assistant Secretary found, in pertinent part, that TVA had violated section 19(a)(1) and (2) of the Order by invoking disparate discipline against employees who had engaged in an improper action, discharging some and merely warning others, where the disparate treatment was solely on the basis of membership in a particular labor organization, namely, Local 760 of the UA. The Assistant Secretary ordered TVA to cease and desist from such discriminatory conduct and to take certain affirmative actions, including the offer of immediate and full reinstatement without prejudice to their seniority or other rights, and the payment of appropriate backpay to 41 of the 75 complainants. He dismissed the complaints filed by the remaining 34 individuals because they were "preference eligible" employees with rights of appeal to the Civil Service Commission and, therefore, he was precluded, by section 19(d) of the Order, from considering the issues raised in their unfair labor practice complaints. (Fifteen of these 34 "preference eligible" employees appealed their discharges to the Civil Service Commission and have been offered reinstatement with backpay and other benefits pursuant to the mandatory recommendations of the Commission.)

Your petition for review, filed with the Council on May 21, 1975, sought to broaden the scope of the Assistant Secretary's remedial order so as to encompass other employees who allegedly had been discharged by TVA at the same time and for the same reasons, but who had failed to file unfair labor practice complaints and therefore had not been included within the scope of the Assistant Secretary's remedial order; to broaden the scope of the order to include the "preference eligible" employees whose complaints had been dismissed by the Assistant Secretary; and to seek compliance with the Assistant Secretary's remedial order.

On July 16, 1975, a civil action was filed in the United States District Court for the Northern District of Alabama, Northeastern Division, on

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behalf of all members of Local 760 of the UA who were terminated from their employment with TVA as a result of the aforementioned work stoppage, including those employees who were the subject of the Assistant Secretary's remedial order. Thereafter, a settlement agreement was reached in the civil action which provided for reinstatement without loss of seniority and for the payment of money by TVA to certain of the employees who had engaged in the work stoppage, including those employees who were the subject of the Assistant Secretary's remedial order as well as the remaining 19 "preference eligible" employees whose complaints were dismissed. On January 9, 1976, District Judge Seymour H. Lynne issued an Order approving the settlement agreement in full, having found it to be "fair, adequate, reasonable and proper."

In light of the foregoing circumstances, and without objection by any interested party, your request to withdraw the aforementioned petition for review in the instant case is hereby granted.

For the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

R. H. Marquis
TVA

R. Matisoff

J. Jacobs

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

January 21, 1976

Honorable Paul J. Fasser, Jr.
Assistant Secretary of Labor
for Labor-Management Relations
Department of Labor, Room S-2307
200 Constitution Avenue, NW.
Washington, D.C. 20210

Re: Tennessee Valley Authority, A/SLMR No. 509, FLRC No. 75A-53

Dear Mr. Fasser:

Receipt is acknowledged of your letter dated January 16, 1976, to the Chairman of the Federal Labor Relations Council, requesting that your referral of June 11, 1975, to the Council of the matter of compliance by the Tennessee Valley Authority with your Decision and Order in the above-entitled case be withdrawn.

Your withdrawal of the aforementioned referral in the instant case is hereby granted.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: R. H. Marquis
TVA

R. L. Potts

R. Matisoff

J. Jacobs

Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Robertson, Arbitrator). The arbitrator denied the grievance relating to a change in the grievant's shift hours for the purpose of training. The union filed exceptions to the arbitrator's award with the Council, alleging (1) that the activity violated appropriate regulations; (2) that the activity violated the Order; and (3) in substance, that the arbitrator reached an incorrect result in his interpretation of the parties' negotiated agreement.

Council action (January 22, 1976). The Council held that the union's exceptions failed to assert grounds upon which the Council will accept a petition for review of an arbitrator's award or failed to set forth support for the exceptions presented. Accordingly, the Council denied the union's petition since it failed to meet the requirements for review under section 2411.32 of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

January 22, 1976

Mr. Richard F. Lake, President
Tidewater Virginia Federal
Employees Metal Trades Council
2700 Airline Boulevard
P.O. Box 3371 Olive Branch Station
Portsmouth, Virginia 23701

Re: Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Robertson, Arbitrator), FLRC No. 75A-95

Dear Mr. Lake:

The Council has carefully considered your petition for review of the arbitrator's award in the above-entitled case.

According to the award, on October 17, 1974, the grievant was instructed by his supervisor that his shift hours were to be changed from his regular third shift hours (11:40 p.m. to 7:40 a.m.) to a 2:00 a.m. to 10:00 a.m. shift, the next day, to enable him to attend a training session that began at 8:00 a.m. on the 18th. The grievant did work the 2:00 to 10:00 a.m. shift on the 18th, receiving 8 hours' pay at the straight time rate. He then returned to his regular third shift on the 18th.

The stipulated issue submitted to arbitration was:

> Did the shipyard violate Article 15, Section 6 of the negotiated Agreement by changing the shift hours of . . . [the grievant] on October 18, 1974 for the purpose of training?1/

1/ According to the award, Article 15, Section 6, provides in pertinent part:

> When effecting changes in the days or hours of an employee's basic workweek, the Employer will notify the affected employees prior to midnight on Wednesday of the week prior to the start of the administrative workweek in which the change is effective except as provided below. The days or shift hours of an employee's basic workweek will not be changed for a period of less than 3 weeks except as provided below. The following changes may be made without the 3 days advance notification and/or 3 weeks duration requirements,
>
> a) Participation in grievance appeals
> b) Disciplinary and other official hearings
> c) Investigations
> d) Training

The arbitrator denied the grievance, stating that:

> . . . the provisions of Section 4 of Article 15 referring to the regularly established shift hours for the first, second and third shifts are designed to establish the norm from which the employer retained the right to deviate for the reasons or bases listed in Article 15, Section 1. Section 6, Article 15 places some limited restriction upon the Employer in effectuating the changes referred to in Section 1 of that Article in that the employe affected must be given a three day notice and as well must be assured that the change will not be of less than 3 weeks duration except, however, when the change is made for the purposes specified, one of which is for training. The right of the Employer to make the changes in days or shift hours on the semi-permanent basis for the reasons listed in Section 1 of Article 15 and to make the changes involved in the exceptions listed in Section 6 of Article 15 derive from the retention of rights recited in Section 1 of the Article. . . .[2/]

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of three exceptions discussed below.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception, the union contends that the arbitrator, in finding for the shipyard, has rewarded it for breach of appropriate regulations. Thus, the union's exception, on its face, alleges that the shipyard by having taken the action about which the grievance was filed, i.e., by changing the shift hours of the grievant on October 18 for the purpose of training, violated "appropriate regulations." This exception does not

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2/ According to the award, Section 4 of Article 15 "states that the regularly established 8 hour work shift hours are: 1st shift 7:20 a.m. to 4:00 p.m.; 2nd shift 3:30 p.m. to 12:00 and 3rd shift 11:40 p.m. to 7:40 a.m." Further, the arbitrator stated that Article 15, Section 1, in essence, provided "for the retention by management of the right to establish, disestablish, schedule the starting time and ending time or change basic workweeks or shifts when based upon a) the need to eliminate safety or health hazards, b) continuous operational or surveillance functions, c) the need to meet scheduled major key event dates, d) effective utilization of available manpower and e) the full utilization of tools and equipment" and that the "restraint upon management's discretion in exercising the rights retained under . . . [section 1] is a requirement for notification to the Union of the proposed changes and meeting to discuss and work out mutually acceptable change."

assert a ground upon which the Council will accept a petition for review of an arbitration award. Furthermore, even if the union's petition, in substance, is construed to allege that it was the arbitrator's award that violated appropriate regulations, the union simply quotes certain agency regulations, advancing no arguments in support of its exception and describing no facts or circumstances sufficient to show that any basis exists for finding the award violative of appropriate regulations.[3/] The Council has consistently declined to review arbitration awards where the petition for review fails to set forth any support for the exceptions presented. See, e.g., Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (August 15, 1975), Report No. 82 and cases cited therein. Therefore, the union's first exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception, the union contends that the arbitrator, in finding for the shipyard, has rewarded it for breach of Executive Order 11491. Thus, the union's second exception, read literally, states, as a ground for review, that the agency violated the Order. This exception, however, does not assert a ground upon which the Council will grant a petition for review of an arbitration award. In support of this exception, the union contends that the arbitrator, in basing his decision on section 11(b) of the Order,[4/] disregarded the fact that in the negotiations leading up to the current collective bargaining agreement, the shipyard elected to negotiate on tours of duty, and the parties, in Section 4 of Article 15, agreed on certain hours of work. When the substance of this exception is considered, the union, in effect, is contending that the arbitrator reached an incorrect result in his interpretation of the agreement. However, the Council has held that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. See, e.g., Airway Facilities Division, Federal Aviation Administration, Eastern

3/ We do not pass upon the question whether the cited agency regulations constitute an "appropriate regulation" within the meaning of section 2411.32 of the Council's rules. Cf. American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator), FLRC No. 75A-45 (December 24, 1975), Report No. 94, and American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61.

4/ Section 11(b) of the Order provides in pertinent part:

> . . . the obligation to meet and confer does not include matters with respect to . . . tour of duty . . . .

Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (August 15, 1975), Report No. 82, and Social Security Administration, Bureau of Retirement and Survivors Insurance, Chicago, Illinois and AFGE, National Council of Social Security Payment Center Locals, Local 1395 (Davis, Arbitrator), FLRC No. 75A-17 (June 26, 1975), Report No. 76. Therefore, the union's second exception does not, under the circumstances of this case, state a ground upon which the Council will grant a petition for review of an arbitration award.

In its third exception, the union contends that the arbitrator, in finding for the shipyard, has rewarded it for breach of the current collective bargaining agreement. Thus the union is, in substance, contending that the arbitrator reached an incorrect result in his interpretation of the negotiated agreement. As previously stated, however, the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. Therefore, the union's third exception does not state a ground upon which the Council will grant a petition for review of an arbitration award.

Accordingly, the Council has denied review of the union's petition because it fails to meet the requirements for review set forth in section 2411.32 of its rules of procedure.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: E. T. Borda
Navy

United States Forest Service, Salmon National Forest, Salmon, Idaho, A/SLMR No. 556. The Assistant Secretary, upon separate unit clarification petitions filed by the activity and Local 1502, National Federation of Federal Employees (NFFE), determined that "seasonal supervisors" should be considered to be included in the bargaining unit during the "out of season" period when they are performing rank and file duties and should be considered outside the unit during the time they serve as "seasonal supervisors." NFFE appealed to the Council, contending that the decision of the Assistant Secretary raises a major policy issue.

Council action (January 22, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, his decision did not raise a major policy issue, and NFFE neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied NFFE's petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

January 22, 1976

Mr. George Tilton
Associate General Counsel
National Federation of Federal Employees
1737 H Street, NW.
Washington, D.C. 20006

Re: United States Forest Service, Salmon National Forest, Salmon, Idaho, A/SLMR No. 556, FLRC No. 75A-107

Dear Mr. Tilton:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, the United States Forest Service, Salmon National Forest, Salmon, Idaho (the activity) and Local 1502, National Federation of Federal Employees (the union) filed separate unit clarification petitions with the Assistant Secretary concerning, in pertinent part, "whether certain classifications of employees designated as 'seasonal supervisors' should be included in the unit at all times even when acting as such supervisors." The Assistant Secretary stated:

> In this connection, the parties indicated a desire for the Assistant Secretary to reconsider and reverse the decision in Department of Interior, Bureau of Land Management, District Office, Lakeview, Oregon, A/SLMR No. 212, in which it was held that employees who supervise seasonal employees should not be included in the recognized unit during such periods, but should be considered to be within the unit only for the part of the year when they are not supervising seasonal employees. The parties in the instant case contend that seasonal supervisors should be considered to be included in the unit throughout the entire year.

Citing the Council's decision and rationale in United States Department of Agriculture, Northern Marketing and Nutrition Research Division, Peoria, Illinois, A/SLMR No. 120, FLRC No. 72A-4 (April 17, 1973), Report No. 36, the 1969 Study Committee Report and Recommendations,[1/] and his own precedent, the Assistant Secretary concluded:

> As the "seasonal supervisors" spend a considerable portion of the year supervising employees within the meaning of Section 2(c) of

1/ Labor-Management Relations in the Federal Service (1975), p. 68.

the Order, it would, in my view, be inconsistent with the stated intent of the Executive Order to place them in a position of potential conflict of interest and responsibility during such extended periods of time. Under these circumstances, I reaffirm the decision in A/SLMR No. 212 with respect to "seasonal supervisors."

As the parties stipulated that the "seasonal supervisors" in the instant proceeding have no permanent employees assigned to them for the entire year, such employees, who spend a portion of the working year as rank and file employees and the remainder of the year as supervisors, should be considered to be included in the employee bargaining unit during the "out of season" period when they are performing rank and file duties and should be considered outside the unit during the time they serve as "seasonal supervisors."

In your petition for review on behalf of the union, you allege that the decision of the Assistant Secretary raises as the sole major policy issue "whether the 'seasonal supervisor' should be included in the unit for the entire year." In support of your position that the decision raises such a major policy issue you contend that: (1) the decision will be "burdensome and unproductive" to both agency management and the union, as well as "unfair" in that it will put employees who are part-time supervisors "in an intolerable conflicts of interests [sic] which is incapable of resolution"; (2) the definition of supervisor is "inappropriate" as applied to seasonal supervisors and it is "inappropriate" to exclude such seasonal supervisors "from full participation in the rights guaranteed them by the Order"; and (3) that the seasonal employees being supervised are, at best, "temporary, casual" employees or "'pick-up' employees," and as such are not employees within the meaning of the Order, so that employees who supervise them are not "supervisors" within the meaning of the Order.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not raise a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

As to your first contention concerning the burden placed on agency management, the union and employees and the "conflicts of interests" created, in the Council's view such speculation as to the possible effects of the Assistant Secretary's decision does not raise a major policy issue warranting review. Moreover, the Assistant Secretary's decision indicates the status of the seasonal supervisor both during the periods when in a supervisory status and during periods when in employee status.[2/] As to your

2/ In this regard it should be noted that section 1(b) of the Order provides that section 1(a) does not authorize the participation in the management of a labor organization or acting as a representative of such an organization by a supervisor.

second contention concerning the appropriateness of treating seasonal supervisors as supervisors under the Order, thereby denying them rights "guaranteed them by the Order" (emphasis added), it appears that this contention begs the question because it assumes that seasonal supervisors were not intended to be treated as supervisors under the Order. Therefore, no major policy issue is raised by this contention. Finally, as to your contention concerning the persons supervised, in the Council's view no major policy issue warranting review is raised inasmuch as the status of the persons supervised is not the dispositive consideration as to whether the seasonal supervisors are supervisors within the meaning of the Order.3/

Since the Assistant Secretary's decision does not present a major policy issue, and since you concede that the Assistant Secretary's decision is not arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

L. Slagowski
Agriculture

3/ See in this regard Department of the Air Force, McConnell Air Force Base, Kansas, A/SLMR No. 134, FLRC No. 72A-15 (April 17, 1973), Report No. 36, wherein the Council sustained the Assistant Secretary's decision that persons who possess supervisory authority are supervisors notwithstanding the fact that such authority is exercised exclusively over military personnel, and Department of the Army, United States Army Base Command, Okinawa, A/SLMR No. 243, FLRC No. 73A-63 (March 20, 1974), Report No. 51, wherein the Council denied review of an Assistant Secretary decision which excluded employee classifications from a unit because they were vested with supervisory authority over foreign nationals.

Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator). The arbitrator denied an employee's grievances relating to assignment of elements of the grievant's position to military personnel, and maintenance of the supervisor's "Record of Employee." The union filed exceptions to the arbitrator's award with the Council, contending in substance that (1) the award violates the Order; (2) the arbitrator was incorrect in his decision; (3) the arbitrator was incorrect in his interpretation of the parties' agreement; and (4) the arbitrator improperly gave cognizance to certain documents submitted by the activity. The union also requested a stay of the arbitrator's award.

Council action (January 30, 1976). The Council held that the union's exceptions failed to set forth support for the exceptions or failed to state grounds upon which the Council will grant a petition for review of an arbitration award. Accordingly, the Council denied the union's petition for review because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the Council denied the union's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

January 30, 1976

Mr. Paul J. Hayes
National Vice President
National Association of
Government Employees
31 Holly Drive
Belleville, Illinois 62221

Re: Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101

Dear Mr. Hayes:

The Council has carefully considered your petition for review of an arbitrator's award, and the agency's opposition thereto, in the above-entitled case.

According to the arbitrator's award, this case arose upon the filing of a number of grievances by an employee who alleged that he had not been treated properly during a reorganization. The parties condensed the matters before the arbitrator to the following two issues:

1. Were elements of the grievant's position improperly assigned to military personnel in violation of the labor agreement?

2. Was the grievant's Air Force Form 971 (Supervisor's Record of Employee) improperly kept in violation of the labor agreement?

Regarding the first grievance, the union contended that the grievant's position was significantly changed in violation of procedures established by the labor agreement in Article XIV, Section 2,[1/] Article XX,

1/ According to the award, Article XIV, Section 2 of the parties' labor agreement states in pertinent part:

ARTICLE XIV - JOB DESCRIPTIONS, GRADES, AND DETAILS

Section 2: Each employee and his supervisor will be furnished copies of job descriptions and any subsequent changes to the job descriptions will be provided when changes occur. Job descriptions will be written based upon the duties and responsibilities assigned to positions. All identical positions in the same job classification within each unit to which the positions are assigned will be covered with the same job description with the exception of the organizational title.

Section 7C,[2] and Article IV, Section 1.[3]

The arbitrator denied this grievance stating:

> The grievant's claim of improper assignment of his tasks to others turns on the question of whether those assignments were an alteration of his duties in a manner or degree violative of the contract. There is no question that certain tasks formerly performed by the grievant were transferred to a member of the military.
>
> Based on evidence presented in the course of the hearing, the Arbitrator cannot conclude that the changes in the grievant's basic job were so significant as to have required a change in the job description. Consequently the failure to change the job description was not a contract violation. . . .

As to the grievance that the grievant's AF Form 971 had been improperly kept, the arbitrator determined that although he could not "agree with the Employer that AF Regulation 40-293 presents only a suggested way of filling out AF Form 971 . . . it cannot be concluded that any impropriety in filling out AF Form 971 is in violation of Article XX Section 7A.C.D.

2/ According to the award, Article XX, Section 7C of the parties' labor agreement states in pertinent part:

ARTICLE XX - GENERAL PROVISIONS

Section 7: Performance Evaluation:

C. Emphasis will be placed on the employee being kept informed of his status in meeting performance requirements of his position.

3/ According to the award, Article IV, Section 1 of the parties' labor agreement states in pertinent part:

ARTICLE IV - PROVISIONS OF AGREEMENT

Section 1: In the administration of all matters covered by this agreement, it is agreed that officials and employees are governed by existing or future laws and regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level. Any reference made in this agreement to specific Air Force directives or Civil Service Commission regulations is not intended to preclude application of any other laws, rules or regulations of higher headquarters or other agencies that are governing.

or Section 13,[4/] since those provisions at most refer to requirements related to the AF Form 971 but not the filling out of the form as such." [Footnote added.] Accordingly, the arbitrator determined that "these violations of AFR 40-293 are not violations of Article XX and consequently the Arbitrator cannot find a contract violation."

Finally, the arbitrator rejected the union's interpretation of Article IV, Section 1 of the agreement that a violation of that provision exists because some Air Force regulation has been violated. Instead, he concluded that Article IV, Section 1 "constitutes a restraint on the application and interpretation of the Agreement and not an extension of the Agreement by incorporation of every federal law, regulation, etc. as enumerated in that section."

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of four exceptions discussed below and requests a stay of the award. The agency filed an opposition.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

4/ According to the award, Article XX, Section 7A, C, and D, and Section 13 of the parties' labor agreement states in pertinent part:

ARTICLE XX - GENERAL PROVISIONS

Section 7: Performance Evaluation:

A. The total intent of the purpose and provisions of AFR 40-451 will be exercised in any official rating of the performance of employees. Deviation from the specific language of the regulation will not be tolerated. Personal bias will not be allowed to compromise total impartiality in evaluation.

C. Emphasis will be placed on the employee being kept informed of his status in meeting performance requirements of his position.

D. Before entries of annual performance ratings are applied to the employee's AF Form 971, Supervisor's Record of Employee, the entry will be discussed with him by his immediate supervisor.

Section 13: The Employer and the Union will encourage employees to contribute their maximum ability in the performance of their duties and to conscientiously strive to eliminate waste of resources.

In its first exception, the union contends that the award violates the Order. While this exception cites a general ground upon which the Council will grant review of an arbitrator's award, the union does not specify in its petition which provision(s) of the Order it believes the award to violate nor does it provide any explanation as to why the award is considered violative of the Order. Furthermore, the petition does not contain a description of facts and circumstances to support this exception. A petition for review of an arbitrator's award will not be accepted where there appears in the petition no support for the stated exception to the award. Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (August 15, 1975), Report No. 82. Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception, the union contends that the award is based in part on an improper conclusion by the arbitrator that a provision of the agreement is operative when in fact it is nonoperative by reason of Council decisions. In this regard, the union asserts that Article XIX, Section 2[5/] of the labor agreement was negated by the Council's subsequent decisions in American Federation of Government Employees, Local 1668 and Elmendorf Air Force Base (Wildwood Air Force Station), Alaska, FLRC No. 72A-10 (May 15, 1973), Report No. 38 and the two related cases decided on that date. This exception, in substance, contends that the arbitrator was incorrect in his decision concerning the grievance. The Council has consistently held that the interpretation of contract provisions and, hence, resolution of the grievance is a matter to be left to the arbitrator's judgment. The Supervisor, New Orleans, Louisiana Commodity Inspection and Grain Inspection Branches, Grain Division, United States Department of Agriculture and American Federation of Government Employees, AFL-CIO, Local 3157 (Moore, Arbitrator), FLRC No. 74A-75 (June 26, 1975), Report No. 74. Moreover, the union's reliance upon the Council's decision in Elmendorf is misplaced. That decision did not address the status of specific provisions in existing agreements which contained the language

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5/ According to the award, Article XIX, Section 2 of the parties' labor agreement states in pertinent part:

ARTICLE XIX - NEGOTIATED GRIEVANCE PROCEDURE

Section 2: Questions involving interpretation of published agency policies or regulations, provisions of law, or regulations of appropriate authorities outside the agency will not be subject to the negotiated grievance procedure or to arbitration regardless of whether such policies, laws, or regulations are quoted, cited, or otherwise incorporated or referenced in the Agreement.

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mandated by the agency directive in question.[6/] Therefore, we conclude that the union's second exception does not state a ground upon which the Council will grant a petition for review of an arbitration award.

In its third exception, the union contends that, "[t]he award is based in part on an improper conclusion that a provision of the Agreement is non-operative because its inclusion in the subject Agreement is required by Executive Order 11491 as amended." In support of this contention, you state that "serious umbrage is taken to a conclusion that Section 1 of Article IV[7/] of the applicable agreement cannot be utilized to invoke the arbitration of a grievance alleging violations of applicable regulations merely because its inclusion in the Agreement is mandated by Executive Order 11491 as amended." [Footnote added.] In effect, this exception is a contention that the arbitrator was incorrect in his interpretation of Section 1 of Article IV of the labor agreement. As previously stated, the Council has consistently held that disagreement with the arbitrator's interpretation of contract provisions and resolution of grievances is not a ground for review of an arbitration award.[8/] Accordingly, the union's third exception does not state a ground upon which the Council will accept a petition for review of an arbitration award.

6/ In Elmendorf the Council held, in pertinent part, that an "agency directive which would mandate specific language in a negotiated grievance procedure is inconsistent with the intent and purposes of section 13 of the Order, as amended by E.O. 11616." Consequently, the Council set aside a specific agency determination disapproving an agreement between the parties to that case which was not in conformity with the mandate of the agency directive. In doing so, the Council pointed out that the nature and scope of the negotiated grievance procedure are to be negotiated by the parties subject only to the explicit limitations prescribed by the Order itself. However, the Council went on to state that "limitations on the scope of negotiated grievance procedures are not inherently inconsistent with the Order and the Report. Such limitations may be proper if established through the process of negotiations." The Council did not thereby render a decision as to the status of specific provisions in existing agreements which contained the language mandated by the agency directive in question.

7/ Section 1 of Article IV, set forth supra in footnote 3, essentially incorporates, as required by the Order, section 12(a) of the Order in the negotiated agreement.

8/ The theory which appears to underlie the union's contention is that by operation of section 12(a) of the Order, which is incorporated in Section 1 of Article IV of the subject agreement, the coverage and scope of the negotiated grievance procedure is extended to include grievances alleging violations of all laws, regulations of appropriate authorities and policies,

(Continued)

In its fourth exception, the union contends that the activity's representative submitted certain documents with his written brief to the arbitrator, and that the submission of those documents was a flagrant violation of the rules of the American Arbitration Association and those enunciated by the arbitrator prior to the conclusion of the arbitration hearing.9/ The union asserts that the arbitrator gave cognizance to these illegally submitted documents. Viewed literally, this exception does not state a ground upon which the Council will grant review of an arbitration award under section 2411.32. That is, the exception does not assert a ground upon which the Council has granted review in the past nor does it appear similar to those upon which challenges to labor arbitration awards are sustained by courts in private sector cases. The union cites no private sector cases in which courts have held this exception to be a ground for review of arbitration awards nor has our research disclosed any such cases. Moreover, if an arbitrator gives cognizance to documents, such as those in this case, it would not be inconsistent with prior Council decisions. Thus, in Local Lodge 830, International Association of Machinists and Aerospace Workers and Louisville Naval Ordnance Station, Department of the Navy, FLRC No. 73A-21 (January 31, 1974), Report No. 48, the Council stated:

> The provisions in section 12(a) must, as stated therein, be part of every agreement and an arbitrator, under that section, must consider the referenced laws and regulations in resolving the grievances arising under the agreement. Such laws and regulations

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(Continued)

including agency policies and regulations. However, section 13 of Executive Order 11491 provides "[t]he coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order." [Emphasis added.] The union's theory concerning the interpretation of section 12(a) of the Order would render section 13 meaningless. The scope of the negotiated grievance procedure is to be negotiated by the parties. Section 12(a) constitutes an obligation in the administration of labor agreements to comply with the legal and regulatory requirements cited therein and is not an extension of the negotiated grievance procedure to include grievances over all such requirements.

9/ The union contends that only three of the five documents submitted were improper. These three documents are identified by the union to be: a copy of the Council's decision in National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61; a copy of the Acting Assistant Regional Director's Report and Findings on Grievability in Department of the Air Force, Scott Air Force Base, Illinois and Local R7-23, National Association of Government Employees, Assistant Secretary Case No. 50-13019 (GR) (July 7, 1975); and, a copy of the Federal Personnel Manual Supplement 752-1, paragraph S1-4, "Reductions in Rank."

obviously cannot be interpreted in a vacuum. They draw their intent and meaning from relevant history, reports, decisions, interpretations, policy rules and the like, which must be derived from sources outside the four corners of the agreement itself.

In discussing the interpretation and application of agency regulations by arbitrators in the resolution of grievances through negotiated grievance procedures, the Council stated, in pertinent part, in its recommendations which led to Executive Order 11838:10/

> . . . Under the present section 13 arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation.

Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules of procedure.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the union's request for a stay of the award is denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: Robert T. McLean
Air Force

10/ Labor-Management Relations in the Federal Service (1975), p. 44; see also Bureau of Prisons and Federal Prison Industries, Inc., Washington, DC and Council of Prison Locals, AFGE, FLRC No. 74A-24 (June 10, 1975), Report No. 74.

Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator). The arbitrator upheld a union grievance, finding that conduct of an agency representative at a prior hearing violated the parties' agreement and ordered corrective action. Upon motion for reconsideration by the agency, the arbitrator ruled that he lacked authority to change the award (i.e., that he was functus officio) and refused to reconsider the award. The agency filed exceptions to the arbitrator's award with the Council, in substance on the grounds that (1) the arbitrator reached an incorrect result in his interpretation of the parties' agreement; (2) the arbitrator erred in concluding that he was functus officio; (3) the arbitrator's award contained a number of erroneous findings of fact; and (4) the arbitrator erred in failing to give a statement of the reasons why the parties' agreement was violated. The agency also requested a stay of the arbitrator's award.

Council action (January 30, 1976). The Council held that the agency's exceptions failed to state any ground upon which the Council will grant review of an arbitration award. Accordingly, the Council denied the agency's petition for review because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the Council, under section 2411.47(f) of its rules, denied the agency's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

January 30, 1976

Mr. Philip M. Weightman
Chief, Labor-Management Relations
Community Services Administration
1200 19th Street, NW.
Washington, D.C. 20506

Re: Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102

Dear Mr. Weightman:

The Council has carefully considered your petition for review of the arbitrator's award, and the union's opposition thereto, filed in the above-entitled case.

According to the arbitrator's award, a formal grievance was filed by the union on December 12, 1973, alleging, in relevant part, that agency personnel staff made false statements at a prior arbitration hearing. In his award of November 1, 1974, the arbitrator found that an agency representative had made a statement at the prior hearing, knowing that it was not a correct statement of the facts. The arbitrator found this conduct violative of the parties' agreement and directed that the agency's Director of Personnel discuss the matter with the Director of the agency and furnish him with a copy of the opinion and award.

The agency filed a motion for reconsideration with the arbitrator. The arbitrator, after reviewing the motion and the union's opposition thereto, held a rehearing. On August 26, 1975, the arbitrator found that the union had participated in the rehearing without prejudice to its position that the arbitrator's jurisdiction had ended with the award. The arbitrator concluded that the parties had not mutually agreed to a reconsideration of the award and that under the doctrine of functus officio[1/] he lacked authority to change the award. Consequently, he refused to reconsider the award.

1/ Elkouri and Elkouri in How Arbitration Works, 3d edition, BNA, 1973, endorse the following statement of the common law rule of functus officio at 239:

> The authority and jurisdiction of arbitrators are entirely terminated by the completion and delivery of an award. They have thereafter no power to recall the same, to order a rehearing, to amend, or to interpret in such manner as may be regarded as authoritative. But they may correct clerical mistakes or obvious errors of arithmetical computation.

The agency requests that the Council accept its petition for review of the arbitrator's award on the basis of four exceptions discussed below.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception, the agency contends that no violation of any provision of the National Agreement was established in the arbitration proceeding and that the arbitrator acted without authority in contradiction of Article 16, Section 11[2/] of the National Agreement. Thus, it appears that the agency is, in substance, contending that the arbitrator reached an incorrect result in his interpretation of the agreement. The Council has consistently held that the interpretation of the agreement is a matter to be left to the arbitrator's judgment. See, e.g., American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44; Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (August 15, 1975), Report No. 82; and Indiana Army Ammunition Plant, Charlestown, Indiana and National Federation of Federal Employees Local 1581 (Render, Arbitrator), FLRC No. 75A-84 (November 28, 1975), Report No. 92. Therefore, this exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

2/ Article 16, Grievance Procedure, Section 11 of the agreement provides, in pertinent part:

> 1) In the event that the local Union or the Regional or Headquarters office allege violation of this or a local supplemental agreement due to non-adherence, improper interpretation, or failure to implement a provision of this Agreement, the party alleging the violation shall submit its complaint to the party alleged to have violated the Agreement in sufficient detail--including dates, time, and individuals involved along with the Agreement provision alleged to have been violated--so that it is clear to the receiving party what is alleged. The party receiving the complaint (Regional Director or Office Head in Headquarters or Local Union President) shall respond in writing within 10 working days.
>
> If the matter is not resolved, either party may refer the matter to its respective national party.

In its second exception, the agency contends that the arbitrator was not functus officio when he received evidence at the rehearing. Therefore, the agency asserts, the evidence adduced and arguments made at the rehearing are a part of the record and must be considered by the arbitrator in rendering his decision upon rehearing. Thus, the agency, is in substance, disagreeing with the conclusion reached by the arbitrator, that he was functus officio. Mere disagreement with the arbitrator's conclusion in this regard does not state a ground upon which the Council will grant review of an arbitration award under section 2411.32 of the Council's rules of procedure. That is, the agency has not cited applicable private sector case law in which an award was vacated or modified upon this ground. Therefore, this exception likewise provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

In its third exception, the agency contends that the arbitrator's finding of fact that an agency representative made a knowing misstatement is clearly erroneous and is without a substantial evidentiary basis in the record. In essence, the agency appears to be contending that the arbitrator's award contains a number of erroneous findings of fact. But, the Council has consistently applied the principle that an arbitrator's findings as to the facts are not to be questioned by the Council. See, e.g., Federal Employees Metal Trades Council, Vallejo, California and Mare Island Naval Shipyard, Vallejo, California (Hughes, Arbitrator), FLRC No. 73A-20 (September 17, 1973), Report No. 44; and Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor (Mallet-Prevost, Arbitrator), FLRC No. 75A-36 (September 9, 1975), Report No. 82. Therefore, the agency's third exception does not assert a ground upon which the Council will grant a petition for review of an arbitration award.

In its fourth exception, the agency contends that the arbitrator did not give a statement of reasons as to why the contract was violated. However, as the Council has indicated, it is the award rather than the conclusion or the specific reasoning employed that is subject to review. See, e.g., American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44; and Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (November 14, 1975), Report No. 89. Moreover, the Council has noted that the arbitrator is not required to discuss the specific agreement provision involved. See, e.g., Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60; and Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (November 14, 1975), Report No. 89. Therefore, this exception, like the other exceptions, provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the

Council's rules of procedure. Likewise, the agency's request for a stay is denied under section 2411.47(f) of the Council's rules.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: Phillip R. Kete
National Council of CSA Locals

American Federation of Government Employees, AFL-CIO, Local 2677 and Community Services Administration (Lundquist, Arbitrator). The arbitrator denied the subject grievance which sought retroactive promotion and back-pay for two employees of the agency. The union filed exceptions to the arbitrator's award with the Council, alleging that it was denied a fair hearing by the arbitrator.

Council action (January 30, 1976). The Council held that the union's petition did not describe facts and circumstances to support its exceptions and, therefore, the exceptions provided no basis for acceptance of the union's petition under section 2411.32 of the Council's rules. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

January 30, 1976

Mr. Phillip R. Kete, President
National Council of CSA Locals
American Federation of Government
Employees, AFL-CIO
1200 19th Street, NW.
Washington, D.C. 20506

Re: American Federation of Government Employees, AFL-CIO, Local 2677 and Community Services Administration (Lundquist, Arbitrator), FLRC No. 75A-105

Dear Mr. Kete:

The Council has carefully considered your petition for review of an arbitrator's award filed in the above-entitled case, the agency's opposition thereto, and the public record of the proceedings before the arbitrator.

According to the arbitration award in this case, the grievance alleged that two employees (the grievants herein) were promoted about 3 months after they were eligible for promotion and consequently, the agency was in violation of Article 11, Section 8 of the agreement[1/] and Section 8 of the amendment.[2/] As a remedy, the union, as representative for the two grievants, sought backpay for them covering the period between the date each was eligible for promotion and the date each was actually promoted. Pursuant to the parties' agreement, the grievance was submitted to arbitration.

1/ According to the award, Article 11, Section 8 of the agreement provides in pertinent part:

> The Employer and the Union agree that the principle of equal pay for substantially equal work will be applied to all position classifications and actions.

2/ According to the award, Section 8 of the amendment to the agreement provides in pertinent part:

> Each employee serving below the journeyman level in a career ladder will be promoted to the next grade level when he has met the qualification requirements of the position . . . .

The arbitrator denied the grievance and, hence, denied the backpay which was being sought. He reasoned that "[i]n order to sustain the Union's contention that the promotions given the two grievants, effective February 16, 1975, were in violation of Section 8 of the Amendment to the Agreement, it must be established that the grievants (clerk-typists) were 'serving below the journeyman level in a career ladder' (emphasis added) position (Sec. 8)." He concluded that "[n]one of the testimony, briefs, or exhibits establishes in any probative fashion that the two grievants (clerk-typists) were employed by the Agency in career-ladder positions at any time prior to their actual promotion . . . ." Further, he concluded that the administrative actions of the agency and the time span taken in processing the promotion papers of the grievants were reasonable and proper and in no way resulted in a violation of Article 11, Section 8 of the agreement.

According to the record of the proceedings, at the conclusion of the testimony at the hearing before the arbitrator, the union sought permission from the arbitrator to call as a union witness, a representative from management, namely, the agency's Director of Administration, to solicit testimony from "an authoritative level of management" as to what their understanding was of career ladder and whether the promotions of the grievants were considered career ladder promotions.[3/] The union also moved for an adjournment of the hearing to a date when witnesses could be heard as to the intention of the parties in negotiating Section 8 of the contract amendments and as to the practice of the parties in interpreting and enforcing Section 8 since its effective date.[4/] In denying the union's requests, the arbitrator took under advisement the need for a further hearing after his review of the parties' briefs which were to cover all pertinent matters, most especially the matter of career ladders.[5/] He also expressed a willingness to receive affidavits from both parties on any pertinent matter, including career ladders.[6/]

Subsequently, the arbitrator determined in his award that these union requests should be denied:

> The Union's contention that it should be given additional opportunity, by way of reopening the hearing, to provide evidence of the applicability of career-ladder to the grievants [sic] positions is without merit and is denied. Ample opportunity has already been given to the parties to show or refute the applicability of career-ladder in this case.

3/ Transcript at 143.

4/ Transcript at 151.

5/ Transcript at 148 and 151.

6/ Transcript at 149.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the two exceptions discussed below. The agency filed an opposition.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception to the award, the union contends that it was denied a fair hearing when the arbitrator refused to allow it to present relevant and material evidence, unless the evidence was excluded under a rule of evidence that the parties were notified would be applied. In support of this exception, the union asserts that the further evidence which it sought to introduce was material and relevant to the application of the term "career ladder" to the clerical positions in this case. The further evidence which the union sought to introduce was, as noted previously, testimony by the agency's Director of Administration "as to the actual position of management" on this question. The union alleges that such testimony was material and relevant and that no technical rule of evidence barring the witness had been announced.

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that an arbitrator refused to hear evidence pertinent and material to the controversy before him and, hence, denied a party a fair hearing. Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (August 15, 1975), Report No. 81; Community Services Administration and American Federation of Government Employees (AFL-CIO), Local 2677 (Dorsey, Arbitrator), FLRC No. 75A-71 (November 18, 1975), Report No. 92; and Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (November 14, 1975), Report No. 89. However, the Council is of the opinion that the union's petition does not describe facts and circumstances to support this exception. The record of the proceedings before the arbitrator discloses that there was an adequate opportunity for the presentation of "the actual position of management" on the meaning of career ladder. Thus, as the union concedes in its petition for review: "At the hearing management presented testimony from a personnel specialist and from the grievants' first and second line supervisors as to the meaning of the term 'career ladder.'" Furthermore, the union was afforded the opportunity to question these witnesses as well as to present its own views as to the meaning and relevance of a career ladder to the matter before the arbitrator.[7/] Finally, the record shows that the arbitrator offered additional opportunity to the parties concerning the matter, not only

7/ Transcript at 13, 63, and 114.

through the submission of briefs and affidavits, but also by his taking "under advisement the question of the need for a further hearing" to which the union representative agreed.[8/] Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

As its second exception, the union contends that it was denied a fair hearing when it was refused a continuance in order to provide expert testimony on a material fact, especially when the fact involves a surprise issue. The union asserts that management introduced the issue of the "career ladder" as a surprise at the hearing, and it was denied a continuance requested in order to provide expert testimony of the intent of the parties in their negotiations as to the meaning of that term. The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator failed to accord a party a fair hearing by his refusal to grant a postponement or continuance in order for a party to provide expert testimony on a material fact, expecially involving a surprise issue. See Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (November 14, 1975), Report No. 89. However, the Council is of the opinion that the union's petition does not describe facts and circumstances to support this exception. First, as to the matter of surprise, there is no question that it was the union that filed the grievance under Section 8 of the amendment to the agreement.[9/] As was noted earlier, Section 8 provides, in pertinent part, that "[e]ach employee serving below

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8/ Transcript at 151.

9/ Thus, the transcript at 3-4 states in part:

> Mr. Frank [Union Representative]: . . . Our grievance was filed February 28th charging a delay in the promotion of . . . [the grievants] in violation of Section 8 of the contract amendments. We will, today, be discussing Section 8 again and again and I would like to review briefly the requirements of that section.
>
> It provides that each employee serving below journeyman level in a career ladder position will be promoted -- will be promoted -- the language is not permissive -- when they have met the qualification requirements for the position, have demonstrated the ability to perform at the higher level if there is enough work at the full performance level for all employees in the career ladder group.
>
> . . . . . .
>
> The union contends that in violation of Section 8, . . . [the grievants], who clearly met all of the conditions of Section 8 on and after November 16, 1974, were not promoted and that their promotions were unreasonably delayed for three full months after that time before they were eventually promoted on February 16th. [Emphasis added.]

the journeyman level in a career ladder will be promoted to the next grade level when he has met the qualification requirements of the position, ..." [Emphasis added.] Second, as to the union's contention that it did not receive a fair hearing as a result of the arbitrator's denying it a continuance in order to provide expert testimony, it should be noted that the union representative acquiesced, as indicated above, in the arbitrator's determination that the meaning of "career ladder" would be decided through the submission of briefs and a further hearing, if needed.10/ Therefore, this exception likewise provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: R. G. Johnson
CSA

10/ Thus, the transcript at 151 states:

> Mr. Frank [Union Representative]: For the record, I would like to make a motion to the effect that the Arbitrater [sic] adjourn the hearing to a date selected by him for the purpose of hearing testimony as to the intention of the parties in negotiating Section 8 of the contract amendments and as to the practice of the parties in interpreting and enforcing Section 8 over the year and a half since it has been negotiated.
>
> Ms. Harding [Agency Representative]: I object to that.
>
> Mr. Lundquist [Arbitrator]: Well, your motion is accepted but I would only state that I will take under advisement the question of the need for a further hearing. And that determination will come after I've had a full opportunity to review the briefs of both parties.
>
> Mr. Frank [Union Representative]: Fine. Okay.

U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 482. The appeal of the National Federation of Federal Employees (NFFE) was due in the office of the Council on or about February 25, 1975. However, while a copy of the appeal was apparently served on the other parties on February 14, 1975, it was not filed with the Council until January 29, 1976, or about 1 year late, and no extension of time for filing was either requested by NFFE or granted by the Council. In submitting its petition for review to the Council, NFFE requested, in effect, a waiver of the time limits for filing because the failure to file was inadvertent; the other parties had been timely served; and assertedly the interested parties had relied on the pendency of the appeal before the Council.

Council action (February 9, 1976). The Council held that the situation adverted to in NFFE's submission fell short of "extraordinary circumstances" as provided in section 2411.45(f) of the Council's rules of procedure such as to warrant waiver of the expired time limits and therefore denied the waiver request. Accordingly, as NFFE's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

February 9, 1976

Ms. Lisa Renee Strax
Staff Attorney
National Federation of Federal Employees
1016 - 16th Street, NW.
Washington, D.C. 20036

Re: U.S. Department of Transportation, Federal Aviation Administration, National Aviation Facilities Experimental Center, Atlantic City, New Jersey, A/SLMR No. 482, FLRC No. 76A-11

Dear Ms. Strax:

This refers to your petition for review and request for stay of the Assistant Secretary's decision in the above-entitled case. For the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

The subject decision of the Assistant Secretary is dated January 31, 1975, and, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's then current rules of procedure, your appeal was due in the office of the Council on or about February 25, 1975. However, while a copy of your appeal was apparently served on each of the other parties on February 14, 1975, your appeal was not filed with the Council until January 29, 1976, or about 1 year late, and no extension of time for filing was either requested by your organization or granted by the Council.

In your letter of January 27, 1976, submitting your petition for review to the Council, you request, in effect, a waiver of the time limits for filing because the failure to file was inadvertent; the other parties had been timely served; and assertedly the interested parties have relied on the pendency of the appeal before the Council. Section 2411.45(f) of the Council's rules provides for the waiver of any expired time limit only "in extraordinary circumstances." In the Council's opinion, the situation adverted to in your submission plainly falls short of "extraordinary circumstances" such as to warrant waiver of the expired time limits. Your request for a waiver is therefore denied.

246-469 O - 78 - 8

Accordingly, as your appeal was untimely filed, and apart from other considerations, your petition for review is denied.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: (w/c of NFFE ltr of 1/27/76)

A/SLMR
Dept. of Labor

L. E. Landry
FAA

S. Q. Lyman
NAGE

J. Girlando
AFGE

Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, USN, Long Beach, California, A/SLMR No. 594. The appeal of the union (International Federation of Professional and Technical Engineers, Local 174, Chapter 1, AFL-CIO) was due in the office of the Council no later than the close of business on January 14, 1976. However, the appeal was not filed until January 27, 1976. The union's representative requested, in effect, a waiver of the time requirements in the Council's rules because of (1) earlier telephone contacts of his office with the Council relating to the appeal; and (2) his vacation during the last part of December 1975 and busy work schedule upon his return from vacation.

Council action (February 12, 1976). With regard to the requested waiver, as to (1), since the union's representative was fully and accurately informed during the telephonic inquiries as to the apposite requirements in the Council's rules, no basis was provided thereby for waiving the time limits clearly set forth in the rules. As to (2), it was determined that the representative's vacation and subsequent work schedule failed to constitute "extraordinary circumstances" such as to warrant the waiver of time limits under section 2411.45(f) of the Council's rules. Accordingly, the request for waiver was denied.. As the union's appeal was untimely filed, and apart from other considerations, the union's petition for review was denied.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

February 12, 1976

Mr. Thomas Martin
Attorney at Law
19626½ S. Normandie Avenue
Torrance, California 90502

Re: Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, USN, Long Beach, California, A/SLMR No. 594, FLRC No. 76A-8

Dear Mr. Martin:

This refers to your petition for review of the Assistant Secretary's decision in the above-entitled case. For the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

The subject decision of the Assistant Secretary is dated December 10, 1975, and, under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council no later than the close of business on January 14, 1976. However, your appeal was not filed with the Council until January 27, 1976, or almost two weeks late.

By letter dated January 14, 1976 (which was addressed to the Assistant Secretary and was received in his office on January 27, 1976 and forwarded by him to the Council on the same date), you have in effect requested a waiver of the time requirements in the Council's rules because of: (1) The earlier telephone contacts of your office with the Council relating to this appeal; and (2) your vacation during the last part of December 1975 and your busy work schedule upon your return from vacation. These grounds provide no persuasive reason for granting the requested waiver.

As to (1), upon telephonic inquiry from your office to the Council on December 23, 1975, you were informed of the time limits in the Council's rules and, on December 24, 1975, a copy of these rules, together with a letter calling attention to the time limits, was forwarded to your office by the Council. Moreover, in response to further telephonic inquiries from your office to the Council on January 9 and 13, 1976, you were again advised of the time requirements in the Council's rules, including the respective provisions in section 2411.45(e) and section 2411.45(f), which prescribe that requests for extension must "be filed in writing no later than 3 days before the established time limit for filing," and which restrict the waiver of expired time limits

to "extraordinary circumstances." Since you were thus fully and accurately informed during these telephonic inquiries as to the apposite requirements in the Council's rules, no basis is provided thereby for waiving the time limits clearly set forth in the Council's rules.

As to (2), the Council is of the opinion that your vacation and subsequent work schedule fail to constitute "extraordinary circumstances" such as to warrant the waiver of time limits under section 2411.45(f) of the Council's rules. Accordingly, your request for waiver of time limits is denied.

As your appeal was untimely filed, and apart from other considerations, your petition for review is denied.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: (w/c of T. Martin ltr of 1/14/76)

A/SLMR
Dept. of Labor

J. C. Causey
Navy

Veterans Administration Center, Temple, Texas and American Federation of Government Employees, Local 2109 (Jenkins, Arbitrator). The Council accepted the agency's petition for review based on the agency's exceptions which, among other grounds, alleged that the award, which ordered the activity to give the grievant the job for which he applied and backpay, violated the Federal Personnel Manual and the Back Pay Act (5 U.S.C. § 5596). The Council also granted the agency's request for a stay. (Report No. 64)

Council action (February 13, 1976). Based upon an interpretation by the Civil Service Commission, in response to the Council's request, the Council found that, in the absence of an agency decision to select the grievant, the portion of the arbitrator's award which ordered the grievant to be promoted and accorded backpay violated applicable regulation, and that the award may not be implemented. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award to the extent inconsistent with the Council's decision. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Veterans Administration Center,
Temple, Texas

and

FLRC No. 74A-61

American Federation of Government
Employees, Local 2109

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the award issued by the arbitrator, wherein he determined that the Veterans Administration Center, Temple, Texas (the Center) had violated the parties' collective bargaining agreement by filling a vacancy through the appointment of an individual, rather than by promotion.

Based on the findings of the arbitrator and the entire record, it appears that the Center had posted a promotion announcement for the position of Painter Helper, WC-4102-5. Several employees applied for the position. The grievant, Clarence R. Reid, was the only applicant who was rated as "highly qualified" for the job, while three other applicants were rated as "qualified." After the closing date for applications for the promotion, the Center requested a Civil Service certification by name for another individual (not covered by the collective bargaining agreement), and appointed this individual to the position described in the promotion announcement. Reid grieved, and the grievance was submitted to arbitration.

The Arbitrator's Award

The arbitrator determined that the Center had "violated its Collective Bargaining Agreement, both in its literal wording, and also in . . . spirit" by filling the vacancy through the appointment of the individual, rather than by promotion.[1/]

1/ The arbitrator, in the opinion accompanying his award, quoted various provisions of the agreement, which in pertinent part provide:

> Article XIX, Section 1. If it is determined that a vacant position is to be filled by promotion, the provisions of the Center Merit Promotion Plan will be followed. It is agreed that every effort shall be made to utilize the skills and potential of employees of the center for the best interest of the activity. . . .

(Continued)

He stated that the Center has the right to choose between several methods, or any combination of methods, in selecting employees; however, the method or methods must be determined at the outset, and once the Center elects to follow the promotion program it is bound to follow it. He found that the Center, by posting the promotion announcement, indicated to the employees that it elected to follow the promotion program. Thus, the Center had no right to disregard the results of the promotion applications, and to ask for a certification from the Civil Service Commission by name of another individual, in the face of one highly qualified employee for the job. As a remedy, the

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(Continued)

> Article XIX, Section 3. The center agrees that negotiable matters within the Merit Promotion Plan will not be changed without first being negotiated and agreed upon between the union and the center. Non-negotiable matters, which are not appropriate for negotiation, will not be changed without first discussing the matter with the union.

The arbitrator described as relevant certain provisions of the Center Merit Promotion Plan, which, in pertinent part, states:

> 2. POLICY.
>
> Filling of vacancies will be made on a fair and equitable basis. Promotions, and reassignments to positions with known potential, will be made in this manner without regard to race, color, religion, sex, national origin, politics, marital status, physical handicap, age, or membership or non-membership in any recognized labor union. Management may choose to fill a vacancy by appointment, reassignment, transfer, reinstatement, demotion, re-promotion, or by application of this Merit Promotion Plan, or any combination of these methods. Selection of candidates to fill vacancies will conform to requirements governing employment of relatives.
>
> 3. COVERAGE:
>
> a. This plan covers the filling of vacancies in Classification Act and Wage Grade positions at Waco and Marlin VA Hospitals, and Temple VA Center when a vacancy is filled through merit promotion.
>
> 4. AREA OF CONSIDERATION:
>
> a. In filling vacancies by this promotion plan in grade GS-6, or equivalent, and lower, the minimum area of promotion consideration will extend to employees at the station where the vacancy occurs.

arbitrator ordered the Center to give the grievant the job for which he applied, together with the backpay necessary to make the grievant whole.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review based on the agency's exceptions which, among other grounds, alleged that the award violates the Federal Personnel Manual and the Back Pay Act (5 U.S.C. § 5596).[2/] The union filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the agency's exceptions allege, among other things, that the arbitrator's award violates provisions of the Federal Personnel Manual and the Back Pay Act (5 U.S.C. § 5596). In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements and Commission regulations as they pertain to the questions raised in the present case. The Commission replied in pertinent part:

> The basic facts in the case are as follows: VA announced a vacancy as a "promotion opportunity" through its merit promotion program; an employee filed an application for the job and was rated the only "highly-qualified candidate" on a certificate containing 4 names; the agency name requested and appointed another candidate from a Civil Service Commission register; the employee grieved and the arbitrator ruled that the agency waived its discretion to use alternative methods of filling the position when it announced the vacancy through its merit promotion plan and failed to inform employees that it was reserving the right to utilize other methods. The arbitrator ordered the grievant promoted to the job for which he had applied and awarded him backpay.
>
> From the standpoint of Commission regulations and requirements, there are three issues in this case: 1) may an agency waive its

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2/ The agency requested and the Council granted, pursuant to section 2411.47(d) of the Council's rules of procedure, a stay pending the determination of the appeal.

right to use alternative methods for filling a position concurrently with the use of merit promotion procedures; 2) may an arbitrator order management to promote a particular person from a list of eligibles; and 3) may the person so promoted be awarded backpay.

With regard to the first issue, CSC Rule 7.1 provides agency discretion in the filling of vacancies --

> In his discretion, an appointing officer may fill any position in the competitive service either by competitive appointment from a civil service register or by non-competitive selection of a present or former Federal employee, in accordance with Civil Service Regulations.

This freedom to explore concurrently alternative staffing resources is well founded and widely understood, and it should be assumed to be retained unless explicitly limited or denied. Nonetheless, an agency may, under appropriate circumstances, agree to confine itself to the use of internal promotion procedures for filling vacancies. Thus, if this issue were properly before the arbitrator, his finding on it would not violate Commission rules or regulations.

The second and third questions are closely related. As a general rule, an agency may not be constrained to select a particular individual from a promotion certificate. Both Subchapter 2 and Subchapter 5 of FPM Chapter 335 make this clear. Subchapter 2 states, "Each plan shall provide for management's right to select or non-select," and Subchapter 5 reaffirms that "which candidate among the best qualified is selected for promotion" is not a matter appropriate for consultation or negotiation. Even when only one candidate is rated highly qualified, as in the instant case, FPM 335, Subchapter 3-7c permits management to select any of the candidates on the certificate.

The only circumstance under which an agency may be required to promote a particular person and to accord that person backpay is when a finding has been made by an arbitrator or other competent authority that such person would have been promoted at a particular point in time but for an administrative error, a violation of a Commission or agency regulation or of a provision of a negotiated agreement. This principle has been set forth in a series of Comptroller General decisions dealing with retroactive promotion, all numbered B-180010, and issued on and subsequent to October 31, 1974.

While it may be inferred from his award that the arbitrator in this case believed the grievant would have been selected but for the violation he found, he does not address the question directly and the agency specifically contests that point. In this respect, the case at hand differs from the Comptroller General decisions referred

to above: in the latter cases, the agency either conceded that "but for" the violation the grievant would have been selected, or did not object to the arbitrator's ruling to that effect.

Since the agency is on record that it might not have selected the grievant even had it not sought an outside candidate from a civil service register, we do not believe the "but for" test has been met. We do not believe, in short, that a direct, causal connection has been established between the error or violation and the failure to promote the grievant, as the CG requires. Therefore, in the absence of an agency decision to select the grievant, we find that portion of the arbitrator's award that orders the grievant to be promoted and accorded backpay in violation of controlling regulations and requirements.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that in the absence of an agency decision to select the grievant, that portion of the arbitrator's award which orders the grievant to be promoted and accorded backpay violates applicable controlling regulations and requirements.3/

Conclusion

For the foregoing reasons, we find that, in the absence of an agency decision to select the grievant, that portion of the arbitrator's award which orders the grievant to be promoted and accorded backpay violates applicable regulation, and the award may not be implemented. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award to the extent inconsistent with the decision herein.4/

3/ In view of our decision herein, it is not necessary to pass upon the other grounds upon which the Council accepted the petition for review.

4/ In the circumstances of this case, as indicated in the Civil Service Commission's response, it was not within the arbitrator's authority under the provisions of the Federal Personnel Manual to find that "but for" the agency's improper personnel action the grievant would have selected. However, in accordance with decisions and interpretations of the Comptroller General and the Civil Service Commission cited herein, the agency, of course, can concede that "but for" the violation the grievant would have been selected, or can in the process of complying with the arbitrator's award, as modified, now make such selection thereby authorizing the retroactive promotion and backpay remedies available under the Back Pay Act.

As so modified, the award is sustained and the stay is vacated.

By the Council.

Henry B. Frazier III
Executive Director

Issued: February 13, 1976

National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District. The dispute involved the negotiability of union proposals concerning (1) confidential office space and conference rooms; (2) provision of computer terminals, telephones and calculators; (3) traffic pattern survey and situation of employees; (4) provision of visitors' chairs and waiting areas for the public; (5) provision of bulletin boards; (6) health facility maintained by full-time nurse; (7) maintenance of adequate lighting; and (8) provision of parking spaces.

Council action (February 24, 1976). As to (1), (2) and (6), the Council held that the proposals were excluded from the agency's obligation to bargain under section 11(b) of the Order and sustained the agency head's determination that the related proposals were nonnegotiable. With regard to (3), the Council held that the proposal was not rendered nonnegotiable by section 12(b)(5), and was not excepted from the obligation to bargain by section 11(b), of the Order, as contended by the agency, and therefore set aside the agency head's determination of nonnegotiability. As to (4), the Council concluded that the union's proposals were outside the required scope of bargaining under section 11(a) of the Order. With respect to (5), the Council found that the union's appeal failed to meet the conditions for review prescribed by section 11(c)(4) of the Order, and denied review of the appeal of the agency head's determination as to this proposal. As to (7) and (8), which the agency head determined were nonnegotiable under General Services Administration (GSA) regulations, the Council, based upon an interpretation by GSA of its regulations, rendered in response to the Council's request, set aside the agency head's determination as to (7), but sustained the determination of nonnegotiability of (8).

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

National Treasury Employees Union
Chapter No. 010

and

FLRC No. 74A-93

Internal Revenue Service,
Chicago District

DECISION ON NEGOTIABILITY ISSUES

Background

National Treasury Employees Union Chapter No. 010 represents Internal Revenue Service employees at the agency's Chicago District Office. Having been informed that the District Office was to be transferred from one office building to another, the parties met to discuss the impact of the move. Over the course of several such meetings the union presented for negotiation with the District Office a series of 12 proposals (detailed hereinafter) which it characterized generally as relating to facilities and to health and safety at the new building. Upon referral, the agency determined that the proposals conflict with sections 11(a), 11(b), and 12(b) of the Order and are therefore nonnegotiable. The union petitioned the Council for review of that determination under section 11(c)(4) of the Order, and the agency submitted a statement of position.

Opinion

The union's proposals will be discussed separately, or in groups concerning similar issues of negotiability, below.

1. Confidential Office Space and Conference Rooms.

Two of the union's proposals read as follows:

> [Facilities] Section 1. Employees required to meet with taxpayers in the performance of their job will be provided with confidential office space.
>
> [Facilities] Section 2. Conference rooms will be provided as follows:
>
> (A) In areas where Revenue Officers are located there will be one conference room per group;
>
> (B) In areas where Revenue Agents are located there will be one conference room per group;

(C) In areas where Estate and Gift Tax Attorneys are located there will be one conference room for each ten employees;

(D) Where Conferees are located there will be three conference rooms;

(E) In areas where reviewers are located there will be five conference rooms.

The agency principally contends, with respect to these two proposals, that "the type of office space" within which employees work is a matter of the technology of performing that work and is, hence, excepted from the obligation to bargain by section 11(b) of the Order.[1/] The union takes the position that the proposals concern negotiable matters of working conditions because "employees will be better able to perform their job in a work environment which includes" confidential office space and conference rooms, and will therefore tend to receive higher performance appraisals and increased opportunities for promotion. The union also asserts that confidential office space and conference rooms were made available in the former building and maintains that it is "merely seeking to continue the working conditions present in the old building to the new building."[2/]

The Council considered the section 11(b) exclusion of work technology from the duty to bargain in the Border Patrol, Yuma case[3/] and, more recently, in the Immigration and Naturalization Service (INS) case.[4/] We are of the opinion that the principles of both the Border Patrol, Yuma and INS decisions relevant to the exclusion of technology from the bargaining obligation under section 11(b) are applicable to the instant dispute.

1/ Section 11(b) provides, in relevant part, that:

> [An agency's] obligation to meet and confer does not include matters with respect to . . . the technology of performing its work . . . .

2/ As to this contention, it does not state a ground for setting aside an agency determination of nonnegotiability. Rather, it appears to conjecture an unfair labor practice by agency management. The proper forum in which to raise such an issue is therefore not a negotiability dispute before the Council but an unfair labor practice proceeding before the Assistant Secretary. Accordingly, we do not pass upon this claim in the instant case. Cf., AFGE Local 2151 and General Services Administration, Region 3, FLRC No. 75A-28 (October 8, 1975) Report No. 86, at note 5.

3/ AFGE Local 2595 and Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector (Yuma, Arizona), FLRC No. 70A-10 (April 15, 1971), Report No. 6.

4/ Immigration and Naturalization Service and American Federation of Government Employees, FLRC No. 74A-13 (June 26, 1975), Report No. 75.

The union's proposal in Border Patrol, Yuma dealt with the maintenance of Border Patrol "drag roads" in a manner intended to reduce the chance of injury to Border Patrol Officers. To this end, the proposal required that the drag roads be maintained by the agency "on a regular basis" and that they be kept "reasonably" level and free of "excessive" dust. The Council held that the proposal was not excepted from the duty to bargain as a matter of technology under section 11(b) because the proposal did not require the agency to negotiate about whether, or to what extent, the technology of drag roads would be used. Rather, the proposal required only that this technology, as adopted by the agency, be implemented in a manner consistent with the health and safety of Border Patrol Officers. The proposal, in other words, established no obligation to use or not use drag roads, but merely required that if drag roads were used they would be maintained by the agency to a certain general standard--which standard the agency did not assert would reduce the roads' effectiveness in achieving the purposes for which they were intended.

The proposals in the INS case, in contrast, would have required the agency to bargain about the provision of "appropriate communication equipment" for agency vehicles as well as about the assignment of "an appropriate number" of vehicles to traffic checkpoints. Contrary to union assertions that these proposals, like the one in Border Patrol, Yuma, constituted only general standards of safety and health, the Council found that the proposals instead sought to prescribe the adoption of a specific technology of performing the agency's work--that technology being the use of vehicle-based communications equipment and of agency vehicles themselves. Thus, instead of dealing with the implementation of a given technology in a manner which would not restrict the agency's elective application of that technology to the purposes for which it was intended (as was the case in Border Patrol, Yuma), the union's proposals would have required the agency to negotiate over the adoption of the actual technology itself. As a result, the Council held that the union's proposals were excluded from the bargaining obligation by section 11(b).

In the instant case, while the union maintains that the two proposals concerning confidential office space and conference rooms are merely intended to "ensure a fair basis for evaluating" unit employees by enabling them to work more efficiently, the proposals themselves manifestly present no standard of fairness or efficiency against which the agency's implementation of a chosen technology might be measured. Instead, as in the INS case, the two proposals here would both require the agency to negotiate about the technology itself--in this instance, about the particular design and use of agency workspace.5/ This being the case, we find that the proposals are excluded

5/ The union does not contest the agency's assertion that the provision of enclosed workspace (confidential offices and conference rooms) in the new building would be inconsistent with the agency's adoption of an "open-space concept" of office planning, under which workspace would be deliberately arranged so as to avoid the use of partitions or walls between employees' desks.

by section 11(b) from the agency's obligation to bargain and we must sustain the agency head's determination that the proposals are nonnegotiable.

2. Provision of Computer Terminals, Telephones, and Calculators.

We next consider the following three union proposals:

> [Facilities] Section 3. There will be one IDRS [computer] terminal per group of Revenue Officers. It will be installed so that it is easily accessible to the group.
>
> [Facilities] Section 5. Each employee who must contact members of the taxpaying public will be provided with his/her own telephone.
>
> [Facilities] Section 8. The employer will provide one calculator for each group of Revenue Agents.

The agency argues that these three proposals also are excluded, as matters of technology, from the duty to bargain under section 11(b) because each proposal would require that the agency "provide an item which is an integral part of what the employee uses to perform his or her work." The union contends, in substance, that all three proposals are designed to promote a more efficient utilization of time by employees and that since employees are evaluated, in part, according to the efficiency of their performance the proposals clearly concern working conditions and must be negotiated.

We believe the agency's position is correct. Once again, as with respect to the two proposals previously discussed, the union's stated concern is to facilitate unit employees' obtaining favorable performance evaluations; but instead of seeking to negotiate directly about standards of evaluation consistent with which the agency might implement the chosen technology of performing its work, the union's proposals are drawn to prescribe the technology itself. In our view, therefore, these three proposals are fundamentally analagous to the previously mentioned proposal in the INS case (note 4 supra) which would have required installation in agency vehicles of "appropriate communication equipment." That is, these proposals concerning the extent to which computer terminals, telephones, and calculators will or will not be provided employees--like the proposal for the provision of vehicular communication equipment--concern matters of technology about which the agency is not required to negotiate under section 11(b). We thus must sustain the agency head's determination that the union's three proposals are excluded by section 11(b) from the agency's obligation to bargain.

3. Traffic Pattern Survey and Situation of Employees.

The union's proposal provides as follows:

> [Facilities] Section 12. The employer will agree to conduct a traffic pattern survey and to situate employees in a manner which will cause them the least distraction from traffic.

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The agency does not assert that its conduct of a "traffic pattern survey" as would be required by this proposal would in any way conflict with appropriate law, regulation, or the Order, and, hence, in effect concedes the negotiability of that matter. We therefore consider here only that portion of the proposal which would require that employees be situated "in a manner which will cause them the least distraction from traffic."

In this respect, the agency contends that such a requirement is nonnegotiable both because "the placement of employees is a matter of the technology of performing the agency's work" which is excepted from the duty to bargain by section 11(b), as well as because such a requirement "affects the work flow in the office, and the fashion in which work will be done. . . . [and] requires the agency to bargain on the 'methods' by which operations are to be performed" in effective violation of section 12(b)(5).6/ The union contends that there exists "no nexus between section 11(b) and desk location," and argues, in effect, that because the proposal does not alter the actual processing of tax returns it does not interfere with the agency's methods of operation under section 12(b)(5).

The agency's position is without merit. As regards section 12(b)(5), the agency's contentions in this case are essentially similar to those advanced in the Border Patrol, Yuma case (note 3 supra)--wherein it was also argued that the union's proposal concerning maintenance of "drag roads" would interfere with agency management's authority to determine the "methods" of operation under section 12(b)(5). In rejecting that argument the Council said:

> [T]he union's proposal specifies only what health and safety standards shall be operative, i.e. "regular" maintenance of the drag roads, so that they are "reasonably" level and free of "excessive" airborne particles. This proposal does not specify in any manner how these standards are to be achieved by the agency and, therefore, does not conflict with the agency's right to order its employees and to determine the methods and means by which its operations are to be conducted, as reserved to management under section 12(b)(1) and (5) of the Order. [Emphasis in original.]

6/ Section 12(b)(5) provides as follows:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--
>
> . . . . . .
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--
>
> . . . . . .
>
> (5) to determine the methods, means, and personnel by which [Government] operations are to be conducted . . . .

Likewise here, the union's proposal specifies only what standard shall be applied in determining the placement of employees' desks, requiring only that their placement be such as to cause employees "the least distraction from traffic." The proposal does not in any manner specify how this standard is to be achieved by the agency, and the agency makes no showing that steps taken to minimize employee distraction under this proposal will in any manner interfere with the conduct of agency operations. We therefore must find that the proposal does not conflict with rights reserved to the agency by section 12(b)(5).7/

Similarly, with respect to section 11(b) of the Order, the instant proposal clearly does not restrict the agency in the adoption of any particular technology. Rather, as was the case with the proposal in Border Patrol, Yuma, the proposal here speaks only to the implementation of technology. For instance, nothing in this proposal would necessarily impede the agency's adoption of an "open-space" approach to office design, for the proposal requires only that whatever approach the agency may adopt be implemented in a manner which will cause employees "the least distraction from traffic." Furthermore, this is not a requirement which the agency has shown would detract from the effectiveness, in achieving the purpose for which it is intended, of any particular work technology which the agency has adopted. We find as a result that the proposal does not fall outside the agency's obligation to bargain by force of section 11(b).

Therefore, we conclude that this proposal is not rendered nonnegotiable by section 12(b)(5), and is not excepted from the obligation to bargain by section 11(b), of the Order. We hold, accordingly, that the agency head's determination to the contrary was improper and must be set aside.

4. Provision of Visitors' Chairs and Waiting Areas for the Public.

The union's two proposals read as follows:

> [Facilities] Section 7. Each employee required to meet with the public will be provided with two visitor chairs next to his/her desk.
>
> [Facilities] Section 10. In areas where taxpayers come to meet with employees, an area will be provided for the taxpayer to wait until the employee is available.

7/ The agency also asserted, without supporting argument, that this proposal would interfere with its authority to maintain the efficiency of Government operations and would thereby violate section 12(b)(4) of the Order. However, "section 12(b)(4) may not properly be invoked to deny negotiations unless there is a substantial demonstration by the agency that increased costs or reduced effectiveness in operations are inescapable and significant and are not offset by compensating benefits." Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Arkansas, FLRC No. 71A-46 (November 20, 1972), Report No. 30.

The agency head principally determined that these two proposals, requiring the provision of visitors' chairs and public waiting areas, are, in effect, nonnegotiable under section 11(a) because neither proposal concerns a personnel policy or practice or a matter affecting working conditions.[8/] The union argues that these proposals are negotiable because, in effect, the facilities extended to members of the public reflect directly upon the working conditions of employees whose job it is to deal with the public. Thus, in the union's view, "[i]f the taxpayer is hostile, irritable, irascible, etc. as a result of having to stand at the employee's desk, the employee cannot perform his tasks as well as he might. And, of course, the failure to perform results in a bad evaluation."

In our opinion, these two proposals are outside the scope of required negotiations under section 11(a) of the Order. That is, they are, by their express terms, clearly concerned with facilities to be provided for, and to be used by, members of the general public who must visit the agency to meet with agency employees who perform functions in furtherance of the agency's mission and who also happen to be in the bargaining unit. These proposals are not, as claimed by the union, concerned in any manner with the working conditions of employees or with how employees will be evaluated for work which they perform. The facilities which the agency provides to the public do not, of themselves, involve personnel policies and practices or matters affecting working conditions of unit employees. Accordingly, since the union's proposals do not involve personnel policies and practices or matters affecting working conditions and, hence, fall outside the required scope of bargaining under section 11(a) of the Order, we must hold that the agency is under no obligation to bargain about them.[9/]

5. Provision of Bulletin Boards.

This proposal would require the following:

> [Facilities] Section 11. The Employer will provide four official bulletin boards on each floor of equal size to those provided at [the former building]. One-third of these bulletin boards will be provided for the exclusive use of NTEU Chapter 010, as provided in the Multi-District Agreement.

8/ Section 11(a) of the Order provides, in relevant part, as follows:

> An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations . . . . [Emphasis supplied.]

9/ Cf. Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 72A-27 (May 25, 1973), Report No. 40.

The agency head determined that this proposal is nonnegotiable because its subject matter is covered by Article 14, Section 4.A., of the parties' multi-District agreement.10/ The union, in substance, argues that the provision in the multi-District agreement relied upon by the agency does not waive the union's right to negotiate about bulletin boards under the circumstances of this case.

Section 11(c) of the Order establishes procedures to be followed in resolving disputes over whether a proposal is nonnegotiable because "contrary to law, regulation, controlling agreement, or this Order . . . ." In the instant case, the agency contends only that the union's proposal is contrary to a "controlling agreement"--i.e., the multi-District agreement previously described--and does not assert that the proposal in any way conflicts with applicable law, regulation, or the Order. The union in effect concedes the existence of a controlling agreement at a higher agency level but contests the agency's interpretation thereof. In this regard, section 11(c)(1) provides that:

> An issue which involves interpretation of a controlling agreement at a higher agency level is resolved under the provisions of the controlling agreement, or, if none, under agency regulations.

The record does not show that the parties have attempted to resolve the instant dispute in conformance with section 11(c)(1). Rather, the union seeks to appeal the issue to the Council.

Clearly, the Order makes no provision for such an appeal. Section 11(c)(4), which states the bases for appeal to the Council on negotiability issues, provides only that:

> A labor organization may appeal to the Council for a decision when--
>
> (i) it disagrees with an agency head's determination that a proposal would violate applicable law, regulation of appropriate authority outside the agency, or this Order, or
>
> (ii) it believes that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or this Order . . . .

10/ The agency's Chicago District, represented by the union, constitutes one of some 56 similar Districts covered by a single agreement between the agency and the National Treasury Employees Union. Article 14, Section 4.A. of this multi-District agreement provides as follows:

> The Employer agrees, as a minimum, to maintain the present number of official bulletin boards and to provide the Union with one-third of each official bulletin board for its exclusive use under a heading entitled "NTEU Chapter ."

As noted previously, the agency head did not determine that the instant proposal would "violate applicable law, regulation of appropriate authority outside the agency, or this Order . . . ." Thus, the agency head's determination is not one which may be appealed to the Council under section 11(c)(4)(i). Likewise, with respect to section 11(c)(4)(ii), the union does not assert that in finding the union's proposal to be barred from negotiation by the terms of the multi-District agreement the agency head in any way relied upon an interpretation of agency regulations. That is, while section 11(c)(1), quoted above, provides that resolution of an issue involving interpretation of a controlling agreement may be accomplished under agency regulations in the event the agreement itself contains no procedures for resolving such an issue, neither party suggests that agency regulations are in any way involved in this case. As a result, we find that the agency head's determination is not appealable to the Council under section 11(c)(4)(ii) of the Order.

Therefore, because the union's appeal with respect to this proposal fails to meet the conditions for review prescribed by section 11(c)(4) of the Order, we hold that review of that appeal must be denied.

6. Health Facility Maintained by Full-Time Nurse.

The union's proposal provides as follows:

> [Health and Safety] Section 3. The Employer will provide a health facility on the premise [sic] maintained by a full-time registered nurse.

The agency contends that this proposal is nonnegotiable because, among other reasons, the provision of health-care facilities is covered in the existing multi-District agreement between the agency and the National Treasury Employees Union;11/ because, in effect, the proposal is contrary to regulations of appropriate authorities outside the agency (the Public Health Service and the General Services Administration);12/ and because the proposal, by specifying the assignment of a full-time registered nurse, would in effect require the agency to bargain about staffing patterns which are outside its obligation to bargain under section 11(b) of the Order. The union does not dispute this latter contention but argues only that "full health facilities including the presence of a nurse during duty hours" were provided at the former building and that their provision constitutes a past practice which the agency may not now abandon without negotiation.13/

11/ We do not find that this agency contention raises an issue upon which the Council may properly rule in this case. See part 5 of this decision, supra.

12/ In view of the circumstances presented and our decision herein under section 11(b) of the Order, we do not reach and therefore make no ruling upon this contention.

13/ As to this contention, it does not state a ground for setting aside an agency determination of nonnegotiability. Rather, it appears to conjecture an unfair labor practice by agency management. The proper forum in which to raise such an issue is therefore not a negotiability dispute before the

(Continued)

Section 11(b) provides that an agency's obligation to bargain does not include "matters with respect to . . . the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty . . . ." This portion of section 11(b), as the Study Committee stated in its Report and Recommendations to the President which accompanied E.O. 11491, applies "to an agency's right to establish staffing patterns for its organization and the accomplishment of its work . . . ."14/

In our opinion, the union's proposal clearly is concerned with the staffing patterns of the agency, for it would, by its express terms, require the agency to provide a particular "type of position or employee" (i.e., a full-time registered nurse) to maintain the proposed health facility. As a result, we must hold, apart from other considerations, that the union's proposal is excepted from the obligation to bargain by section 11(b), and we must sustain the agency head's determination that the proposal is nonnegotiable.

7. Maintenance of Adequate Lighting.

The union's proposal would require the following:

> [Health and Safety] Section 4. The Employer will maintain adequate lighting in the work areas to assure the health and safety of employees. To determine if the lighting is adequate in the work place, it will be measured during the darkest part of the day and directly over each employee's work place.

The agency alleges that this proposal, dealing with the maintenance of adequate lighting in work areas, is nonnegotiable under Part 101-20.116-2(a)(1) of the General Services Administration's Federal Property Management Regulations (41 C.F.R. § 101-20.116-2(a)(1) (1975)).

Since the General Services Administration has primary responsibility for the issuance and interpretation of its own directives, including the Federal Property Management Regulations, that agency was requested, in accordance with Council practice, for an interpretation of GSA directives as they pertain to the instant proposal.

The General Services Administration replied, in pertinent part, as follows:

> The union has requested that the employer maintain adequate lighting in the work areas to assure the health and safety of employees. To determine if the lighting is adequate in the work place, it will be measured

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(Continued)

Council but an unfair labor practice proceeding before the Assistant Secretary. Accordingly, we do not pass upon this claim in the instant case. See note 2, supra.

14/ Labor-Management Relations in the Federal Service (1975), section E.1, at 70.

during the darkest part of the day and directly over each employee's work place.

The provision of adequate lighting is the statutory responsibility of GSA. The present standards for lighting set by GSA are found in the Federal Property Management Regulations (FPMR), Part 101-20.116. Fundamentally, it says that the current lighting program has been influenced by the energy conservation program and nonuniform standards are to be applied to existing systems by removing excess lamps and fixtures, so that during working hours, overhead lighting shall be reduced to 50 foot-candles at work stations, 30 foot-candles in work areas. Reductions in overhead lighting shall be accomplished with minimum practicable deviation from the specified levels. Illumination levels are to be measured at the place or places where the visual requirements are present. Furthermore, lighting measurements shall be made so as not to allow natural light to influence the foot-candle reading. Work station lighting measurements shall be taken at the desk surface, typewriter surface, and working surface, etc. Work area lighting measurements shall be read on the working surface.

While GSA field officials (Buildings Managers) may make adjustments for the needs of individuals, any across the board changes in the allotted foot-candles would be a clear violation of the FPMR.

Thus, to the extent the proposal requires that the adequacy of lighting be measured by standards other than those established by GSA regulations, it would conflict with such regulations. However, since the language of the proposal merely requires the maintenance of "adequate lighting," and neither precludes nor requires the application of any particular standard of lighting adequacy, it does not, on its face, require application of standards other than those set by GSA regulations.

Further, since the provision of adequate lighting is, as already mentioned, the statutory responsibility of GSA, insofar as the proposal would require the agency to assume responsibility for the actual physical maintenance of lighting it would conflict with GSA regulations. However, if the proposal does not require the agency to assume such physical maintenance responsibility, but, rather, merely to assure that the GSA prescribed standards of lighting are maintained, by reporting any observed deviation to the appropriate GSA official (Buildings Manager), the proposal does not conflict with GSA regulations in this regard.

Based on the foregoing interpretation by GSA of its own directives, we find that, since there appears no evidence in the record to support a conclusion that the union's proposal would require that the adequacy of lighting be measured by standards other than those established by GSA or that the agency would be required to assume responsibility for the actual, physical maintenance of such lighting (and we so interpret the proposal for the purposes of this decision), the proposal does not conflict with GSA directives. Accordingly, the agency head's determination that the proposal is nonnegotiable

because it violates regulations of appropriate authority outside the agency was in error and must be set aside.

8. Provision of Parking Spaces.

The union's final proposal provides as follows:

> [Health and Safety] Section 5. The Employer agrees to negotiate with the owners and managers of the building to provide parking places to the following:
>
> (A) Persons suffering from a handicap; and
>
> (B) four or more persons who agree to form a car pool.

The agency head determined that this proposal also is nonnegotiable under GSA regulations--specifically Temporary Regulation D-47[15/] of GSA's Federal Property Management Regulations.

Accordingly, the Council requested from GSA an interpretation of its directives as related to the proposal. GSA responded, in relevant part, as follows:

> National Treasury Employees Union Chapter No. 010 has requested that the employer agree to negotiate with the owners and managers of the buildings to provide parking spaces for persons suffering from a handicap or four or more persons who agree to form a carpool.
>
> As outlined in the Public Buildings Act of the Federal Property Management Regulations (FPMR's), an agency itself is not authorized to negotiate or obtain any additional space. Only GSA as the property manager for the Federal Government would be empowered to obtain additional area. GSA would only acquire more employee parking spaces when an agency head certifies that the lack of adequate parking will affect the mission of the agency.
>
> Therefore, insofar as this proposal requires the agency to negotiate with owners and managers of the building, it conflicts with GSA regulations.
>
> However, once the size of the parking areas has been determined by GSA, it is the responsibility of the agency to assign the individual spaces. In assigning the allocated spaces, agencies may wish to consult with recognized labor organizations to answer such questions as to how many members comprise a carpool, methods used to break ties, determining handicapped spaces, etc.

15/ The requirements of this regulation have since been made permanent. 41 Fed. Reg. 7944 (1976).

Composition of parking assignments and existing facilities is outlined in GSA FPMR Part 101-20.117 which has replaced Temporary FPMR D-47 . . . . Basically, it states that the spaces under jurisdiction of the agencies are to be assigned observing the following priorities:

1. Official vehicle and visitor parking.
2. Handicapped employees.
3. Executive and unusual hours (a goal of not more than 10% of total).
4. Carpools.

Thus, based upon GSA's interpretation of its own directives, we find that this proposal, since it would by its express terms require the agency to negotiate with owners and managers of the building in question in order to obtain additional employee parking spaces, conflicts with GSA directives, and we therefore must sustain the agency head's determination that the proposal is nonnegotiable.

Conclusion

For the reasons discussed above, and pursuant to sections 2411.22 and 2411.28 of the Council's rules and regulations, we find that:

1. The union's appeal for review of the agency head's determination as to the nonnegotiability of the proposal entitled Facilities Section 11 fails to meet the conditions prescribed in section 11(c)(4) of the Order and must be denied; and

2. The agency head's determination as to the nonnegotiability of the proposals entitled Facilities Sections 1, 2, 3, 5, 7, 8, and 10, and Health and Safety Sections 3 and 5, was valid and must be sustained; and

3. The agency head's determination as to the nonnegotiability of the proposals entitled Facilities Section 12 and Health and Safety Section 4 was improper and must be set aside. This decision shall not be construed as expressing or implying any opinion of the Council as to the merits of the union's proposals. We decide only that, as submitted by the union and based upon the record before the Council, the proposals are properly subject to negotiation by the parties concerned under section 11(a) of the Order.

By the Council.

Henry B. Frazier III
Executive Director

Issued: February 24, 1976

Department of the Army, Headquarters, U.S. Army Materiel Command and National Federation of Federal Employees, Local 1332. The union requested a waiver of the requirement in section 2411.22(b) of the Council's rules of procedure concerning exceptions to internal agency regulations raised by an agency head as bars to negotiations; and an extension of time to file an appeal with the Council (which appeal was later filed and docketed as FLRC No. 76A-29). The union's requests raised questions concerning (1) whether an informal request for and denial of an exception from an internal agency regulation, submitted at the bargaining table, satisfies the requirement in section 2411.22(b) of the Council's rules; and (2) the time limits under section 2411.24(b) of the Council's rules for filing a negotiability appeal involving an internal agency regulation asserted by the agency as a bar to negotiations. The Council's responses to these questions were considered of sufficiently widespread interest to warrant publication in this Report.

Council action (February 27, 1976). As to (1), the Council informed the union that a mere informal request and denial of an exception request at the bargaining table fails to satisfy the requirements of section 2411.22(b) of the rules. As to (2), the Council described the time limits under section 2411.24(b) of its rules as they would apply to three typical situations. The Council also informed the union that if the case concerned several negotiability issues submitted to the agency head, only one of which involved an internal agency regulation asserted by the agency as a bar to negotiation, the union might, if desired, submit a consolidated appeal to the Council on all negotiability issues and the applicable time limit for the consolidated appeal would depend on the time limit for the issue involving the internal agency regulation.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

February 27, 1976

Mr. Allan F. Small
Director, Collective Bargaining
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Negotiability Dispute between Department of the Army, Headquarters, U.S. Army Materiel Command and National Federation of Federal Employees, Local 1332

Dear Mr. Small:

This is in response to your letter of January 20, 1976, relating to the above-entitled negotiability dispute.

Confirming oral advice, your request for a waiver of the requirement in section 2411.22(b) of the Council's rules of procedure was denied; your organization was granted until February 2, 1976, to request an exception to the subject regulation from the Department of the Army, in accordance with section 2411.22(b) of the Council's rules; and, as you were informed, if the agency denies your request for an exception, appeal from the agency head negotiability determination in this matter must be filed with the Council within the time limits provided in section 2411.24(b) of the rules.

For your further assistance, additional information is here provided in response to the questions raised in your letter.

1. As to whether an informal request for and denial of an exception from an internal agency regulation, submitted at the bargaining table, satisfies the requirement in section 2411.22(b) of the rules, it is the intent of this section of the rules, in conformity with subpart V.1.(c) of the Report accompanying E.O. 11838,1/ that a written request for an exception must be made by the union and that a written response thereto must be made by the agency head as a condition to a union negotiability appeal involving that regulation. Such request by the union (including any arguments for granting an exception) and such response by the agency head (including any reasons for denying the exception) are required to assure the Council that the parties have fully "explore(d) the opportunity of an exception to a higher level agency regulation determined by the agency head to bar negotiations, before recourse to the Council." Accordingly, as previously indicated, a mere informal request for and denial of an exception at the bargaining table fails to satisfy the requirements of section 2411.22(b) of the Council's rules.

1/ Labor-Management Relations in the Federal Service (1975) at 39-40.

2. As to your questions concerning the time limits under section 2411.24(b) of the Council's rules for filing a negotiability appeal involving an internal regulation asserted by the agency as a bar to negotiations, it may be helpful to consider the three typical situations which might have arisen in your case and the time limits as they would apply to those respective situations:

Situation 1: Had you requested a negotiability determination by the agency head, and simultaneously with that request (or at least 15 days before service of the agency head's determination) had you requested an exception from the subject agency regulation, the agency head would have a maximum of 45 days to render a negotiability determination (see § 2411.24(c) of the rules) and, at the same time, to act upon the union's request for an exception from the regulation asserted by the agency as a bar. The time limit under section 2411.24(b) for you to file your negotiability appeal with the Council would then be 30 days from the date the agency head's determination (including the agency head's action on the request for exception)[2/] was served on you.[3/]

For example, if on January 9, 1976, you simultaneously requested an agency head negotiability determination and an exception to the regulation involved; and on February 23, 1976, the agency head rendered and served his negotiability determination, including a denial of your request for an exception, your appeal to the Council would be due no later than March 24, 1976.

Situation 2: Had you requested a negotiability determination by the agency head and subsequently, but less than 15 days before the determination was rendered, you had requested an exception from the subject agency regulation, the agency would have a maximum of 15 days to act on the exception request. The 30-day time limit for your appeal to the Council would be extended by the number of days (remaining out of the 15) which the agency head takes after the negotiability determination to act on the request for exception. Thus, if the agency's ruling on your exception request was served after the negotiability determination, and both the negotiability determination and ruling on the exception request were adverse to your position, your appeal to the Council would be due no later than 30 days from the date of service of the exception ruling.

2/ In this situation and those which follow the time limit for the union to file its negotiability appeal with the Council would be the same if the agency head failed to act on the request for exception within the time period indicated. (See § 2411.22(b) of the Council's rules.)

3/ The 30-day time limit in section 2411.24(b) for this situation and the other situations which follow is of course subject to the usual additions if, for example, the last day of the computation falls on a Saturday, Sunday or holiday, or if service is made by mail, as provided in section 2411.45. Likewise these time limits are subject to extension or waiver under the restricted conditions provided in the latter section of the rules.

For example, if on January 9, 1976, you requested an agency head negotiability determination; on February 17, 1976, you further requested an exception to the subject regulation; on February 23, 1976, the agency head rendered and served his negotiability determination; and on March 3, 1976, the agency head further rendered and served a denial of your request for an exception; the 30-day time limit would be extended 9 days (i.e., the number of days between the negotiability determination by the agency head and his action on the exception request) and your appeal to the Council would thus be due no later than April 2, 1976.

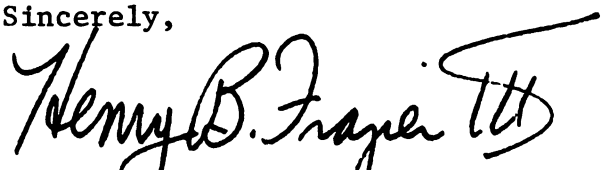
Situation 3: Had you requested a negotiability determination by the agency head and, after the determination was rendered, you requested an exception from the subject regulation relied upon by the agency head as a bar to negotiations, the 30-day time limit would be extended by the number of days (not to exceed 15) which you take, after the negotiability determination has been rendered and served, to request an exception, and the number of days after your request which the agency head takes (not to exceed 15) to act upon the request.

For example, if on January 9, 1976, you requested an agency head negotiability determination; on February 23, 1976, the agency head rendered and served his negotiability determination; on March 9, 1976, you requested an exception from the subject regulation relied upon by the agency head as a bar to negotiation; and on March 24, 1976, the agency head denied the request for an exception; the 30-day time limit for you to appeal to the Council would be extended 30 days (i.e., 15 days after the negotiability determination taken by you to request an exception plus 15 days taken by the agency head to act thereon) and your appeal to the Council would thus be due no later than April 23, 1976.

3. Finally, while not specifically raised in your letter, if your case concerns several negotiability issues submitted to the agency head, only one of which involves an internal agency regulation asserted by the agency as a bar to negotiation, you may, if desired, submit a consolidated appeal to the Council on all the negotiability issues and the applicable time limit for this consolidated appeal would depend on the time limit for the issue involving the internal agency regulation asserted by the agency as a bar to negotiations.

For the Council.

Sincerely,



Henry B. Frazier III
Executive Director

cc: B. B. Beeson
Army

Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator). The arbitrator determined that the activity failed to consult the union before it changed the grievants' basic workweek, thereby violating the parties' agreement, and directed the activity to "pay to each of the grievants the difference between what he would have been paid at the overtime rate and the amount actually paid at the straight time rate for each Saturday and Sunday he worked during the periods the administrative workweek was in force. The days each was off during the normal workweeks as a result of the changed workweek shall be treated as days of authorized administrative leave." The Council accepted the agency's petition for review insofar as it related to the agency's exception that the award violated the applicable pay statute, 5 U.S.C. § 5544, as interpreted by the Comptroller General (Report No. 64). The Council also granted the agency's request for a stay.

Council action (March 3, 1976). Based upon a decision of the Comptroller General, rendered in response to the Council's request, the Council concluded that, because there was no legal authority for the payments awarded by the arbitrator, the award may not be implemented. The Council further considered resubmitting the award to the arbitrator with instructions that he fashion an award similar to the remedies permitted for unfair labor practices under 29 C.F.R. § 203.26(b) (1975), as recommended by the Comptroller General. The Council determined that there was no proper basis upon which it could resubmit or direct the resubmission of the award to the arbitrator, noting, however, that the parties could, of course, resubmit the case to the arbitrator if they wished to do so. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the award by striking the above-quoted language from the award. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Mare Island Naval Shipyard

and

FLRC No. 74A-64

Mare Island Navy Yard Metal
Trades Council, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the remedy awarded by the arbitrator for the activity's failure, as he found, to comply with a provision of the parties' collective bargaining agreement which set forth consultation procedures to be used when the activity formulated or modified shipyard instructions and notices concerning policies and programs related to working conditions.

Based on the findings of the arbitrator and the entire record, it appears that the basic workweek of the activity's employees consisted, pursuant to Article VIII, Section 2, of the collective bargaining agreement,[1/] of 5 days, Monday through Friday. In order to achieve a continuous test program 7 days a week, the activity changed the basic workweek of approximately 54 employees to include either Saturday or Sunday, or both. Before the arbitrator, the activity conceded that it changed the employees' workweek in order to avoid paying them at the overtime rate for the work they performed on Saturdays and Sundays. The affected employees filed grievances alleging that the activity had violated Article VIII, Section 3,[2/] and the "consultation" provision of Article VI, Section 2,[3/] of the agreement. The parties ultimately submitted the grievances to arbitration.

1/ According to the award, Section 2 of Article VIII (Hours of Work) provides:

> Except as hereinafter provided, the basic workweek will consist of five (5) days, Monday through Friday, inclusive, on each of which the employee is scheduled to work an eight (8) hour shift.

2/ According to the award, Section 3 of Article VIII (Hours of Work) provides in pertinent part:

> When necessary to meet operating needs, the Employer may schedule basic workweeks other than Monday through Friday for employees. . . .

3/ According to the award, Section 2 of Article VI (Appropriate Matters) provides:

(Continued)

The Arbitrator's Award

The arbitrator determined that the activity changed the grievants' workweek in order to meet operating needs within the meaning of Article VIII, Section 3, of the agreement and, therefore, the change was not arbitrary and capricious. However, the arbitrator determined that the activity had failed to consult the union before it changed the grievants' basic workweek, and had thereby violated Article VI, Section 2, of the agreement. As a remedy, the arbitrator directed the activity to "pay to each of the grievants the difference between what he would have been paid at the overtime rate and the amount actually paid at the straight time rate for each Saturday and Sunday he worked during the periods the administrative workweek was in force." The arbitrator further directed that the "days each [aggrieved employee] was off during the normal workweeks as a result of the changed workweek shall be treated as days of authorized administrative leave."

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleges that the arbitrator's award violates the applicable pay statute, 5 U.S.C. § 5544, as interpreted by the Comptroller General. The Council also granted the agency's request for a stay pending determination of the appeal. Neither party filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

(Continued)

> In formulating or modifying Shipyard instructions and notices concerning policies and programs related to working conditions, the Employer will notify the Council. The Employer will furnish the Council with information as to the content of the instruction being formulated or revised, and will request written comments and suggestions from the Council. At the request of the Council, representatives of the Employer will meet with the representatives of the Council Policy Committee for purposes of oral consultation and to provide the opportunity for an exchange of views.

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The question before the Council is whether the remedy portion of the arbitrator's award, which directs the activity to pay to each of the grievants the difference between what he would have been paid at the overtime rate and the amount actually paid at the straight time rate for each Saturday and Sunday he worked during the periods the administrative workweek was in force, and which further directs that the days each aggrieved employee was off during the normal workweeks as a result of the changed workweek shall be treated as days of authorized administrative leave, violates the applicable pay statute, 5 U.S.C. § 5544, as interpreted by the Comptroller General.

Because this case concerns an issue within the jurisdiction of the Comptroller General's Office, especially the applicability of prior Comptroller General decisions, he was requested to decided whether the arbitrator's award violates the applicable pay statute, 5 U.S.C. § 5544. The Comptroller General's decision in the matter, B-180010, January 6, 1976, is set forth in relevant part as follows:

> On July 5, 1972, the U.S.S. Abraham Lincoln, a nuclear powered fleet ballistic submarine attached to the U.S. Pacific Fleet, was withdrawn from active duty and entered Mare Island Naval Shipyard for overhaul and repairs. The Chief of Naval Operations determined that the Lincoln could be relieved from fleet operations for a period of 13 months and that it should be returned to service by August 6, 1973. The Shipyard planned and scheduled the overhaul work to be performed and the work was begun. However, it became obvious by early February 1973 that the repair work on the Lincoln was so far behind schedule that the programed completion date could not be met. As a result, the Commander of the Submarine Forces for the Pacific criticized the Shipyard's failure to adhere to the work schedule and demanded that the Lincoln be returned to his command as soon after the original completion date as possible. Also in early February, the Naval Ship Systems Command conducted an inspection and audit of the Shipyard and severely castigated its failure to complete repair work on schedule and condemned its excessive use of overtime.
>
> Faced with the problem of speeding up work on the Lincoln while restricting the use of overtime, the Shipyard commander ordered subordinate officials to investigate the possibility of initiating a shifted workweek for employees in the propulsion plant testing facility. The purpose of the proposed workweek shift was to achieve a 7 days per week continuous test program. The proposed plan for accomplishing this objective was to schedule the basic workweek of certain employees from Sunday through Thursday and to schedule the basic workweek of other employees from Tuesday through Saturday.
>
> On March 2, 1973, a meeting was held with the president of the Mare Island Navy Yard Metal Trades Council during which shipyard officials discussed the proposal. The president expressed his personal opposition to the proposed change in workweek but promised to confer with

representatives of the various unions affiliated with the Metal Trades Council during a meeting scheduled for March 5, 1973. On March 6, 1973, the president informed shipyard officials that the Metal Trades Council was opposed to the plan and suggested alternative solutions to the problem. The Shipyard officials advised the president that they would inform the shipyard commander of the Council's position and that the president would be informed as to the commander's decision.

During the afternoon of March 6, 1973, the Shipyard commander decided to implement the plan to change the basic workweek of certain employees beginning on the following Sunday, and Shipyard officials were instructed to notify the affected employees. The Council's president was not informed of the decision until the following day. Also on March 7, Shipyard supervisors began notifying employees whose basic workweek had been changed. The plan was placed in operation effective Sunday, March 11, 1973.

Four groups of affected employees from various shops at the shipyard, totaling about 54 individuals, presented grievances through the Metal Trades Council protesting the change of their basic workweek. The parties were unable to adjust the grievances under the negotiated grievance procedure and the issues involved were submitted to binding arbitration under the terms of the agreement.

In the arbitration proceeding the union contended that the shipyard violated section 2 of article VI and section 3 of article VIII of the negotiated agreement in changing the basic workweek of the grievants. Section 2, article VI, provides:

> "Section 2. In formulating or modifying Shipyard instructions and notices concerning policies and programs related to working conditions, the Employer will notify the Council. The Employer will furnish the Council with information as to the content of the instruction being formulated or revised, and will request written comments and suggestions from the Council. At the request of the Council, representatives of the Employer will meet with the representatives of the Council Policy Committee for purposes of oral consultation and to provide the opportunity for an exchange of views."

Section 3, article VIII, provides:

> "Section 3. When necessary to meet operating needs, the Employer may schedule basic workweeks other than Monday through Friday for employees. When changing the days of a unit employee's basic workweek, the Employer, except as otherwise provided in Section 4 below:
>
> "a. Will give notice to the employee at least three (3) calendar days before the first administrative workweek affected by the change,

"b. Will make the change for a period of not less than three (3) consecutive weeks, and

"c. Will notify the appropriate Council steward and, upon request, provide information as to the reason for the change."

The union argued that the consultation requirements of section 2, article VI, were not satisfied by the shipyard before it implemented the plan and that the change in basic workweek was not "necessary to meet operating needs" under the terms and conditions of section 3 of article VIII.

The Shipyard maintained that section 2 of article VI was inapplicable to the instant dispute inasmuch as it neither formulated nor modified a shipyard instruction or notice relating to hours of work within the meaning of that section. Also, it contended that the change of the grievants' basic workweek was necessary to meet "operating needs" within the meaning of article VIII and that it complied with the consultative requirements of that article in making the change.

After considering the evidence and arguments presented by the parties during the proceeding, the arbitrator found that the shipyard's "action was not arbitrary or capricious and was necessary to meet operating needs within the meaning of Article VIII, Section 3, of the Agreement." The arbitrator also found, however, that the shipyard had modified one of its Instructions (NAVSHIPMAREINST 5330.2D) governing hours of work, when it changed the basic workweek of the grievants, and in doing so violated the consultative provisions of section 2, article VI. As a remedy for this violation the arbitrator fashioned the following award:

> "The change in the basic workweek of the aggrieved employees instituted by the Employer was in violation of ARTICLE VI, Section 2, of the Negotiated Agreement. The Employer shall pay to each of the grievants the difference between what he would have been paid at the overtime rate and the amount actually paid at the straight time rate for each Saturday and Sunday he worked during the periods the administrative workweek was in force. The days each was off during the normal workweeks as a result of the changed workweek shall be treated as days of authorized administrative leave."

The sole issue presented for consideration by us is whether or not the arbitrator's award of backpay to the aggrieved employees violates applicable law and regulations.

The Department of the Navy has challenged the validity of the award of overtime pay, relying on the rule stated in several of our decisions that employees may not be compensated for overtime work when

they do not actually perform work during the overtime period. See, for example, 42 Comp. Gen. 195 (1962); 45 id. 710 (1966); and 46 id. 217 (1966). Our "no work, no pay" rule set forth in the cited decisions was based on the premise that the statutes authorizing overtime, 5 U.S.C. § 5542(a) and 5 U.S.C. § 5544(a) clearly contemplated the actual performance of overtime duty. The Navy further points to our decision B-175867, June 19, 1972, which held that the improper denial of the opportunity for an aggrieved employee to work overtime in violation of a mandatory provision of a negotiated agreement is not an unjustified or unwarranted personnel action within the purview of the Back Pay Act, 5 U.S.C. § 5596 (1970), and the regulations implementing that statute. Hence, the Navy argues there is no available remedy for employees who are denied the opportunity of performing scheduled overtime work.

Our holding in B-175867, supra, was based on our previous decisions holding that the overtime statutes required the actual performance of work during the overtime period. However, upon reexamination we have subsequently changed our view and held that an employee improperly denied overtime work may be awarded backpay. See 54 Comp. Gen. 1071 (1975) where we expressly stated that we would no longer follow our decision B-175867, supra. See also B-180010, August 25, 1975, 55 Comp. Gen. ____.

In our recent cases we have also held that a violation of a mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay, allowances, or differentials is as much an unjustified or unwarranted personnel action as is an improper suspension, furlough without pay, demotion or reduction in pay, provided the provision was properly included in the agreement. 54 Comp. Gen. 312 (1974), 54 id. 403 (1974), 54 id. 435 (1974), and 54 id. 538 (1974). Thus, the Back Pay Act of 1966, 5 U.S.C. § 5596 (1970), is the appropriate statutory authority for compensating an employee for pay, allowances, or differentials he would have received, but for the violation of the negotiated agreement.

However, before any monetary payment may be made under the provisions of 5 U.S.C. § 5596 (1970), there must be a determination not only that an employee has undergone an unjustified or unwarranted personnel action, but also that such action directly resulted in a withdrawal of pay, allowances, or differentials, as defined in applicable civil service regulations. Although every personnel action which directly affects an employee and is determined to be a violation of the negotiated agreement may also be considered to be an unjustified or unwarranted personnel action, the remedies under the Back Pay Act are not available unless it is also established that, but for the wrongful action, the withdrawal of pay, allowances, or differentials would not have occurred. 54 Comp. Gen. 760, 763 (1975). We further stated in that decision the general rule that:

"* * * failure-to-consult actions, in the absence of a requirement that the agency carry out the advice received as a result of the consultation, are not likely to result in the necessary 'but for' relationship between the wrongful act and the harm to the individual employee for which the Back Pay Act is the appropriate remedy."

In light of the foregoing, in order to make a valid award of backpay, it is necessary for the arbitrator not only to find that the negotiated agreement has been violated by the agency, but also to find that such improper action directly caused the grievants to suffer a loss or reduction in pay, allowances, or differentials.

Here, the arbitrator found that the Shipyard violated the agreement by its failure to consult with the union before initiating a change in the basic workweek of the grievants which caused them to undergo an unjustified and unwarranted personnel action. However, the arbitrator did not find that the agreement imposed a requirement on the Shipyard to carry out the advice it received during the consultation process or that the agency would have been precluded from implementing the workweek changes if it had complied with the consultation provisions of the agreement. Therefore, there is no showing that but for the shipyard's failure to consult with the union the grievants would have received overtime pay for each Saturday and Sunday they worked during the period that the changed basic workweek was in effect.

Accordingly, there is no legal authority for the payments awarded by the arbitrator, and the award may not be implemented.

It should be pointed out that if the arbitrator had made the proper findings to support the award as fashioned, he should also have awarded backpay instead of administrative leave for days off during the grievants' regular basic workweek on which they normally would have worked but for the change in workweek.

We note that, pursuant to section 19(d) of Executive Order 11491, the union had the option of raising the failure to consult issue as either an unfair labor practice under section 19(a)(6) or as a grievance under section 13, but not under both procedures. The union elected to file a grievance under section 19 of the Order which resulted in the arbitration award now being reviewed. Where an award is defective the reviewing authority should, if feasible, resubmit the award to the arbitrator for corrective action. Enterprise Wheel and Car Corp. v. United Steelworkers of America, 269 F.2d 327 (4th Cir. 1959), approved in part 363 U.S. 593, 599 (1960), National Brotherhood Packinghouse and Dairy Workers Local No. 52 v. Western Iowa Pork Company, Inc., 247 F. Supp. 663 (1965), affirmed 366 F.2d 275 (8th Cir. 1966). Therefore, to provide a remedy for the union, we recommend that the Federal Labor Relations Council consider resubmitting the award to the arbitrator with instructions that he fashion an award similar to the remedies permitted for unfair labor practices under 29 C.F.R. § 203.26(b) (1975).

Based upon the foregoing decision by the Comptroller General, we must conclude that, because there is no legal authority for the payments awarded by the arbitrator, the award may not be implemented.

Conclusion

For the foregoing reasons, we find that, because there is no legal authority for the payments awarded by the arbitrator, the award may not be implemented. As recommended by the Comptroller General, the Council has considered resubmitting the award to the arbitrator with instructions that he fashion an award similar to the remedies permitted for unfair labor practices under 29 C.F.R. § 203.26(b) (1975). However, for the reasons indicated below, there is no basis upon which the Council can resubmit the award in the circumstances of this case.

The Council's practice, consistent with the practice in the private sector,[4/] is to direct the resubmission of an arbitration award only for the limited purposes of clarifying or interpreting the award, and not for the purposes of relitigating or modifying the award. See American Federation of Government Employees, Local 2532 and Small Business Administration (Dorsey, Arbitrator), FLRC No. 73A-4 (February 12, 1974), Report No. 49.[5/]

4/ In the private sector, resubmission of an arbitration award is made only for the limited purpose of clarifying or interpreting the award, not for relitigating or modifying the award. See Enterprise Wheel and Car Corp. v. United Steelworkers of America, 269 F.2d 327, 332 (4th Cir. 1959), approved in part 363 U.S. 593, 599 (1960) (resubmission to ascertain amounts of money due the grievants); ILWU Local 142 v. Land & Construction Co., Inc., 498 F.2d 201, 206 (9th Cir. 1974) (resubmission to determine exact amount due the grievant); National Brotherhood Packinghouse and Dairy Workers, Local No. 52 v. Western Iowa Pork Co., Inc., 247 F. Supp. 663, 666 (S.D. Iowa 1965), aff'd 366 F.2d 275 (8th Cir. 1966) (resubmission for accounting procedure to determine amounts of backpay); Hanford Atomic Metal Trades Council, AFL-CIO v. General Electric Co., 353 F.2d 302, 307 (9th Cir. 1965) (resubmission of award to clarify and interpret it with respect to whether backpay applied to certain employees).

5/ With respect to the procedures used in resubmitting an award, the Council's practice is also consonant with the practice of the private sector, as exemplified in the cases cited in footnote 4, supra. That is, pursuant to section 2411.37(b) of the Council's rules of procedure, the Council can direct the parties to resubmit an award to an arbitrator for the limited purposes of clarifying or interpreting the award, but the Council itself does not resubmit an award to the arbitrator. Community Services Administration and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator), FLRC No. 74A-29 (November 18, 1975), Report No. 91, at 7, n. 3; American Federation of Government Employees, AFL-CIO, Department of Labor Local 12 and U.S. Department of Labor (Harkless, Arbitrator), FLRC No. 73A-56 (May 22, 1975), Report No. 70, at 3.

In the instant case, the award does not require clarification or interpretation. Rather, the fashioning of a new remedy by the arbitrator in the circumstances of this case would, in the Council's opinion, constitute a modification of the award. Therefore, there is no proper basis upon which the Council can direct the resubmission of the award to arbitration.

However, the parties themselves can, of course, resubmit the case to the arbitrator if they wish to do so. In fashioning a remedy, the arbitrator (in this case, or in any other case) could, as suggested by the Comptroller General, provide a remedy similar to those permitted for unfair labor practices under 29 C.F.R. § 203.26(b) (1975) if he deemed such a remedy appropriate in the circumstances of the case. The Council follows a policy, as do courts in the private sector, of allowing arbitrators discretion in fashioning remedies so long as those remedies do not violate applicable law, appropriate regulation or the Order. See Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88 (July 24, 1975), Report No. 78 and Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator), FLRC No. 74A-12 (September 9, 1974), Report No. 56.

Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award by striking the following language from the award:

> . . . The Employer shall pay to each of the grievants the difference between what he would have been paid at the overtime rate and the amount actually paid at the straight time rate for each Saturday and Sunday he worked during the periods the administrative workweek was in force. The days each was off during the normal workweeks as a result of the changed workweek shall be treated as days of authorized administrative leave.

As so modified, the award is sustained and the stay of the award is vacated.

By the Council.

Henry B. Frazier III
Executive Director

Issued: March 3, 1976

Texas ANG Council of Locals, AFGE and State of Texas National Guard. The dispute involved the negotiability of the union's proposal concerning the filling of "threshold" supervisory positions outside the bargaining unit.

Council action (March 3, 1976). The Council held that the proposal was outside the bargaining obligation established by section 11(a) of the Order and sustained the agency head's determination of nonnegotiability.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Texas ANG Council of Locals, AFGE

and

FLRC No. 74A-71

State of Texas National Guard

DECISION ON NEGOTIABILITY ISSUE

Background

The Texas Air National Guard Council of Locals represents a unit consisting of all non-supervisory Air National Guard Technicians in State of Texas Air National Guard.[1/] In the course of contract negotiations a dispute arose concerning the union's proposal (intended for inclusion in two articles of the proposed agreement entitled, respectively, Article XVI, "Promotions (Excepted Service)" and Article XVII, "Promotions (Competitive Service)") which reads as follows:

> This article is applicable to the filling of threshold supervisory positions outside the bargaining unit.

Upon referral, the Department of Defense determined principally, that the proposal is outside the agency's obligation to bargain under section 11(a) of the Order and is therefore nonnegotiable in the circumstances of this case.

The union appealed to the Council from the agency head's determination and the agency filed a statement of position.

Opinion

The issue presented is whether the union's proposal, to make the unit's negotiated promotion procedures applicable to "the filling of threshold supervisory positions outside the bargaining unit," is a matter within the bargaining obligation established by section 11(a) of the Order.

The agency contends in substance that the proposal is outside the obligation to bargain on personnel policies and practices and matters affecting working

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1/ Section 10(b) of the Order provides, in pertinent part, that a "unit shall not be established . . . if it includes—

(1) any management official or supervisor . . . ."

conditions under section 11(a).[2] The agency construes management's section 11(a) obligation to negotiate personnel policies and practices, including those concerning merit promotion, in a manner which confines the obligation to those policies and practices which relate to positions within the bargaining unit. More particularly, the agency argues, in effect, that, since section 10(e) of the Order[3] only authorizes the union to "act for and negotiate agreements covering all employees in the unit," the procedures for filling supervisory positions, which positions may not be included in the bargaining unit under section 10(b)(1) of the Order,[4] are not "personnel policies and practices and matters affecting working conditions," concerning which the agency must negotiate, within the meaning of section 11(a). Thus, the agency concludes that, although management may, at its option, negotiate certain policy and procedural matters having to do with opportunities for unit employees to apply and be considered for promotion to non-unit positions, including first-level supervisory positions, there is no obligation under the Order for management to do so.

The union, however, contends that its proposal falls within the obligation to bargain, arguing that, while the proposal is concerned with the filling of supervisory positions outside the bargaining unit, in effect, it does not apply to supervisory employees but, rather, applies only to unit employees who are candidates for promotion to threshold supervisory positions. Hence, the union concludes, in this regard, that its proposal is negotiable because

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2/ Section 11(a) of the Order provides, in pertinent part:

> Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; . . . and this Order.

3/ The relevant portion of section 10(e) states:

> (e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and to negotiate agreements covering all employees in the unit.

4/ See note 1, supra.

"the union has the right to negotiate promotion procedures for unit employees," including "procedures for those in the unit to career ladder positions outside the unit." In support of this conclusion the union relies upon two prior Council decisions.5/

Section 11(a) of the Order, as already set forth, establishes an obligation to bargain concerning personnel policies and practices and matters affecting working conditions as far as may be appropriate under various enumerated authorities, including provisions of the Order itself. In this respect, as already mentioned, the agency points out that section 10(b) of the Order excludes supervisors from bargaining units and asserts, in its determination, that:

> If the unit criteria set forth in section 10(b) of Executive Order 11491 are to have meaning, management's section 11(a) obligation to negotiate personnel policies and practices, including those concerning merit promotion, must be construed in a manner which confines the obligation to negotiate to policies and practices relating to positions within the unit. Although there are policy and procedural matters having to do with opportunities for unit employees to apply and be considered for promotion to first-level supervisory positions which management could, at its option, negotiate on, we find no obligation under the Order for management to do so.

We find merit in the agency's position in the circumstances of this case. The rationale for the Order's excluding supervisors from bargaining units, set forth in the Report and Recommendations which led to the issuance of E.O. 11491, specifies a firm line of demarcation between bargaining units and supervisors, as follows:6/

> We view supervisors as a part of management, responsible for participating in and contributing to the formulation of agency policies and procedures and contributing to the negotiation of agreements with employees. Supervisors should be responsible for representing management in the administration of agency policy and labor-management agreements, including negotiated grievance systems, and for expression of management viewpoints in daily communication with employees. In short, they should be and are part of agency management and should be integrated fully into that management.

Accordingly, under the Order, supervisors and, hence, supervisory positions are structurally and functionally a part of management. This status results

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5/ IAM&AW Lodge 2424 and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Maryland, FLRC No. 72A-18 (September 17, 1973), Report No. 44; AFGE Local 1923 and Social Security Administration Headquarters Bureaus and Offices, Baltimore, Maryland, FLRC No. 71A-22 (May 23, 1973), Report No. 39.

6/ Labor-Management Relations in the Federal Service (1975), at 68.

in, as well as being underscored by, their exclusion from any bargaining unit. The proposal at issue, however, would establish that the merit promotion procedures negotiated for the filling of positions within the bargaining unit must be the merit promotion procedures which management must use to fill supervisory positions, outside the bargaining unit. That is, the proposal solely relates to procedures for the filling of non-unit positions, which positions are concerned with management responsibilities and the performance of management functions. It clearly does not relate to the personnel policies and practices affecting the bargaining unit which are encompassed within the bargaining obligation under section 11(a). Further, given the fact that supervisors represent management in both negotiations and the processing of grievances, the proposal is contrary to the basic premise contemplated by the Order that bargaining be carried on by representatives freely and independently chosen by the respective parties. In like manner, a conflict of interest could develop from union participation in the selection of supervisors, who, as noted in the Report to the President, owe primary responsibility to agency management. Participation in the selection process through negotiation of procedures applicable to filling supervisory positions could lead to grievances and arbitration over the interpretation and application of the language and would impact upon the selection of managerial representatives as well as affect their attitudes in their new positions. Hence, we must find that the union's proposal is outside the bargaining obligation established by section 11(a) of the Order. That is, the agency may, at its option, bargain on the proposal, but it is not obligated to do so under the Order.

Prior Council decisions relied upon in the present case by the union and cited herein at note 5, supra, involved proposals for procedures relating to the filling of unit positions, unlike the proposal now before us. Therefore, the principles enunciated in those decisions are without controlling significance to the present dispute.7/

To avoid any possible misunderstanding, we must emphasize that our decision herein does not, of course, mean that all proposals in any way related to the filling of supervisory positions would be outside the obligation to bargain under section 11(a)--for example, proposals dealing with notification of unit employees eligible for consideration under agency regulations. However, the instant proposal goes beyond assurance of notification by seeking to prescribe the procedures, themselves, which must be used by management in filling supervisory positions outside the bargaining unit.

7/ Further, while one of the proposals involved in NFFE Local 943 and Keesler Air Force Base, Mississippi, FLRC No. 74A-66 (November 18, 1975), Report No. 89, decided by the Council after the submission of the instant appeal, was concerned with the filling of supervisory positions, the Keesler decision did not turn on that fact. Rather, the Council determined that the proposal, requiring a "reasonable allocation of supervisory positions [to be] filled by civilian [as opposed to military] employees," was violative of management's section 12(b)(5) right to determine "who" would perform certain agency functions and the significance of the fact that the positions involved were supervisory therefore was not reached or passed upon by the Council.

Conclusion

For the reasons discussed above, and pursuant to section 2411.28 of the Council's rules and regulations, we find the agency head's determination as to the nonnegotiability of the proposal promotion procedures for the filling of "threshold supervisory positions" was valid and must be sustained.

By the Council.

Henry B. Frazier III
Executive Director

Issued: March 3, 1976

Internal Revenue Service, Greensboro District Office, Greensboro, North Carolina, Assistant Secretary Case No. 40-5314 (AP). This appeal arose from a decision of the Assistant Secretary who, upon the filing of an Application for Decision on Grievability or Arbitrability by the National Treasury Employees Union (NTEU), held that, under the circumstances of the case, the question of whether the matter in dispute was subject to advisory arbitration under the parties' agreement, as well as a finding on the merits, involved questions concerning the interpretation and application of the agreement and should be resolved through the negotiated grievance procedure. The Council accepted the agency's petition for review on the ground that the Assistant Secretary's decision raised major policy issues concerning the application of section 13(d) of the Order, particularly, in the circumstances of this case, whether an arbitrator, sitting in advisory arbitration during an adverse action appeal, has the authority to decide whether or not the downgrading of the employee was, in fact, involuntary and thus an adverse action, and whether the arbitrator in such a case would have the authority to decide a question as to the timeliness of the request for such arbitration. The Council also granted the agency's request for a stay. (Report No. 67)

Council action (March 3, 1976). Based principally on an interpretation by the Civil Service Commission of the relevant statutes, Executive orders and implementing regulations of the Commission, rendered in response to the Council's request, the Council held that the Assistant Secretary's determination that the question of whether the downgrading was voluntary or involuntary was subject to arbitration under the negotiated agreement was consistent with the mandate of section 13(d) of the Order and also with the CSC regulations cited by the Commission. However, the Council also held, in pertinent part, based on the same CSC response, that under CSC regulations in effect at the time involved, the employee could not seek redress through advisory arbitration until his appeal had been accepted as timely, an issue which the arbitrator was not empowered to decide and which was not addressed by the Assistant Secretary in his decision.

Accordingly, the Council sustained the Assistant Secretary's decision to the extent that it found proper for arbitration under the agreement the question of whether the downgrading was involuntary and thus an adverse action and vacated its earlier stay of that decision; provided, however, that the matter may not go to arbitration unless the employee and NTEU are upheld on an appeal of the timeliness issue under applicable regulations. The Council thereby remanded the case to the Assistant Secretary for disposition consistent with its decision.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Internal Revenue Service,
Greensboro District Office,
Greensboro, North Carolina

and

National Treasury Employees Union

Assistant Secretary
Case No. 40-5314 (AP)
FLRC No. 74A-79

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision of the Assistant Secretary who, upon the filing of an Application for Decision on Grievability or Arbitrability by the National Treasury Employees Union (NTEU), held that, under the circumstances of the case, the question of whether the matter in dispute was subject to advisory arbitration under the agreement, as well as a finding on the merits, involves questions concerning the interpretation and application of the agreement and should be resolved through the negotiated grievance procedure.

The underlying circumstances of the case, as established by the entire record in the matter, are as follows: On September 30, 1973, an employee of the Internal Revenue Service (IRS) was downgraded from Revenue Officer, GS-9, to Revenue Representative, GS-7. IRS contended that the employee had voluntarily requested the downgrading in a letter dated September 5, 1973, in which he had requested reassignment to be effective September 30, 1973. NTEU contended that the employee was coerced into requesting the reduction in rank, thereby making the reassignment involuntary and, thus, an adverse action.

In a letter dated December 6, 1973, NTEU's General Counsel addressed a letter to the Director of the Federal Mediation and Conciliation Service requesting a list of arbitrators for the purpose of invoking arbitration in the matter under Article 32 of the negotiated agreement.[1/] IRS received

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1/ Article 32 of the negotiated agreement between IRS and NTEU, in effect at the time here involved, provides in pertinent part:

Advisory Arbitration Of Adverse Actions

Section 1.
When arbitration is invoked, the parties will, within ten (10) work days, request a list of five (5) Arbitrators from the Federal

(Continued)

a copy of the letter on December 10, 1973, and it asserts that this was the first time that it became cognizant of the allegation that the employee's reassignment was not voluntary but was instead considered to be an adverse action. Thereafter, IRS responded to NTEU quoting pertinent provisions of the Federal Personnel Manual regarding the time limits for filing an appeal from an adverse action[2/] and asked NTEU to furnish

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Mediation and Conciliation Service. The parties will meet within ten (10) work days after receipt of the list to seek agreement on an Arbitrator. If the parties cannot agree on an Arbitrator, the Employer and the Union will each strike one name from the list alternately until one name remains. The remaining person will be the duly selected Arbitrator.

Section 2.

A. When Advisory Arbitration is invoked, it serves as an alternate to the Employer's appeals procedure, and the employee must choose one procedure or the other.

B. If the employee chooses Advisory Arbitration, he is entitled to a Hearing before the Arbitrator.

. . . . . .

Section 6.

A. The decision of the Arbitrator may not relate to the contents of the Treasury Department's or Employer's policy, but is restricted to the propriety of an Adverse Action in a particular case.

B. The decision of the Arbitrator will be advisory in nature.

C. The burden of proof will be substantial evidence.

D. The Arbitrator's authority will be limited to affirmation or reversal of the Employer's action.

E. Upon recommendation of a reversal, the Arbitrator may further recommend that the employee be made whole to the extent such remedy is not limited by Statute or Regulation.

2/ The IRS response quoted the Federal Personnel Manual, chapter 771, subchapter 2, section 2-10b(2), in effect at the time here involved, as follows:

(2) When the appeal does not show clearly whether the action was voluntary or involuntary and the agency receives the appeal more than 15 calendar days after the effective date of the action, the

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an explanation for the delay in submitting the appeal. On January 10, 1974, NTEU responded, setting forth its reasons for the delay. On January 23, 1974, IRS rejected the explanation claiming that the delay from September 30, 1973, the effective date of the employee's reassignment, until December 6, 1973, the date of NTEU's letter of appeal, was excessive and that the explanation did not justify the delay. IRS informed NTEU of its right to appeal the decision on the timeliness question to either the Regional Commissioner of IRS or to the Regional Director of the Civil Service Commission. However, no appeal from the decision was taken and subsequently NTEU invoked arbitration in the matter pursuant to Article 32. When IRS declined to participate in the arbitration because no determination had been made that an adverse action was, in fact, involved, an Application for Decision on Grievability or Arbitrability was filed with the Acting Assistant Regional Director who found that there were two questions before him—the timeliness of the employee's and the union's appeal to the agency and the propriety of invoking advisory arbitration in the matter. He concluded that it would be "inappropriate" for him to rule on the timeliness question and that under the parties' collective bargaining agreement there had to be a prior determination that an adverse action was involved before advisory arbitration could be invoked. He therefore dismissed the Application.

On review the Assistant Secretary reversed the finding of the Acting Assistant Regional Director, concluding:

> [I]n the particular circumstances of this case both the threshold question of determining whether an involuntary downgrading of an employee is an adverse action and thus subject to advisory arbitration under Article 32 "Advisory Arbitration of Adverse Actions," of the negotiated agreement, as well as a finding on the merits (if the arbitrator determines that such action is subject to the provisions of Article 32) involve questions of interpretation and application of such negotiated agreement and should be resolved through the negotiated procedure.

IRS appealed the decision to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious and presented major

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> agency should ask the employee to explain the delay before asking him to explain in detail why he considers the action involuntary. The 15-day time limit for appeal should not be applied strictly to an appeal from a normally voluntary action, since the employee is not notified of a time limit. The appeal should be rejected as untimely, however, when the delay is excessive and the employee does not offer an acceptable explanation.

policy issues and requested a stay of the Assistant Secretary's decision. NTEU filed an opposition to the appeal.

The Council decided that the Assistant Secretary's decision raised major policy issues concerning the application of section 13(d) of the Order, particularly, in the circumstances of the case, whether an arbitrator, sitting in advisory arbitration during an adverse action appeal, has the authority to decide whether or not the downgrading of the employee was, in fact, involuntary and thus an adverse action[3/] and whether the arbitrator in such a case would have the authority to decide a question as to the timeliness of the request for such arbitration. The Council also determined that the issuance of a stay was warranted and granted IRS's request. Both parties filed briefs on the merits.

Opinion

In support of the contentions made in its appeal to the Council, IRS stated, in part, that advisory arbitration under the collective bargaining agreement pertains only to actions predetermined to be adverse actions and the authority of the arbitrator is limited by the agreement and Civil Service Commission (CSC) regulations solely to determination of the propriety of an adverse action whereas the authority to determine whether an action is involuntary, and thus an adverse action, rests solely in the statutory appeals system in CSC regulations. Further, IRS stated that, in any event, the request for advisory arbitration was untimely filed pursuant to CSC regulations. Since the Civil Service Commission has the responsibility to implement statutory and Executive order provisions relating to adverse actions, the Council, in accordance with established practice, requested the Commission's interpretation of the relevant statutes, Executive orders and implementing CSC regulations as they pertain to the Assistant Secretary's decision in the instant case. The question presented to the Commission was whether an arbitrator, sitting in advisory arbitration during an adverse action appeal, has the authority to decide whether or not the downgrading of an employee was, in fact, involuntary and thus an adverse action and whether the arbitrator

3/ In so stating this major policy issue, the Council noted that the Federal Personnel Manual makes it clear that an involuntary downgrading of an employee is an adverse action. FPM supplement 752-1, subchapter S1, section S1-2. Therefore, we concluded that the Assistant Secretary's apparently conflicting statement (i.e., ". . . the threshold question of determining whether an involuntary downgrading of an employee is an adverse action . . .") was inadvertent. A careful reading of the entire record in the matter before the Assistant Secretary supports this conclusion. NTEU's Application for Decision on Grievability or Arbitrability, IRS's Response to the Application, the Report and Findings of the Acting Assistant Regional Director and the opening paragraph of the Assistant Secretary's decision all speak to the authority of the arbitrator to determine the voluntariness or involuntariness of the downgrading.

in such a case would have the authority to decide a question as to the timeliness of the request for such arbitration. The Commission replied in relevant part as follows:

> Executive Order 10987, January 17, 1962, provided that, under implementing regulations issued by the Civil Service Commission, the head of each department and agency shall establish an appeals system to reconsider administrative decisions to take adverse actions against employees. It further provided that the agency system may include provisions for advisory arbitration where appropriate.
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> Subpart B of part 771 of the Commission's regulations (issued under 5 USC 1302, 3301, and 3302 and Executive Orders 10577 and 10987) implemented Executive Order 10987. Section 771.218(b) stated that the scope of appellate review of an agency appeals system should have included but should not have been limited to (1) a review of the issues of fact and (2) a review of compliance with agency and Commission procedural requirements for effecting the adverse action. Sections 771.223-224 outlined the restrictions on the agency use of advisory arbitration. Section 771.224 (c) restricted advisory arbitration to the propriety of an adverse action in a particular case. Section 771.224(d) stated that in a one-level appeals system advisory arbitration served as an alternate to the agency examiner and permitted the employee to elect one or the other but prohibited the use of both.
>
> Section 2-10b, Special Issues in Appeals, chapter 771 of the basic Federal Personnel Manual discussed allegations of coercion. This section stated that when an employee submitted an appeal from a normally voluntary action and the appeal showed clearly that the action was voluntary, the action should have been rejected. In addition, when the appeal did not show clearly whether the action was voluntary or involuntary, the agency should first have asked the employee to explain the delay in filing (if the appeal was not filed within the 15-day time limit for adverse action appeals) and then, if the reasons offered for late filing were acceptable, the employee should have been asked to explain in detail why he considered the action involuntary.
>
> It should be noted that CSC instructions explained that since an employee was not notified of a time limit on a normally voluntary action, the 15-day time limit should not have been applied strictly. The appeal should, however, have been rejected as untimely when the delay was not explained or when the employee did not offer an acceptable explanation. When the agency rejected an appeal, the notice of rejection must have been in writing and have informed the employee that an attempt to appeal further was subject to a time limit of 15 days.

Section 752.205 prescribed restrictions on the use of appeal rights from adverse actions. It prohibited concurrent appeals to the agency and the Commission on the same adverse action; required an employee to forfeit a right of appeal to the agency if he appealed first to the Commission; and described an employee's appeal rights to the Commission after having first appealed to the agency. Chapter 752(1-5b) of the basic Federal Personnel Manual clearly described the relationship between appeals to the agency and appeals to the Commission.

Section 752.204 not only prescribed time limits for filing adverse action appeals but also provided for the Commission or the agency, as appropriate, to extend the time limit on an appeal to it when the appellant showed that he was not otherwise aware of the time limit or that he was prevented by circumstances beyond his control from appealing within the time limit.

The above provisions of Commission regulations and Executive Order 10987 were in effect until September 9, 1974. At that time Executive Order 11787 revoked Executive Order 10987 and the Commission amended its regulations accordingly. The appeals system established by the Civil Service Commission under chapter 77 of title 5, USC, and section 22 of Executive Order 11491 of October 29, 1969, became the sole system of appeal for an employee covered by that system. However, since your questions are based on a case which originated and was processed under law, Executive orders, and regulations in effect prior to September 9, 1974, our reply is based on our interpretation of policy at that time.

In any appeal to the Commission, the hearing officer first examines an appeal to determine whether (1) the appeal is timely; and (2) the employee and the action appealed are covered by CSC regulations. Prior to September 9, 1974, an employee could elect to appeal either to the Commission or to the agency (including invoking advisory arbitration under negotiated procedures). If the employee elected to appeal to the agency, under CSC instructions (section 2-10b of chapter 771 of the FPM), the agency first had to make a timeliness determination. If the agency rejected the appeal as untimely, the written decision informing the employee of the untimeliness of his appeal had to inform the employee of his right to appeal the decision within 15 calendar days either to the Commission or to the agency. The agency was instructed to refer the appeal to an examiner (or arbitrator) when the deciding official had accepted the appeal, when the deciding official was unable to resolve relevant and material factual issues concerning the voluntary or involuntary character of the action, and when the employee requested a hearing. Under applicable implementing agency procedures, the examiner (or the alternative arbitrator) would, therefore, not be authorized to

consider timeliness since the agency resolved this issue either by accepting the appeal or by rejecting it and informing the employee of his appeal rights on the rejection decision. Nevertheless, when the appeal was accepted and referred for a hearing, the examiner (or arbitrator) could consider whether or not the downgrading of an employee was, in fact, involuntary and thus an adverse action.

In replying to your questions concerning the authority of the arbitrator to decide whether an agency action was involuntary and whether an employee request for arbitration was timely, we have reversed the order of the questions. In summary, under Commission regulations and instructions in effect on September 30, 1973, the effective date of the personnel action at issue, and January 25, 1974, when the union invoked advisory arbitration, the timeliness issue had to be settled before a case could be examined either on procedures or on its merits. In this case the agency gave the employee a written decision that his appeal was untimely and informed him in writing of his rights to appeal, within 15 calendar days, the decision on timeliness either to the Civil Service Commission or to a higher level in the agency. The employee did not exercise either appeal right but, instead, sought redress through advisory arbitration, a remedy not available to him unless and until his appeal was accepted as timely. The employee may want to consider pursuing his appeal on the timeliness issue under applicable regulations. These permit an extension if the appellant shows that he was not notified of the time limit and was not otherwise aware of it, or that he was prevented by circumstances beyond his control from appealing within the time limit. In reply to your first question, if the employee now appeals the timeliness issue and is upheld and thereafter invokes advisory arbitration, the arbitrator would have the authority to render an advisory opinion on the procedural and merit aspects of the alleged involuntary downgrading.

On the basis of the foregoing interpretation by the Civil Service Commission, it is evident that the Assistant Secretary's decision, to the extent that if found proper for arbitration the question of whether or not the downgrading was in fact involuntary, is consistent with appropriate regulations and with the purposes of the Order. In this latter regard, section 13(d) of the Order provides:

(d) Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision. Other questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted

to arbitration or may be referred to the Assistant Secretary for decision.[4/]

In the present case the Assistant Secretary found that the threshold question of whether the downgrading was voluntary or involuntary was properly subject to arbitration under the negotiated agreement. As previously indicated, this determination is consistent with the mandate of section 13(d) of the Order[5/] and also with CSC regulations cited by the Commission.[6/] Accordingly, the Assistant Secretary's decision, to the extent that it held that the question of whether or not the downgrading of the employee was involuntary was for advisory arbitration under the agreement, is sustained.[7/]

4/ Section 13(d) is cited as amended by E.O. 11838. While the subject decision of the Assistant Secretary was decided under the Order prior to amendment by E.O. 11838, the Order was not changed in respects which are material in this case. Further, while section 13(d) now requires that disagreements between the parties on questions of whether a grievance is on a matter subject to a statutory appeal procedure be referred to the Assistant Secretary for decision, there was no such explicit requirement in the Order at the time this matter was before the Assistant Secretary. However, this change is not material to the resolution of this case since the matter was taken to the Assistant Secretary for resolution.

5/ See also the discussion of the obligations of the Assistant Secretary under section 13(d) in Department of the Navy, Naval Ammunition Depot, Crane, Indiana and Local 1415, American Federation of Government Employees, AFL-CIO, FLRC No. 74A-19 (February 7, 1975), Report No. 63.

6/ In this regard, see the discussion in the CSC reply, quoted supra, at 6:

> The agency was instructed to refer the appeal to an examiner (or arbitrator) when the deciding official had accepted the appeal, when the deciding official was unable to resolve relevant and material factual issues concerning the voluntary or involuntary character of the action, and when the employee requested a hearing. [Emphasis added.]

7/ The present case is to be distinguished from the Council's decision in Internal Revenue Service, Austin Service Center, Austin, Texas and National Treasury Employees Union, Assistant Secretary Case No. 63-4995 (G&A), FLRC No. 74A-81 (January 15, 1976), Report No. 95. In that case NTEU had asserted that the failure of IRS to return an employee to an active duty status for reasons other than workload constituted a suspension for greater than 30 days and was thus an adverse action subject to advisory arbitration under the collective bargaining agreement. The

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However, the Civil Service Commission's response indicates that, under Commission regulations and instructions in effect at the time involved, the employee could not seek redress through advisory arbitration until his appeal had been accepted as timely, an issue which an arbitrator was not empowered to decide. The Assistant Secretary did not address the timeliness question in his decision.

On the basis of the Commission's response it appears that at the time the Application for Decision on Grievability or Arbitrability was first filed, the matter should have been returned to the parties for resolution of the timeliness question through IRS or Commission appeal procedures. Thereafter, if the appeal were found to be timely and if there were still a question as to whether the matter was subject to arbitration under the agreement, then the matter would be proper for resolution by the Assistant Secretary. In this case the Assistant Secretary has already made the arbitrability determination consistent with the Order and CSC regulations and the only remaining matter for determination is a resolution of the timeliness question by the IRS or the Commission. Accordingly, the Assistant Secretary should return the matter to the parties for determination as to the timeliness of the appeal. If the appeal is found to be timely by proper authority, the matter may then go to advisory arbitration consistent with the decision of the Assistant Secretary.

Conclusion

Based upon the foregoing and pursuant to section 2411.18(b) of the Council's rules and regulations, we sustain the Assistant Secretary's decision to the extent that it found proper for arbitration under the agreement the question of whether the downgrading was involuntary and thus an adverse action and vacate our earlier stay of that decision; provided, however, the matter may not go to arbitration unless the

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(Continued)

Assistant Secretary found that the question of whether or not such an action was an adverse action and thus subject to advisory arbitration was for resolution by the arbitrator. In setting the decision aside and remanding the case to the Assistant Secretary, the Council pointed out that the threshold question to be determined in the matter was whether the failure to return the employee to active duty status for reasons other than workload was in fact an adverse action and that this determination was one of arbitrability for the Assistant Secretary since the matter could not go to an arbitrator under the agreement if the action was not an adverse action. In the present case there is no question that an involuntary downgrading is an adverse action and the only question is whether the downgrading was voluntary or involuntary. As indicated, this is a question for the trier of fact, either a hearing examiner or an arbitrator.

employee and NTEU are upheld on an appeal of the timeliness issue under applicable regulations as indicated in the Civil Service Commission's response. We hereby remand this case to the Assistant Secretary for disposition consistent with our decision herein.

By the Council.

Henry B. Frazier III
Executive Director

Issued: March 3, 1976

National Treasury Employees Union, A/SLMR No. 536. The Assistant Secretary, concurring with the conclusion of the Chief Administrative Law Judge, found that the union had picketed the agency (Internal Revenue Service) in a labor-management dispute, in violation of section 19(b)(4) of the Order. The Council accepted the union's petition for review on the ground that a major policy issue is raised by the instant decision of the Assistant Secretary, concerning the meaning and application of section 19(b)(4) of the Order. (Report No. 83.)

Council action (March 3, 1976). The Council held, for reasons detailed at length in its decision, that the language of 19(b)(4), read literally, clearly proscribes all picketing of an agency by a labor organization in a labor-management dispute; that such a literal interpretation is fully consonant with the intent of the drafters of the Order, as established by the "legislative history" of the Order; and that such interpretation is likewise consistent with and implements the underlying purposes of the Order. Accordingly, the Council found, as did the Assistant Secretary, that the union's conduct in picketing the agency in a labor-management dispute, in the present case, violated section 19(b)(4) of the Order; and the Council therefore sustained the decision of the Assistant Secretary as consistent with the purposes of the Order.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

National Treasury Employees Union

and

A/SLMR No. 536
FLRC No. 75A-96

Internal Revenue Service,
Department of Treasury

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary who, acting upon a complaint filed by the Internal Revenue Service (hereinafter referred to as "IRS" or "the agency"), determined that the National Treasury Employees Union (hereinafter referred to as "NTEU" or "the union") had engaged in certain conduct prohibited by section 19(b)(4)[1/] of the Order.

The pertinent factual background of this case, as found by the Assistant Secretary and based upon the entire record, is as follows: NTEU holds exclusive recognition for bargaining units at nine IRS Service Centers, the IRS Data Center and the IRS Computer Center. In 1975, NTEU and IRS were engaged in the negotiation of a multiunit agreement covering these bargaining units. Two of the Service Centers involved were the Service Centers at Covington, Kentucky, and Brookhaven, New York. As found by the Assistant Secretary, essentially without contradiction, a labor-management dispute existed between the union and IRS, such dispute stemming from an impasse having been reached in the course of such negotiations. Picketing in conjunction with such dispute occurred on May 30, 1975, at IRS's Service Center in Covington, and on June 12, 1975, at the Service Center in Brookhaven. Officers and agents of the union participated in the picketing, and the union assumes full responsibility and is responsible for such picketing. The nature of the picketing was peaceful and did not interfere with IRS's operations.

1/ Section 19(b)(4) of the Order provides as follows:

Sec. 19. Unfair labor practices.

. . . . . .

(b) A labor organization shall not--

. . . . . .

(4) call or engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it;

IRS filed a complaint alleging that the union violated section 19(b)(4) of the Order by picketing the agency in a labor-management dispute. Under the special expedited procedures set forth in section 203.7(b) of the Assistant Secretary's rules (29 CFR 203.7(b) (1975)), a preliminary hearing was conducted, and, on the basis of that proceeding, the Administrative Law Judge found that reasonable cause to believe that the union had violated and was continuing to violate section 19(b)(4) of the Order did in fact exist, and ordered the union to cease and desist from such conduct pending disposition of the complaint. Thereafter, in accordance with the foregoing expedited procedures, the Chief Administrative Law Judge held a hearing based upon which he issued his Recommended Decision and Order finding that the union violated section 19(b)(4) of the Order by picketing the cited IRS installations.

The Assistant Secretary, in his decision adopting the conclusions of the Chief Administrative Law Judge, stated that:

> The Chief Administrative Law Judge found that the picketing conducted by the Respondent was "informational" in character but that it was violative of Section 19(b)(4) of the Order. In this regard he concluded, on the basis of the express wording of Section 19(b)(4) and his examination of the Study Committee Report and Recommendations of August 1969, that the language of Section 19(b)(4) is so clear and unambiguous that only a literal interpretation is justified, i.e., that all picketing in a labor-management dispute, including informational picketing, is prohibited by the Order.
>
> I concur with the conclusion of the Chief Administrative Law Judge that Section 19(b)(4) of the Order prohibits all picketing in a labor-management dispute in the Federal sector.[2/]

Accordingly, the Assistant Secretary ordered the union to cease and desist from participating in or condoning such picketing activity and to post appropriate notices at its national and local business offices, at its normal meeting places, and at all other places where notices to members and to employees of the IRS are customarily posted.

The union appealed the Assistant Secretary's decision to the Council, alleging that the subject decision was arbitrary and capricious and presented major policy issues, and the agency filed an opposition to the appeal. The Council accepted the union petition for review, concluding that under section 2411.12 of its rules of procedure (5 CFR 2411.12 (1975)), a major policy issue is raised by the subject decision concerning the meaning and application of section 19(b)(4) of the Order.

2/ A/SLMR No. 536 at 2.

The union requested a stay of the decision and order pending Council resolution of the appeal. Pursuant to the criteria for granting a stay set forth in section 2411.47(c)(2) of its then current rules (5 CFR 2411.47(c)(2) (1975)), the Council also determined that issuance of a stay of the notice-posting requirement (paragraph 2 of the Assistant Secretary's remedial order) was warranted, but that issuance of a stay was not warranted with respect to all other portions of the Assistant Secretary's decision and order. Accordingly, the union's request for a stay was granted in part and denied in part.

The agency filed a brief with the Council. The union did not file a brief, instead relying upon the contentions and arguments set forth in its petition for review. The Department of Defense filed an amicus curiae brief, permission having been granted by the Council pursuant to section 2411.49 of the Council's rules (5 CFR 2411.49 (1975)), urging, in effect, that the Assistant Secretary's decision be sustained.

The Council has carefully considered this case on the entire record, including the submissions by the parties to both the Council and the Assistant Secretary, the pertinent record before the Assistant Secretary and the brief submitted by the amicus curiae in the case. Based thereon, the Council has reached the conclusions set forth below.3/

Opinion

As previously noted, the issue before the Council concerns the meaning of section 19(b)(4) of the Order and its application in the circumstances of this case. The agency argues generally that the language of the provision is clear and unambiguous and should be construed in accordance with its plain meaning to prohibit all picketing of an agency by a labor organization in a labor-management dispute, as the Assistant Secretary concluded. The union asserts in essence that the provision should not be read so as to prohibit such conduct as that engaged in by the union in the instant case.4/

3/ The agency, joined by the union, requested oral argument. Pursuant to section 2411.48 of the Council's rules (5 CFR 2411.48 (1975)), this request is denied because the positions of the participants in this case are adequately reflected in the entire record now before the Council.

4/ In essence, the union appears to argue in this regard that an absolute prohibition on all such picketing would be unconstitutional. As the courts have frequently held, the role of a Government agency is not to judge the constitutionality of the law which it is empowered to administer. Thus, the Council's function in the instant case is strictly limited to interpreting and applying the provisions of the Order in a manner which is consonant with the language, intent and purposes of the Order.

We conclude, for the reasons set forth in detail below, that the language of the provision herein, read literally, clearly proscribes the subject picketing; that such a literal interpretation is fully consistent with the intent of the drafters of the Order; and that such an interpretation best effectuates the purposes of the Order. We, therefore, hold that the Assistant Secretary correctly interpreted and applied section 19(b)(4) of the Order herein.

As already mentioned, section 19(b)(4) expressly provides that "[a] labor organization shall not . . . picket an agency in a labor-management dispute . . . ." It is not controverted that NTEU is a labor organization.5/ Further, it is not controverted that IRS is a constituent element of the Department of Treasury, an agency as that term is defined in the Order.6/ Moreover, as found by the Assistant Secretary without contradiction by the parties, a labor-management dispute was here involved and that dispute stemmed from an impasse having been reached in the course of negotiations which were being conducted under section 11(a) of the Order. Further, as similarly found, NTEU engaged in and was responsible for the subject picketing of the agency in this labor-management dispute. Therefore, under the language of the Order, read literally, NTEU violated the provisions of section 19(b)(4) by engaging in the picketing here involved.7/

5/ Section 2(e) defines a labor organization as follows:

> (e) "Labor organization" means a lawful organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with agencies concerning grievances, personnel policies and practices, or other matters affecting the working conditions of their employees; but does not include an organization which—
>
> (1) consists of management officials or supervisors, except as provided in section 24 of this Order;
>
> (2) assists or participates in a strike against the Government of the United States or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;
>
> (3) advocates the overthrow of the constitutional form of government in the United States; or
>
> (4) discriminates with regard to the terms or conditions of membership because of race, color, creed, sex, age, or national origin;

6/ Section 2(a) defines an agency as follows:

> (a) "Agency" means an executive department, a Government corporation, and an independent establishment as defined in section 104 of title 5, United States Code, except the General Accounting Office;

7/ It must be emphasized that the Order's prohibition is directed at picketing in a labor-management dispute and not at all picketing, regardless of its nature or the circumstances involved. Since the record before us clearly shows the picketing was in connection with a labor-management dispute (as found by the Assistant Secretary without contradiction), we do not here reach the issue of picketing in other forms and circumstances.

Moreover, aside from the precise language of section 19(b)(4), this literal reading and application of that section is plainly consonant with the intent of the drafters of Executive Order 11491, as established in the "legislative history" of the Order. More particularly, Executive Order 10988 which was the predecessor of E.O. 11491 was issued on January 17, 1962, establishing the initial policies governing labor-management relations in the Federal sector.8/ Section 13(a) of E.O. 10988 provided:

> The Civil Service Commission and the Department of Labor shall jointly prepare (1) proposed standards of conduct for employee organizations and (2) a proposed code of fair labor practices in employee-management relations in the Federal service appropriate to assist in securing the uniform and effective implementation of the policies, rights and responsibilities described in this order.

Pursuant to Executive Order 10988, on May 21, 1963, the President issued a Memorandum for the Heads of Executive Departments and Agencies prescribing, among other things, a Code of Fair Labor Practices in the Federal Service.9/ With respect to picketing, the Code provided in section 3.2(b)(4) as follows:

> Sec. 3.2 Prohibited Practices.
>
> . . . . . .
>
> (b) Employee organizations are prohibited from:
>
> . . . . . .
>
> (4) Calling or engaging in any strike, work stoppage, slowdown, or related picketing engaged in as a substitute for any such strike, work stoppage or slowdown, against the Government of the United States;10/

As contemporaneously explained by the U.S. Civil Service Commission,11/ this provision was intended to depart from private sector practice in

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8/ 3 CFR, 1959-63, Comp. at 521.

9/ Id. at 848.

10/ Id. at 852-853.

11/ Explanation of Provisions of the Standards of Conduct for Employee Organizations and Code of Fair Labor Practices in Employee-Management Cooperation in the Federal Service, United States Civil Service Commission, Attachment to FPM Let. 711-2 (August 30, 1963), at 17-18.

recognition of the unique nature of employee-management relations in the Federal sector. Specifically, the Civil Service Commission stated:[12]

> There are a number of provisions in the Code and the [National Labor Relations] Act that have no similarity. . . . The prohibited practices contained in Section 3.2(b)(3), (4), and (5) are included in the Code in recognition of the special obligation that all parties to employee-management relations in the Federal service have to conduct themselves in such a manner as not to interfere with the proper performance of the Government's business . . . .

Subsequently, an Interagency Committee on Federal Labor-Management Relations (hereinafter referred to as the Study Committee)[13] was appointed to conduct an intensive review and evaluation of the Federal labor-management relations program and to present to the President a report and recommendations for its improvement. On September 10, 1969, the Study Committee submitted to the President its Report and Recommendations on Labor-Management Relations in the Federal Service which led to the issuance of E.O. 11491. In its letter of transmittal the Study Committee stated:[14]

> I. CODE OF FAIR LABOR PRACTICES
>
> . . . . . .
>
> (2) The Code provision on strikes and picketing should be amended to clarify the language relating to prohibited picketing and to reflect the responsibility of a labor organization to take affirmative action to prevent or stop any strike or prohibited picketing by its locals, affiliates, or members.

12/ Section 1.3 of the Standards of Conduct for Employee Organizations and Code of Fair Labor Practices provided as follows:

> Sec. 1.3 General Responsibilities of the Civil Service Commission.
>
> The Civil Service Commission, in accordance with the provisions of section 12 of the Order, shall be responsible for the dissemination of information with respect to the Standards of Conduct and Code of Fair Labor Practices, and shall insure an adequate exchange of information between agencies as to its application and enforcement.

13/ The members of this Interagency Committee on Federal Labor-Management Relations were: the Secretary of Defense, the Postmaster General, the Secretary of Labor, the Director of the Bureau of the Budget, and the Chairman of the U.S. Civil Service Commission. Labor-Management Relations in the Federal Service (1969), at 27.

14/ Labor-Management Relations in the Federal Service (1969), at 21.

In more detail, the Study Committee's Report stated:[15/]

I. Code Of Fair Labor Practices

. . . . . .

(2) The code provision on strikes and picketing should be amended to clarify the language relating to prohibited picketing and to reflect the responsibility of a labor organization to take affirmative action to prevent or stop any strike or prohibited picketing by its locals, affiliates, or members. [Emphasis in original.]

. . . . . .

We find that there has been some difficulty in interpreting the "related picketing" language of the code section which prohibits a labor organization from: "Calling or engaging in any strike, work stoppage, slowdown, or related picketing engaged in as a substitute for any such strike, work stoppage or slowdown, against the Government of the United States." The wording of this provision is unnecessarily obscure and confusing. We recommend that it be revised to state clearly and simply its intended meaning, which is to prohibit the use of picketing directed at an employing agency by a labor organization in a labor-management dispute.

Labor organizations generally have accepted their responsibility for adhering to the strike and picketing prohibitions of the code, and for taking appropriate action to ensure conformance with these prohibitions by any of their locals, lodges, affiliates, or members. However, in view of recent changes in the constitutions of some labor organizations involving the dropping of a no-strike pledge, an addition is needed to the strike and picketing prohibitions in order to ensure that there is no misunderstanding as to the responsibility which accompanies union recognition. The section should make clear that a recognized labor organization may not condone a strike or prohibited picketing by any member or group of members within its organization which it represents under the Order. Officials of the organization have the duty, in view of the procedures provided for peaceful and orderly resolution of disputes and differences between employees and management, to exercise all organizational authority available to them to prevent or to stop any such action by the organization or any of its locals, affiliates, or members.

15/ Labor-Management Relations in the Federal Service (1969), at 42-43. Also found in Labor-Management Relations in the Federal Service (1975), at 74-75.

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> To implement these recommendations, the code section in question should be revised so as to provide that a labor organization shall not engage in a strike, work stoppage, or slowdown; picket an agency in a labor-management dispute; or condone any such activity by failing to take affirmative action to prevent or stop it. [Emphasis added.]

When Executive Order 11491 was issued on October 29, 1969, to become effective on January 1, 1970, the President adopted without change the recommendations of the Study Committee, and the Order contained section 19(b)(4) in its present form, which provided "clearly and simply" that: "A labor organization shall not . . . picket an agency in a labor-management dispute."

Therefore, contrary to the contentions of the union, it is manifest that the intent of the drafters of the Order was that section 19(b)(4) be read literally to prohibit all picketing of an agency by a labor organization in a labor-management dispute and that the picketing here involved was contrary to that intended meaning.

Apart from the precise language of section 19(b)(4) and the express intent of the drafters of the Order, a literal interpretation and application of section 19(b)(4) clearly effectuates the purposes of the Order. As indicated in its preamble, Executive Order 11491, which provides a statement of the respective rights and obligations of labor organizations and agency management, is based upon the premise that employees should have an opportunity to participate in the development of personnel policies and practices and matters affecting the conditions of their employment, while at the same time recognizing the need to ensure efficient administration of the Government and full recognition of the public interest.16/

16/ The preamble of Executive Order 11491, as amended, reads as follows:

> WHEREAS the public interest requires high standards of employee performance and the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and
>
> WHEREAS the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and
>
> WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; and

(Continued)

To this end, with the preservation of the public interest as the primary consideration, the Order provides a carefully structured program for dealings by management and labor organizations including comprehensive procedures for the resolution of disputes and differences between employees and management. In this regard the Study Committee recognized that among the six major areas in which program change was required at the time Executive Order 11491 was issued were the following:17/

- A central body to administer the program and make final decisions on policy questions and disputed matters.

. . . . . .

- Third party processes for resolving disputes on unit and election questions, for investigation and resolution of complaints under the "Standards of Conduct for Employee Organizations" and "Code of Fair Labor Practices," and for assistance in resolving negotiation impasse problems and grievances.

The Study Committee went on to note:

> We believe that desirable changes in these areas can be accomplished without serious disruption to the ongoing program by a new order which builds upon the foundation of experience gained by the parties under Executive Order 10988. The changes should remove many of the current causes of agency and union dissatisfaction and provide a framework for responsible dealings by both sides in the future.

(Continued)

> WHEREAS subject to law and the paramount requirements of public service, effective labor-management relations within the Federal service require a clear statement of the respective rights and obligations of labor organizations and agency management:
>
> NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the executive branch of the Government in all dealings with Federal employees and organizations representing such employees.

17/ Labor-Management Relations in the Federal Service (1975), at 63-64.

> In fashioning the recommendations which follow, we have been mindful of the desirability of preserving the features of Executive Order 10988 which have worked well. We do not propose change for change's sake or in order to adopt some other model for Federal labor-management relations. Our recommendations deal only with deficiencies in the present order that need correction and weaknesses in operations that need strengthening, for overall the program is healthy and thriving. We have been mindful, too, in proposing these adjustments, of the need to provide an equitable balance of rights and responsibilities among the parties directly at interest—the employees, labor organizations, and agency management—and the need, above all, in public service to preserve the public interest as the paramount consideration.

As part of the particular labor-management relations program in the Federal sector, the Order establishes and protects the rights of a labor organization that has been duly selected by employees as their representative to act for and negotiate agreements covering those employees within the guidelines of the Order.[18/] Thus, among other things, section 10(e) of the Order provides that "[w]hen a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and negotiate agreements covering all employees in the unit." Further, section 11(a) requires that "an agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations . . . ."

To ensure that these rights are fully protected, the Order provides that it is an unfair labor practice for management to "refuse to accord appropriate recognition to a labor organization qualified for such recognition" or to "refuse to consult, confer, or negotiate" with such labor organization.[19/]

As to the comprehensive procedures for resolving disputes or differences which might arise out of the exercise of such rights or in the course of the labor-management relationship, a detailed framework of third-party machinery has been established to resolve such disputes. Thus, the Order created the Federal Labor Relations Council, a "central Council of high executive officials . . . [to] ensure the desired balance of judgment and expertise in the personnel management and labor relations fields" and

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18/ See sections 1(a), 10 and 11(a) of the Order.

19/ See section 19(a)(5) and (6) of the Order.

the Council was authorized "to oversee the entire Federal service labor relations program, to make definitive interpretations and rulings on any provision of the order, to decide major policy issues, [and] to entertain, at its discretion, appeals from decisions on certain disputed matters . . . ."[20/] Included within its responsibilities is the resolution of negotiability disputes, i.e., issues which develop in connection with negotiations as to whether a proposal is contrary to law, regulation, controlling agreement, or the Order, and, therefore, not negotiable. The Assistant Secretary of Labor for Labor-Management Relations was designated to provide third-party determinations in unit, representation, unfair labor practice, and standards of conduct for labor organizations cases, because "impartial action on these matters is necessary for the fair and effective conduct of labor relations in the Federal service."[21/] The services of the Federal Mediation and Conciliation Service were extended to the Federal labor-management relations program.[22/] Finally, as a unique feature of the third-party machinery established under the Order, the Federal Service Impasses Panel was created as an agency within the Council for the purpose of assisting the parties in the resolution of impasses reached in the course of negotiations and was to be "an impartial body . . . concerned with the public interest rather than with the special interests of either party to an impasse."[23/] Section 17 of Executive Order 11491 provides in the latter regard:

> Sec. 17. Negotiation impasses. When voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or other third-party mediation, fail to resolve a negotiation impasse, either party may request the Federal Service Impasses Panel to consider the matter. The Panel, in its discretion and under the regulations it prescribes, may consider the matter and may recommend procedures to the parties for the resolution of the impasse or may settle the impasse by appropriate action. Arbitration or third-party fact finding with recommendations to assist in the resolution of an impasse may be used by the parties only when authorized or directed by the Panel.

In sum, the Order carefully details comprehensive procedures and self-contained third-party methods for the resolution of labor-management disputes.[24/] Excluded from these procedures and methods are such self-help

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20/ Labor-Management Relations in the Federal Service (1975), at 64.

21/ Id. at 68-69.

22/ Id. at 72-73.

23/ Ibid.

24/ Indeed, in the instant case NTEU sought and used the services of a mediator from the Federal Mediation and Conciliation Service and when negotiations were at impasse NTEU filed a request for assistance with the Federal Service Impasses Panel. Further, since the agency subsequently determined that four union proposals were not negotiable, NTEU requested that the Panel refer those agency determinations to the Federal Labor

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weapons as strikes, work stoppages and picketing of an employer by a union in a labor-management dispute which are sanctioned in the private sector for resolving such disputes.25/ Indeed, the only substantive reference to such weapons is the prohibition against their use under section 19(b)(4) of the Order. Therefore, for the reasons set forth above, it is clear that a literal interpretation and application of section 19(b)(4) of the Order to prohibit all picketing of an agency by a labor organization in a labor-management dispute is consistent with and implements the underlying purposes of the Order.

In summary, we conclude for the reasons set forth in detail above that the language of section 19(b)(4) of the Order read literally clearly proscribes the subject picketing; that such a literal interpretation is fully consistent with the intent of the drafters of the Order; and that such an interpretation best effectuates the purposes of the Order. Thus, the Order prohibits all picketing of an agency by a labor organization in a labor-management dispute. As the Supreme Court has indicated in this regard:

> Section 1 of the Executive Order does not grant federal employees the right, guaranteed by § 7 of the NLRA for employees in the private sector, "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The right to attempt to persuade others to join the union, however, is derived from the rights to form, join, and assist a union, as well as from the right to engage in concerted activities. The absence of mention of a right to engage in concerted activities is obviously no more than a reflection of the fact that the Order does not permit federal employee unions to engage in strikes or picketing. The prohibition of picketing and the lack of protection for concerted activities might be thought to indicate an intention in the Executive Order to regulate the location or form of employee

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(Continued)

Relations Council for review. Subsequently, NTEU withdrew its requests for such assistance after the parties resolved their impasse and reached an agreement [Case No. 75 FSIP 20]. Thus, the union was fully aware of and invoked the third-party procedures for resolving labor-management disputes which were available under the Order.

25/ Other methods for communicating with the affected employees and the union membership were, of course, utilized by the union. Thus, so far as the record discloses the union, without complaint by the agency, held meetings in every city in which it represented IRS Service Center employees to inform the membership as to the status of the labor dispute, as well as for the purpose of planning the distribution of handbills to all affected employees, and for the preparation of petitions to Congress bearing the signatures of such employees. The record further reveals that such activities were subsequently carried out on several occasions immediately preceding and following the picketing herein.

speech to a somewhat greater extent than under the NLRA, but we do not perceive any intention to curtail in any way the content of union speech.[26] [Emphasis added.]

Before concluding, we think that it is important to observe that the Executive Order's section 19(b)(4) prohibitions, including the prohibition against picketing by a labor organization of an agency in a labor-management dispute, are an essential part of the framework for responsible labor-management relations which includes comprehensive procedures for the resolution of labor-management disputes. Thus, the prohibition against picketing is a crucial part of the balance which the drafters struck among the interests of the public, the employees, agencies, and labor organizations in creating a special framework for conducting labor-management relations in the Federal service. The unique Federal sector labor-management relations program therefore has evolved as a response to the special nature of employee-management relations in the Federal service, and through the process of careful accommodation of these interests.

Conclusion

For the foregoing reasons, we find that section 19(b)(4) prohibits all picketing of an agency by a labor organization in a labor-management dispute. Thus, in the instant case we find, as did the Assistant Secretary, that the union's conduct in picketing the agency in a labor-management dispute violated section 19(b)(4) of the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules and regulations, as the Assistant Secretary's decision is consistent with the purposes of the Order, it is hereby sustained and we vacate our earlier partial stay of that decision.

By the Council.

Henry B. Frazier III
Executive Director

Issued: March 3, 1976

26/ Old Dominion Branch National Association of Letter Carriers v. Austin, 418 U.S. 264, at footnote 13, p. 278 (1974). Also, the Supreme Court stated in that case that "the same federal policies favoring uninhibited, robust, and wide-open debate in labor disputes are applicable here," and concluded that "[there is] nothing in the Executive Order which indicates that it intended to restrict in any way the robust debate which has been protected under the NLRA." (Id. at 273-275.)

San Antonio Air Logistics Center, San Antonio Air Materiel Area (AFLC), Kelly Air Force Base, Texas, A/SLMR No. 540. The Assistant Secretary, upon a complaint filed by American Federation of Government Employees, Local 1617, found that the activity violated section 19(a)(1) and (6) of the Order. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (March 3, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious or present major policy issues. Accordingly, the Council denied review of the agency's appeal. The Council likewise denied the agency's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 3, 1976

Major Nolan Sklute
Headquarters, U.S. Air Force
Office of the Judge Advocate General
General Litigation Division
Washington, D.C. 20314

Re: San Antonio Air Logistics Center, San Antonio Air Materiel Area (AFLC), Kelly Air Force Base, Texas, A/SLMR No. 540, FLRC No. 75A-100

Dear Major Sklute:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the union's opposition thereto, in the above-entitled case.

The facts of the case, as found by the Administrative Law Judge (ALJ) and adopted by the Assistant Secretary, are as follows: San Antonio Air Logistics Center, San Antonio Air Materiel Area, Kelly Air Force Base, Texas (the activity) and American Federation of Government Employees, Local 1617 (the union) were involved in negotiating their initial agreement covering a unit of the activity's General Schedule (GS) employees. The parties had discussed, among others, certain proposals regarding the use of official time by unit employees and union stewards for the processing and presentation of grievances. The activity proposed specific restrictions on the amount of official time available to union representatives for such purposes. The union, on the other hand, declined to incorporate any such restrictions, opting instead for "reasonable time" in accordance with the provisions of A. F. Regulation 40-771, generally applicable to all Air Force installations, including the activity herein concerned. No agreement had been reached by the parties when the activity sent a letter to its supervisors, instructing them, in relevant part, to calculate the amount of official time used by each employee for representational purposes during each pay period, and, when an employee had used eight hours of official time for such activities in that pay period, to secure the approval of the branch chief or higher authority prior to granting a request for any additional use of official time. The union thereupon filed a complaint alleging, in substance, that the activity, in issuing the foregoing letter, violated section 19(a)(1) and (6) of the Order by "unilaterally changing a practice and/or condition of employment" with respect to the utilization of official time for processing grievances.

The Assistant Secretary found that "under the circumstances herein, I find that no impasse had been reached by the parties on a negotiable issue in the course of their bargaining for a negotiated agreement, and

that, therefore, the [activity's] unilateral change of a term and condition of employment was violative of section 19(a)(1) and (6) of the Order."

In your petition for review on behalf of the agency, you contend that the Assistant Secretary's decision is arbitrary and capricious in that the ALJ's finding, which was adopted by the Assistant Secretary, that the activity's alleged conduct constituted a change in personnel policies and practices or in conditions of employment is contrary to the weight of the evidence. Further, you contend that the decision presents two major policy issues: First, with respect to the ALJ's conclusion that when a party to negotiations initiates a bargaining proposal which concerns a nonmandatory bargaining topic, including a matter involving a section 12(b) retained management right, that proposal is thereby converted into a mandatory bargaining topic; and, second, with respect to a Supreme Court decision involving the National Labor Relations Act which the ALJ interpreted as holding that there must be an impasse on the entire collective bargaining contract before management may implement a unilateral change in a term or condition of employment which has been the subject of negotiation.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious or present major policy issues. With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in finding that the activity had instituted a unilateral change in a term and condition of employment in the circumstances of this case. As to the alleged major policy issues, the Council is of the opinion that, in the circumstances of this case, the Assistant Secretary's finding that "no impasse had been reached on a negotiable issue" when the activity instituted a "unilateral change of a term or condition of employment" does not warrant Council review.*/

Accordingly, without adopting or indeed even passing upon either the reasoning or the conclusions of the ALJ, review of your appeal is hereby

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*/ In view of the Assistant Secretary's finding that "no impasse had been reached on a negotiable issue," the Assistant Secretary's decision does not present the alleged major policy issue concerning the ALJ's conclusions with respect to whether agency management waives its prerogatives as to matters covered by section 12(b) of the Order if it chooses to negotiate about such nonnegotiable matters, or with respect to the impasse conditions under which management may make a unilateral change in a term or condition of employment. Moreover, noting particularly that the Assistant Secretary did not cite or specifically rely on private sector law in reaching his decision, the second alleged major policy issue likewise is not presented herein.

denied, since it fails to meet the requirements of review as provided in section 2411.12 of the Council's rules of procedure. The request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

M. G. Blatch
AFGE

National Science Foundation, A/SLMR No. 487. The Assistant Secretary, in a decision on certain challenged ballots in a representation election, found, contrary to the contentions of the agency, that the evidence did not establish that certain employees classified as Program Managers, or their equivalent, were management officials within the meaning of the Order. The agency appealed to the Council, contending that the decision of the Assistant Secretary presented major policy issues.

Council action (March 3, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, his decision did not present any major policy issues and the agency neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 3, 1976

Mr. Lewis E. Grotke, Attorney
National Science Foundation
1800 G Street, NW.
Washington, D.C. 20550

Re: National Science Foundation, A/SLMR No. 487, FLRC No. 75A-109

Dear Mr. Grotke:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, the National Science Foundation (NSF) challenged the ballots of certain individuals, including a group of employees classified as "Program Managers," in a representation election conducted in separate groups of its professional and nonprofessional employees on the ground that they are "management officials" within the meaning of the Order.

The Assistant Secretary, in agreement with the Administrative Law Judge (ALJ), found "that the evidence does not establish that the Program Managers, or their equivalent, are management officials within the meaning of the Order." The ALJ, citing and relying upon the Assistant Secretary's definition of "management official" in Department of the Air Force, Arnold Engineering Center, A/SLMR No. 135 (February 28, 1972),[1/] found that the Program Managers and Directors "are highly trained and skilled professional employees who in performing their duties, necessarily exercise a great deal of discretion and independent judgment"; that "they are, in effect,

1/ That definition is as follows:

> When used in connection with the Executive Order, the term 'management official' means an employee having authority to make, or to influence effectively the making of, policy necessary to the agency or activity with respect to personnel, procedures, or programs. In determining whether a given individual influences effectively policy decisions in this context, consideration should be concentrated on whether his role is that of an expert or professional rendering resource information or recommendations with respect to the policy in question, or whether his role extends beyond this to the point of active participation in the ultimate determination as to what the policy in fact will be. [Footnote omitted.]

the individuals who solicit, evaluate and plan studies and evaluations at the first or primary level and then, using their expertise, advise their superiors of the course they recommend should be followed"; but that "[t]heir supervisors decide finally what course of action should be followed." Accordingly, he concluded that such individuals are not "management officials" within the meaning of the Order.

In your petition for review on behalf of NSF, you contend that the decision of the Assistant Secretary presents two major policy issues: (1) "At what level of policy-making do agency managers become eligible for inclusion in a bargaining unit," and (2) "Should the definition of the term 'management official' be dependent upon the proportion of policy-makers to the total work force of the agency?"

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not present any major policy issues and you neither allege, nor does it appear, that his decision is arbitrary and capricious. As to the first alleged major policy issue regarding the level of policy making at which agency managers are eligible for inclusion in a bargaining unit, the Council is of the opinion that, for the reasons stated in our denial of review in Department of Health, Education, and Welfare, Food and Drug Administration, Newark District, Newark, New Jersey, A/SLMR No. 361, FLRC No. 74A-34 (November 22, 1974), Report No. 60, no basis for Council review is presented in this regard. Thus, your petition for review "neither contends, nor does it offer evidence to suggest, that the Assistant Secretary's definition of 'management official,' which he enunciated in his decision in Arnold Engineering, and upon which he relied in the instant case, is inconsistent either with the purposes of the Order or with other applicable authority." Rather, your appeal herein takes issue only with the manner in which the Assistant Secretary applied that definition to the facts of this case, and therefore does not raise a major policy issue warranting Council review. Further, as to the second alleged major policy issue, i.e., whether the definition of "management official" should depend upon the proportion of policy makers to the total work force, the Assistant Secretary, "in agreement with the Administrative Law Judge," found that "the evidence does not establish that the Program Managers . . . are management officials within the meaning of the Order," (emphasis supplied) and hence there is no indication that the Assistant Secretary, as alleged, made the definition of management official dependent upon the proportion of policy makers to the total work force of the agency. Instead, it appears that the Assistant Secretary relied upon the definition of "management official" which he had previously promulgated and upon the evidence relevant to the application of that definition to the employees herein.[2/] Moreover, the alleged major policy issue appears

2/ While the ALJ noted that "[f]urther, to disenfranchise [the Program Managers, or their equivalent] would be to determine that a disproportionately large numerical portion of NSF's work force are 'management

(Continued)

to assume that the individuals in question are "policy-makers" as that term is used in the definition, contrary to the findings and conclusions of the Assistant Secretary, and therefore the issue of whether the proportion of policy makers to the total work force should be a factor in such a determination is not raised by the Assistant Secretary's decision. Accordingly, in this respect, the decision of the Assistant Secretary presents no major policy issue warranting review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal does not meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

E. T. McManus
AFGE

(Continued)

officials,'" there is no indication that the Assistant Secretary included the factor of the proportion of policy makers to the total work force within the definition of "management official" as he applied it to the employees in this case.

Departments of the Army and the Air Force, Headquarters Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, Local 2921 (Schedler, Arbitrator). The Council granted the agency's request for an extension of time until the close of business on February 2, 1976, to file an appeal in the present case. However, the agency did not file its appeal until February 13, 1976, and no further extension of time for filing was either requested by the agency or granted by the Council.

Council action (March 3, 1976). Because the agency's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 3, 1976

Mr. Robert E. Edwards
Associate General Counsel
Chief, Labor Relations Law Branch
Headquarters Army and Air Force
Exchange Service
Departments of the Army and the
Air Force
Dallas, Texas 75222

Re: Departments of the Army and the Air Force, Headquarters Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, Local Union 2921 (Schedler, Arbitrator), FLRC No. 76A-20

Dear Mr. Edwards:

This refers to your petition for review of the arbitrator's award in the above-entitled case. For the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

By letter dated January 13, 1976, confirming oral advice, the Council granted an extension of time for filing an appeal in the above-entitled case until the close of business on February 2, 1976. Therefore, under section 2411.45(a) and (c) of the Council's rules, your appeal was due in the office of the Council on or before the close of business on February 2, 1976. However, your appeal was not received by the Council until February 13, 1976, and no further extension of time for filing was either requested by you or granted by the Council.

Accordingly, as your appeal was untimely filed, and apart from other considerations, your petition for review is denied.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: J. Griffith
AFGE

246-469 O - 78 - 13

Department of the Air Force, Headquarters, 31st Combat Support Group, Homestead Air Force Base, Homestead, Florida, A/SLMR No. 574. The Assistant Secretary dismissed a complaint filed by Local 1167, National Federation of Federal Employees (NFFE), which alleged that the activity had violated section 19(a)(1), (5) and (6) of the Order by refusing to enter into negotiations for a new collective bargaining agreement during the pendency of a representation question raised by a rival labor organization before the Assistant Secretary with respect to a portion of the unit represented by NFFE. NFFE appealed to the Council, alleging that the Assistant Secretary's decision presented a major policy issue.

Council action (March 9, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not raise a major policy issue, and NFFE neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied NFFE's petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 9, 1976

Ms. Lisa Renee Strax, Legal Department
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Department of the Air Force, Headquarters, 31st Combat Support Group, Homestead Air Force Base, Homestead, Florida, A/SLMR No. 574, FLRC No. 75A-112

Dear Ms. Strax:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, Local 1167, National Federation of Federal Employees (NFFE) and the Department of the Air Force, Headquarters, 31st Combat Support Group, Homestead Air Force Base, Homestead, Florida (the activity) were parties to a collective bargaining agreement which was due to expire April 3, 1975. On August 23, 1974, Local F-182, International Association of Firefighters (IAFF) filed a petition seeking an election in a unit composed of all nonsupervisory firefighters, crew chiefs and fire inspectors employed by the activity asserting, in substance, that these classifications were unrepresented. NFFE and the activity took the position that the employees in question were within the existing unit and that the IAFF petition was barred by their agreement. The Assistant Regional Director (ARD) issued a notice of hearing on October 9, 1974, in order to resolve certain factual issues involved. Thereafter, on January 6, 1975, NFFE made a timely demand upon the activity to negotiate a new agreement. The activity offered to extend the current agreement, but refused to negotiate a new agreement until the representation question raised by the IAFF petition had been resolved. NFFE agreed to the extension, but nevertheless filed an unfair labor practice charge and complaint against the activity alleging that the latter had violated section 19(a)(1), (5) and (6) of the Order by refusing to enter into negotiations for a new agreement.

The Assistant Secretary ordered that the complaint be dismissed. Consistent with his previous holding in Department of the Navy, Naval Air Rework Facility, Jacksonville, Florida, A/SLMR No. 155 (May 8, 1972), the Assistant Secretary found:

> . . . [W]hen a question concerning representation clearly had been raised with respect to a portion of the NFFE's exclusively recognized unit, while the [activity] was obligated to continue to honor

> its existing agreement with the NFFE throughout its duration and could properly extend the terms of the existing agreement while awaiting resolution of the representation matter, it was not obligated to negotiate a new agreement with the NFFE covering employees in the exclusively recognized unit until the representation question was resolved with respect to those employees sought by the IAFF and alleged by the NFFE and the [activity] to be included in the unit.

In this connection, the Assistant Secretary noted that the activity did not use the representation question "as a pretext to avoid its obligations owed to the NFFE . . . but . . . acted in good faith . . ." by opposing the IAFF petition and offering to extend the current agreement. Under these circumstances, the Assistant Secretary concluded that

> . . . [The activity] did not violate Section 19(a)(1), (5) and (6) of the Order by refusing to negotiate a new agreement with the NFFE as there existed a valid question concerning representation with respect to a portion of the unit represented exclusively by the NFFE.

In your appeal on behalf of NFFE, you allege that the Assistant Secretary's decision presents one major policy issue, namely, "[w]hen is a real question concerning representation raised by a rival labor organization?" You contend that the Assistant Secretary improperly deviated from established private and public sector law in determining that a real question concerning representation was presented herein, since the IAFF petition did not raise a "substantial or supportable claim" conflicting with the interests asserted by NFFE which would have permitted the activity to refuse NFFE's request to negotiate a new collective bargaining agreement.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not raise a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious. With respect to your alleged major policy issue, noting, as did the Assistant Secretary, that IAFF sought by its petition to represent employees alleged by NFFE and the activity to be included in the existing unit, no major policy issue is raised warranting review by the Assistant Secretary's conclusion that in the facts of the case there existed a valid question concerning representation. Moreover, the Assistant Secretary's decision appears to be consistent with prior decisions of the Council. (See generally Headquarters, U.S. Army Aviation Systems Command, A/SLMR No. 168, FLRC No. 72A-30 (July 25, 1973), Report No. 42, wherein the Council stated that an activity which has acted in apparent good faith "should not be forced to assume the risk" of an unfair labor practice finding "during the period in which the underlying representation issue is still pending before the Assistant Secretary.")

Since the Assistant Secretary's decision does not present a major policy issue, and since you do not contend that the Assistant Secretary's decision

is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

Capt. E. K. Brehl
USAF

Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Meyers, Arbitrator). The arbitrator determined that the agency had violated a provision in the parties' agreement concerning consultation by the agency with the union and directed the agency to meet and consult in good faith on all matters of appropriate concern to bargaining unit employees, including the proposed reclassification and/or status of all bargaining unit positions as that status may from time to time be deemed by the agency to require change. The Council accepted the agency's petition for review insofar as it related to the agency's exceptions which alleged (1) that the arbitrator exceeded his authority by deciding an issue not before him and then fashioning an award which provided the union with a procedure it sought but failed to obtain at the bargaining table; and (2) that the arbitrator exceeded his authority and violated the collective bargaining agreement by in effect writing a change in the agreement (Report No. 68). The Council also granted the agency's request for a stay.

Council action (March 18, 1976). The Council found that the arbitrator did not exceed his authority by deciding an issue not before him and then fashioning an award which provided the union with a procedure it sought but failed to obtain at the bargaining table; nor did he exceed his authority by writing a change in the collective bargaining agreement. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the arbitrator's award and vacated the stay which it have previously granted.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Pacific Southwest Forest and Range
Experiment Station, Forest Service,
Department of Agriculture

and

FLRC No. 75A-4

American Federation of Government
Employees, Local 3217

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's determination that the agency had violated Article 6 of the collective bargaining agreement between the parties, and from the arbitrator's award directing the agency to meet and consult in good faith on all matters of appropriate concern to bargaining unit employees, including the proposed reclassification and/or status of all bargaining unit positions as that status may from time to time be deemed by the agency to require change.

Based upon the findings of the arbitrator and the entire record, including the transcript and exhibits of the arbitration proceeding, the circumstances of the case appear as follows:

In January 1974, the union filed a grievance alleging preselection by the agency in the filling of seven specific positions. When the grievance was not resolved in the negotiated grievance procedure, the union invoked arbitration. The parties notified the arbitrator of his selection by joint letter dated April 5, 1974, in which the parties also advised the arbitrator:

> Following is our submission agreement indicating the issued involved:
>
> Is Management at the Pacific Southwest Forest and Range Experiment Station in violation of the Labor-Management Relations Agreement, specifically Article 8, in the selection process used to fill various positions at the Station, e.g.
>
> 1. Project Clerk, GS-4/5, Fire Management Systems
> 2. (Research Forester) Administrator, GS-13
> 3. Audio-Visual Production Specialist, GS-5
> 4. Secretary (Stenography), GS-6, Fire Laboratory, Riverside
> 5. Director, GS-16
> 6. Supply Clerk, GS-4
> 7. Supervisory Accounting Technician, GS-7

Following selection of the arbitrator, the agency, pursuant to section 6 of the Order, filed with the Assistant Regional Director of the Labor-Management Services Administration, Department of Labor, an Application for Decision on Grievability and Arbitrability requesting a decision as to whether certain of the positions specified in the April 5 letter were within the scope of the parties' collective bargaining agreement. The Assistant Regional Director found that the positions of Director, GS-16 and (Research Forester) Administrator, GS-13, were not covered by Article 8 of the collective bargaining agreement and therefore the union's grievance was not arbitrable with respect to those two positions.[1/] Subsequently, the grievance (excluding the reference to these two positions) went to arbitration.

The Arbitrator's Award

In the written opinion accompanying his award, the arbitrator stated that based upon the evidence and argument, he found as follows:

ISSUE

> Is management at the Pacific Southwest Forest and Range Experiment Station in violation of the Labor-Management Relations Agreement, specifically Article 8,[2/] in the selection process used to fill various positions at the station? If so, what is the appropriate remedy? [Footnote added.]

1/ U.S. Forest Service, Pacific Southwest Forest and Range Experiment Station and American Federation of Government Employees, AFL-CIO, Local 3217, Assistant Regional Director's Report and Findings on Application for Decision on Grievability and Arbitrability, Assistant Secretary Case No. 70-4252, June 21, 1974.

2/ In his opinion the arbitrator quoted various "relevant contractual provisions" including sections 1, 5, and 7 of Article 8 (Promotion and Personnel Assignments) as follows:

> Section 1. Selection for competitive promotions will be from the best qualified candidates without discrimination for any non-merit reason, such as race, color, religion, sex, national origin, politics, marital status, physical handicap, personal relationship, age, membership or non-membership in an employee organization, and will be in accordance with the Employer's Merit Promotion Plan.
>
> . . . . . .
>
> Section 5. Some lateral assignments will be made to vacant positions to make use of an employee's skills that are under-utilized . . . .
>
> Section 7. Non-selection for promotion from among a group of properly ranked and certified candidates will not constitute a basis for a formal complaint.
>
> . . . . . .

In his "DISCUSSION" the arbitrator indicated that the "dispute involves the manner in which certain promotional positions have been filled by the Employer." The arbitrator then discussed each of the five positions that had been listed in the joint letter of April 5 and found arbitrable. In addition, he discussed the agency's course of conduct in filling certain other positions besides those listed in the joint letter of April 5. In doing so, he was compelled to resolve a dispute which arose between the parties over the scope of the issue properly before him. According to the award, the employer contended that the impropriety of certain of these additional personnel actions was not properly before the arbitrator because they had not been part of the original grievance. The union argued that evidence with respect to positions not set forth in the original grievance was introduced for the purpose of showing what it alleged to be a clear pattern of improper conduct by the employer in filling promotional positions. The arbitrator concluded:

> . . . [C]onsideration will be given . . . to other personnel actions alleged by the Union in the hearing to illustrate improper conduct by the Employer. As the Arbitrator construes the issue presented in this case, it is whether management has engaged in a course of conduct in filling various positions that is in violation of the Agreement, so that it is proper to consider other actions alleged by the Union to be improper in addition to those specifically set forth in Joint Exhibit 8.3/ [Footnote added.]

In presenting its contentions concerning the personnel actions involving certain of the positions listed in the joint letter of April 5 as well as others considered by the arbitrator, the agency introduced arguments pertaining to classification actions which had been taken with respect to these positions. In considering these contentions, the arbitrator concluded that the employer "does have the responsibility and the obligation for the proper classification of all of its positions, consistent with the needs of the agency and the duties and responsibilities being performed by the employees. However, where there is an Agreement, as in this case, designating the Union as the exclusive representative of all employees in a defined bargaining unit, then the Employer is also obligated to consult with the Union about any change proposed in the bargaining unit 'for the purpose of obtaining and considering their views on matters of appropriate concern to employees in the unit.'"4/ In reaching these conclusions the

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3/ Joint Exhibit 8 is identified in the transcript of the arbitration hearing as the joint letter dated April 5, 1975, submitting the grievance to arbitration.

4/ The language quoted by the arbitrator appears in Article 6, Section 2 of the agreement. The first five (of seven) sections of Article 6 (Consultation), which are among the "relevant contractual provisions" in the arbitrator's written opinion, provide as follows:

> Section 1. The Employer will meet and consult in good faith with representatives of the Local at mutually agreed upon times but at (Continued)

arbitrator stated that it was apparent to him that there was an "underlying issue" in the case as to "what shall be the proper conduct of labor-management relations between the parties."

In his summary, the arbitrator determined that the record did not "support findings of outright violations of the Agreement, and related documents, with respect to the filling of specific positions." However,

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(Continued)

least bi-monthly to discuss matters with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual, published agency policies and regulations, a national or other controlling agreement at a higher level in the agency, and Executive Order 11491 as amended. The right to make reasonable rules and regulations in accordance with Article 3, Section 1, of this agreement is an acknowledged function of the Employer. However, the Employer recognizes the need for and agrees to consult with the Local prior to implementing new policies or modifying existing policies involving personnel procedures or working conditions.

Section 2. Consultation is defined to mean verbal discussion or written communication with representatives of the Local for the purpose of obtaining and considering their views on matters of appropriate concern to employees in the unit.

Section 3. Matters appropriate for consultation shall include such matters as proposed changes in the Employer's promotion plan, training program, equal employment opportunity plan, and safety practices; and the adverse impact of technological change, the adverse impact of a reduction-in-force, and the adverse impact of classification actions which affect employees in the unit. Consultation will relate to personnel policy determinations, practices, and working conditions, not day-to-day operations.

Section 4. The obligation to meet and consult does not include matters with respect to the mission of the agency; its budget; its organization; the number of employees; and the number, type, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security.

Section 5. The bi-monthly meetings of the Employer and the Local may consider other topics such as the interpretation of the agreement and matters of mutual concern. Individual grievances will not be taken up during the bi-monthly meetings. Agenda items will be submitted by both parties five (5) working days in advance of each meeting. The Employer will furnish the requested number of copies, not more than 12, of proposed changes in personnel policies and practices in advance of consultation with the Local.

the arbitrator determined that "the intent and spirit of Article 6 - Consultation - of the Agreement has not been adhered to by the Employer," because:

> [T]he relationship between the Employer and the Union has obviously resulted in an atmosphere of mutual suspicion and distrust which, in turn, has led to an appearance of wrongdoing on the part of the Employer. That atmosphere can be changed only by more open communication by the Employer of its intended personnel actions to the Union and by supplying the Union with such documents as position descriptions when requested by the Union.

Accordingly, the arbitrator made the following award:

1. Management at the Pacific Southwest Forest and Range Experiment Station was not in violation of the Labor-Management Relations Agreement, specifically Article 8, in the selection process used to fill various positions at the station.

2. Management has violated Article 6 of the Agreement in not meeting and consulting in good faith with respect to all matters of appropriate concern to bargaining unit employees, including the proposed reclassification and/or status of all bargaining unit positions as that status may from time to time be deemed by the Employer to require change. As a remedy, the Employer is hereby directed to so meet and consult in good faith on such matters. Further, the Employer is ordered to make available to the Union copies of all new and changed position descriptions prior to taking action to fill such positions, and shall afford the Union an opportunity for consultation prior to taking action with respect to such proposed changes.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it relates to the agency's exceptions which allege: (1) that the arbitrator exceeded his authority by deciding an issue not before him and then fashioned an award which provides the union with a procedure they sought but failed to obtain at the bargaining table; and (2) that the arbitrator exceeded his authority and violated Article 21 of the collective bargaining agreement by in effect writing a change in Article 6 of the agreement.[5/] Neither party filed a brief.

5/ The agency requested and the Council granted a stay of the award pending the determination of the appeal pursuant to section 2411.47(d) of the Council's rules of procedure which governed the granting of stays of arbitrator's awards when the stay was acted upon.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

Regarding the agency's first exception, the Council will sustain a challenge to an arbitration award where it is shown that the arbitrator exceeded the scope of his authority by determining an issue not included in the subject matter submitted to arbitration. American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42. In the cited decision the Council found that the arbitrator answered a question not presented to him when he awarded relief under the agreement to two nongrievants, as well as to the grievant, and that he thereby exceeded his authority. (It was noted in that decision, however, that in addition to determining those issues specifically included in the particular question submitted, an award may extend to issues that necessarily arise therefrom. This latter point was reiterated in two subsequent cases in which the Council found that issues addressed by the arbitrator were related to and included in the issue submitted and that therefore the arbitrator had not exceeded his authority.6/)

The initial question with respect to the first exception, therefore, is whether the joint letter of April 5 constituted a complete agreement between the parties concerning the precise issue(s) before the arbitrator and hence limited his consideration in the matter solely to determining those issues specifically included in the particular question submitted (as well as those that arise necessarily therefrom). In FLRC No. 72A-3, supra, the Council pointed out that the basic purpose of a submission agreement is to specify in writing the disputed issue and to formulate it as a question or questions to be posed before the arbitrator. The submission agreement, it was noted, sets forth the issue to be arbitrated in precise language, which defines and circumscribes the authority of the arbitrator.7/ Consistent with practice in the private sector, if there is not a submission agreement with a precise issue, an arbitrator in the Federal sector has unrestricted authority to pass on any dispute presented to him so

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6/ Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60; Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), FLRC No. 74A-40 (January 15, 1975), Report No. 62.

7/ FLRC No. 72A-3, Report No. 42 at 6 of the Decision, n. 12 citing Prasow & Peters, Arbitration and Collective Bargaining 18 (1970).

long as it is within the confines of the collective bargaining agreement. In Amalgamated Food & Allied Workers Union, Local 56 v. Great Atlantic and Pacific Tea Co., 415 F.2d 185 (3d Cir. 1969), the Third Circuit, in affirming the district court's order vacating an award, quoted with approval the district court's opinion, in part, as follows:

> The obvious issues then are whether the arbitrators exceeded the scope of their authority under the contract, and whether the decision of the arbitrators on the issue of the submission was so unreasonable as to amount to a denial of due process.
>
> The sole source of, and limitation upon, the arbitrators' authority is the collective bargaining agreement and the submission. . . . The agreement to arbitrate vests the arbitrators with powers as broad as the agreement explicitly or implicitly provides. . . . In determining whether the arbitrators exceeded their authority, the agreement must be broadly construed with all doubts resolved in favor of their authority. . . .
>
> Although grievances need not be submitted to arbitration in language comparable to that used in formal court proceedings, . . . where the submission does not specify any precise issue the authority of the arbitrator is unrestricted and he may pass upon any dispute presented to the arbitrators and arising under the agreement. . . . 415 F.2d 188, 189. [Citations omitted; emphasis added.]

In the present case, while it is clear that the joint letter of April 5, i.e., the "submission agreement," made specific reference only to Article 8 of the collective bargaining agreement, a careful reading of the entire record in the matter, including the transcript of the proceedings before the arbitrator, makes it clear that there was not total agreement on a precise issue. As previously indicated, the arbitrator noted that there was an "underlying" issue in the matter and further allowed the union to introduce evidence regarding the filling of positions other than those listed in the submission agreement on the basis that it was "part of the Union's case of establishing a practice" on the part of the agency that was contrary to the agreement.8/ The arbitrator then fashioned an award which

8/ Transcript of the Arbitration Proceedings, August 12, 1974, at 18. See also, Transcript, at 9, where the union, in claiming the right to introduce evidence regarding the filling of other positions, states:

> [W]e are entitled, by the submission agreement, by the contract, to use other examples of the process, both for the purposes of proving the pattern of practice which is a basis underlying this problem that brought us before you in the first place, and secondly, for seeking a remedy for those situations.

The agency's objection to this was not to the union's use of such evidence for the purpose of proving a pattern of practice, but to the arbitrator's fashioning "any remedy based upon grievances brought for the first time at this hearing."

was consistent with the "underlying" issue regarding the agency's practice in filling the various positions. Therefore, the Council is of the opinion that the arbitrator in this case did not exceed his authority by deciding an issue not before him. While the parties entered into a submission agreement, it was cast in language sufficiently imprecise that it, along with the evidence proferred at the arbitration hearing regarding the agency's course of conduct in filling positions, gave the arbitrator a reasonable basis for formulating the "underlying" issue and providing an appropriate remedy. It is noted that the parties' submission agreement did not purport to formulate the precise issue to which the arbitrator was limited, but instead "indicated" the issue and gave "examples" of the positions involved.9/ Accordingly, since the submission did not specify a precise issue, the arbitrator was within his authority in passing upon the dispute before him in the manner indicated. The Council notes that when the parties to a dispute reach agreement as to the issue to be presented to an arbitrator and thereafter undertake to formulate that issue in a submission agreement, it is important that the agreement define precisely the issues involved. Moreover, it is to be noted that even when the parties have entered into a submission agreement, the Council, in accordance with private sector precedent, will construe an agreement broadly with all doubts resolved in favor of the arbitrator when a question is presented to the Council as to whether an arbitrator exceeded his authority in a particular manner.

As to the second part of the first exception, that is, whether the arbitrator fashioned an award which provides the union with a procedure they sought but failed to obtain at the bargaining table, the agency contends that during negotiations on the existing agreement, the union's proposal for what is currently Article 6, Section 3, included the words:

> Matters which shall be subjected to consultation are . . . classification actions or changes in duties that may adversely affect employees in the unit . . . .

9/ See submission agreement quoted at 1, supra. Cf. Lee v. Olin Mathieson Chemical Corporation, 271 F. Supp. 635 (W.D. Va. 1967), cited in Amalgamated Food above, wherein one of the issues submitted to the arbitrator was ". . . does the Company's refusal to allow [terminated employee's] to return to the bargaining unit constitute a violation of Article V, § 18?" The arbitrator found that the company did not violate Article V, § 18, but that it "violated other provisions of the Agreement by destroying the employee's seniority rights in the bargaining unit." The district court held that the arbitrator's jurisdiction ended when he decided the question regarding Article V, § 18 and found that he had exceeded his authority and gone beyond the terms of the submission by finding that the company had violated other provisions of the agreement. In the present case, however, the issue before the arbitrator is not so precise. The parties chose to set the reference to Article 8 off by commas, thus giving rise to an inference that the words "specifically Article 8" were meant to be attention calling rather than issue limiting.

The agency states that although one of the key phrases negotiated out of the proposal was "or changes in duties," the arbitrator has ordered the agency to "make available to the Union copies of all new and changed positions and . . . afford the Union an opportunity for consultation prior to taking action with respect to such proposed changes." Thus, the agency contends that the union is being afforded an opportunity to consult on a matter negotiated out of the agreement.

The Council is of the opinion that the agency has misinterpreted the arbitrator's award. The Council reads the award as simply directing the agency to comply with the provisions of Article 6 of the existing agreement by consulting with the union prior to implementing new policies or modifying existing policies involving personnel procedures or working conditions. Such consultation is defined in the agreement to include verbal discussion or written communication with representatives of the union for the purpose of obtaining and considering their views on matters of appropriate concern to employees in the unit and extends to the adverse impact of classification actions which affect employees in the unit. This remedy reflects the parties' agreement and does not give the union additional rights than those they were entitled to prior to the arbitration hearing.

The agency's second exception is that the arbitrator exceeded his authority and violated Article 21 of the collective bargaining agreement[9/] by in effect writing a change in Article 6 of the agreement. This exception is, in effect, the same as the second part of the agency's first exception, that is, that the arbitrator fashioned an award which provides the union with a procedure they sought but failed to obtain at the bargaining table when the words "or changes in duties" were negotiated out of the proposal. While the Council recognizes that the arbitrator in this case was strictly limited in his function by the provisions of Article 21 which state that he "may not make or propose changes to the agreement," it is our opinion that, as previously indicated, the agency is misinterpreting the arbitrator's award and the arbitrator is not directing the agency to do anything it is not already required to do under the current terms of the agreement. We conclude, therefore, that the arbitrator did not exceed his authority by in effect writing a change in the agreement.

Conclusion

For the foregoing reasons, we find that the arbitrator did not exceed his authority by deciding an issue not before him and then fashioning an award which provides the union with a procedure it sought but failed

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9/ Article 21, Section 1, of the agreement provides in pertinent part:

> The arbitrator may not make or propose changes to the agreement.

to obtain at the bargaining table; nor did he exceed his authority by writing a change in the collective bargaining agreement. Accordingly, pursuant to section 2411.37(b) of the Council's rules of procedure, we sustain the arbitrator's award and vacate the stay.[10/]

By the Council.

Henry B. Frazier III
Executive Director

Issued: March 18, 1976

10/ We are administratively advised that the union, subsequent to the arbitrator's decision, was decertified. We make no finding here as to the activity's responsibility to implement the award in these circumstances. Enforcement questions, if any, are resolved under the unfair labor practice procedures of the Assistant Secretary. (See Department of the Army, Aberdeen Proving Ground and International Association of Machinists and Aerospace Workers, Local Lodge 2424, FLRC No. 74A-46 (March 20, 1975), Report No. 67.)

Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Boston Region, District and Branch Offices, A/SLMR No. 562. The Assistant Secretary, upon a clarification of unit petition filed by the activity, found that employees in the classification of "Administrative Aide" were confidential employees and therefore should be excluded from the unit represented by American Federation of Government Employees, Local 1164, AFL-CIO. The union appealed to the Council, principally contending that the decision of the Assistant Secretary presented major policy issues.

Council action (March 22, 1976). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious and did not present any major policy issues warranting Council review. Accordingly, the Council denied review of the union's appeal.

246-469 O - 78 - 14

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 22, 1976

Mr. Daniel J. Kearney
National Vice President
American Federation of Government
Employees, AFL-CIO
512 Gallivan Boulevard, Suite 2
Dorchester, Massachusetts 02124

Re: Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Boston Region, District and Branch Offices, A/SLMR No. 562, FLRC No. 75A-108

Dear Mr. Kearney:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the agency, in the above-entitled case.

In this case, the Department of Health, Education and Welfare, Social Security Administration, Bureau of Field Operations, Boston Region, District and Branch Offices (the activity) filed a clarification of unit petition seeking to exclude employees in the classification of "Administrative Aide" (and others not material herein) from the unit of all nonsupervisory employees in the District and Branch Offices of the activity in New England for which American Federation of Government Employees, Local 1164, AFL-CIO (the union) is the certified representative. The activity contended before the Assistant Secretary that due to changes that had taken place since the Certification of Representative was issued on May 19, 1970, employees in this classification were now confidential and should be excluded from the certified unit. The Assistant Secretary found that the Administrative Aides were confidential employees and therefore should be excluded from the exclusively recognized unit. In so concluding, he noted that the Administrative Aides "act as the principal secretaries to the District or Branch Managers" who "are involved in the formulation and effectuation of the [activity's] labor-management relations policies," and that "they perform confidential duties for the Managers with respect to labor-management relations matters."

In your petition for review on behalf of the union, you contend, in effect, that the decision of the Assistant Secretary presents a major policy issue as to "[w]hy Management, after such a long history of good relations in units which included Administrative Aides, now find that they are ineligible to be in that unit." In this regard, you assert that Administrative Aides have been included in the existing bargaining unit for the past 12 years, during which time management never indicated that a conflict of interest

existed between the Aides' duties and their inclusion in the unit; and that the Assistant Secretary's finding that they are confidential employees is contrary to the evidence presented at the hearing. You further contend, in substance, that the decision of the Assistant Secretary presents a major policy issue as to "whether or not sanitized documents can be offered into evidence and sustained after our objections." In this latter connection, you allege that the Hearing Officer erroneously permitted management to introduce into evidence, over the union's objections, "sanitized documents" whose contents were so unrecognizable and lacking in specificity that they could not be questioned by the union.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious and does not present any major policy issues. With regard to your contention concerning the previous inclusion of the Administrative Aides in the unit, and evidence presented at the hearing, it does not appear that the Assistant Secretary acted without reasonable justification or that his decision presents a major policy issue. Thus, as the Council stated in our denial of review in U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, A/SLMR No. 428, FLRC No. 74A-73 (May 21, 1975), Report No. 70, "the Assistant Secretary relied upon his previously established test for determining confidentiality of employees as reflected in his case precedents - i.e., those who assist and act in confidential capacities to persons who formulate and effectuate management policies in the field of labor relations," and you do not contend that such definition of "confidential employee" is inconsistent either with the purposes of the Order or with other applicable authority. Rather, your appeal herein takes issue only with the manner in which the Assistant Secretary applied the definition to the facts of this case, and therefore does not raise a major policy issue warranting Council review. Further, your related contention that the decision of the Assistant Secretary is contrary to the evidence presented at the hearing constitutes, in effect, nothing more than disagreement with the Assistant Secretary's factual findings and therefore does not present a basis for Council review. Nor is a major policy issue raised with respect to your contention that the Hearing Officer erroneously permitted management to introduce "sanitized documents" into evidence over the union's objections. The Assistant Secretary, pursuant to his authority under section 6(d) of the Order to prescribe regulations needed to administer his functions under the Order, has provided in Section 202.12 of his regulations:

> It shall be the duty of the Hearing Officer to inquire fully into the facts as they relate to the matters before him. With respect to cases assigned to him between the time he is designated and the transfer of the case to the Assistant Secretary, the Hearing Officer shall have the authority to:
>
> . . . . . .
>
> (b) Rule upon offers of proof and receive relevant evidence;
>
> . . . . . .

The Hearing Officer's admission of "sanitized documents" into evidence was based upon the application of this regulation, and your appeal fails to establish that his application of such regulation in the instant case presents a major policy issue warranting review, noting particularly that the Assistant Secretary found the Hearing Officer's rulings to be "free from prejudicial error."

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

I. Becker
SSA

Headquarters, U.S. Army Materiel Command, U.S. Department of the Army, Assistant Secretary Case No. 22-5900 (CA). The Assistant Secretary, upon a 19(a)(1), (2), (4) and (6) complaint by the union (National Federation of Federal Employees, Local 1332), found that the union did not present sufficient evidence to establish a reasonable basis for its allegation that an employee's position was eliminated for discriminatory reasons; and, further, that the union's allegations with respect to denial of representation and refusal to consult regarding a reorganization were procedurally defective in that those allegations were not included in the pre-complaint charge. Accordingly, the Assistant Secretary denied the union's request for review of the Assistant Regional Director's dismissal of the complaint. The union appealed to the Council, principally alleging that the Assistant Secretary's decision presented a major policy issue.

Council action (March 22, 1976). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not present a major policy issue, and the union neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied review of the union's petition.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 22, 1976

Ms. Lisa Renee Strax
Legal Department
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Headquarters, U.S. Army Materiel Command, U.S. Department of the Army, Assistant Secretary Case No. 22-5900 (CA), FLRC No. 75A-114

Dear Ms. Strax:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the agency's opposition thereto, in the above-entitled case.

In this case, a charge was filed by National Federation of Federal Employees, Local 1332 (the union), against Headquarters, U.S. Army Materiel Command, U.S. Department of the Army (the activity). The charge alleged that an employee had been discriminated against because he had lodged a grievance against the activity. A complaint against the activity was subsequently filed which alleged that the employee was discriminated against because he had filed a grievance against the activity, and in addition, alleged that the activity had denied the employee the right to be represented at the grievance hearing, had instituted a reorganization without conferring or negotiating with the union, and in the process of such reorganization, had deliberately abolished the employee's position. Such conduct, it was alleged, constituted violations of section 19(a)(1), (2), (4) and (6) of the Order.

The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), decided that a reasonable basis for the complaint had not been established and that further proceedings were therefore unwarranted. In reaching this determination, he found that the union

> did not present sufficient evidence to establish a reasonable basis for its allegation that [the employee's] position was eliminated for discriminatory reasons. In this connection, see Section 203.6(e) of the Assistant Secretary's Regulations which provides, in relevant part, that, "[t]he Complainant shall bear the burden of proof at all stages of the proceeding regarding matters alleged in the [sic] complaint. . . ." Further, it was noted that the allegations with respect to denial of representation and refusal to consult regarding a reorganization were procedurally defective in that these allegations were

not included in the pre-complaint charge. In this regard, see Section 203.2(b) of the Assistant Secretary's Regulations which provides, in relevant part, that a charging party may file a complaint "limited to the matters raised in the charge."

Accordingly, the Assistant Secretary denied the union's request for review seeking reversal of the ARD's dismissal of the complaint, whereupon the union filed the instant appeal.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision presents a major policy issue as to "[w]hether the presence or absence of bad faith in the instant situation can be competently determined prior to a hearing in the case now before us." In this connection, you assert that a cause of action was clearly stated on the face of the complaint and that a hearing is required to resolve contested factual issues as well as the allegation of bad faith. You further assert that the decision to dismiss reflected an erroneous interpretation of the issues raised by the charge filed, since the denial of the employee's "rights to representation is separate from the activity's retaliatory acts" against the employee for having filed the grievance.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue, and you do not allege, nor does it appear, that his decision was arbitrary and capricious.

Section 6(d) of the Order provides: "The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order," one of which is to "decide unfair labor practice complaints . . ." pursuant to section 6(a)(4) of the Order. Section 203.8(a) of the Assistant Secretary's regulations provides:

> If the Assistant Regional Director determines that . . . a reasonable basis for the complaint has not been established, or for other appropriate reasons, . . . he may dismiss the complaint.

Further, Section 203.6(e), specifically referred to and relied upon by the Assistant Secretary herein, states:

> The Complainant shall bear the burden of proof at all stages of the proceeding regarding matters alleged in its complaint . . . .

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, and in a number of subsequent decisions, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a

reasonable basis for the complaint has not been established, . . . he may dismiss the complaint." His decision in the instant case was based upon the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish the above regulations, or that he applied these regulations in a manner inconsistent with the Order in the circumstances of this case. With respect to the Assistant Secretary's dismissal of the allegations in the union's complaint which were not contained in the pre-complaint charge required by Section 203.2 of his regulations,[1/] you do not allege that the Assistant Secretary was without authority under the Order to establish and apply the above regulation, but rather that the ARD erroneously interpreted the issues raised by the charge in the instant case. In our view, such contention fails to state a basis for Council review, particularly where, as here, you appear to concede that the issue raised in the charge "is separate from" the issues subsequently stated in the complaint.

Because the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for

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1/ In this regard, it should be noted that the Assistant Secretary's rule had its inception in the Study Committee Report and Recommendations, August 1969, Labor-Management Relations in the Federal Service (1975), which led to the issuance of the Order:

> Alleged unfair labor practices . . . should be investigated by the agency and labor organization involved and informal attempts to resolve the complaints should be made by the parties. If informal attempts are unsuccessful in disposing of the complaints within a reasonable period of time, . . . either party may request the Assistant Secretary to issue a decision in the matter. . . . If he finds, based on the allegations and the report of investigation of the parties, that there is a reasonable basis for the complaint, and that no satisfactory offer of settlement has been made, he may appoint a hearing officer to hold a hearing and report findings of fact and recommendations . . . .

Clearly, these requirements could not be met unless the allegations in the union's unfair labor practice complaint were contained in its pre-complaint charge. See also United States Air Force, 380th Combat Support Group, Plattsburgh Air Force Base, N.Y., A/SLMR No. 557, FLRC No. 75A-106 (January 13, 1976), Report No. 95.

review set forth in section 2411.12 of the Council's rules and regulations.[2/] Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

W. J. Schrader
Army

2/ In view of the foregoing disposition of this case, and in the absence of any contention or evidence that the employee whose position was allegedly abolished in the course of the reduction in force suffered adverse consequences enumerated in the Federal Personnel Manual, we do not pass upon the existence of a statutory appeals procedure to resolve such issue or the applicability of section 19(d) of the Order herein.

U.S. Marine Corps Air Station, El Toro, A/SLMR No. 560. The Assistant Secretary, upon an amended 19(a)(1), (2) and (6) complaint by the union (Local 1881, American Federation of Government Employees), determined that the employee involved was a supervisor within the meaning of section 2(c) of the Order, and found, therefore, that no basis existed for a 19(a)(1), (2) and (6) finding predicated solely upon the activity's action in unilaterally dropping the employee from payroll union dues deduction without prior consultation with the union. Accordingly, the Assistant Secretary dismissed the union's complaint. The union appealed to the Council, contending, in essence, that the decision of the Assistant Secretary presented major policy issues and was arbitrary and capricious.

Council action (March 22, 1976). The Council held that the union's petition for review did not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, since the union's appeal failed to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, the Council denied review of the appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 22, 1976

Mr. Raymond J. Malloy
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: U.S. Marine Corps Air Station, El Toro,
A/SLMR No. 560, FLRC No. 75A-115

Dear Mr. Malloy:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, Local 1881, American Federation of Government Employees, AFL-CIO (AFGE) filed a complaint, twice amended, alleging that the U.S. Marine Corps Station, El Toro (the activity) violated section 19(a)(1), (2) and (6) of the Order. AFGE's amended complaint alleged that the activity had violated the Order by "remov[ing] Mr. R. J. Griego, maintenance scheduler, . . . from payroll union dues deduction without prior consultation with [AFGE] or any of its agents nor with . . . Griego, a member in good standing. . . ." According to the Findings of Fact of the Administrative Law Judge (ALJ), as adopted by the Assistant Secretary, Griego had been permanently promoted to "Maintenance Scheduler," a position which the activity viewed as supervisory. Thereafter, in accordance with the agreement between the parties,[1/] the activity cancelled Griego's union dues deduction.

1/ Section 4 ("Termination of Allotment") of the parties' agreement provides, in pertinent part:

> (a) An employee's voluntary allotment for payment of his Union dues will be terminated with the start of the first pay period following the pay period in which any of the following occur:
>
> . . . . . .
>
> (2) When an employee leaves the Unit as a result of any type of separation, transfer, or other personnel action (except temporary promotion or detail).

As further found by the ALJ, the Agreement made "no provision for 'notice' to [AFGE] in the event that an employee's voluntary allotment is terminated" in accordance with the above provision.

The Assistant Secretary, adopting the ALJ's findings, conclusions, and recommendations, determined that Griego, in his position as Maintenance Scheduler, had the authority to hire and evaluate the performance of other employees, and thus was a supervisor within the meaning of section 2(c) of the Order. It was found, therefore, that since the activity's obligation to consult and confer with AFGE ran only to conditions and policies affecting unit employees and not supervisors, no basis existed for a 19(a)(1), (2) and (6) finding predicated solely upon the activity's action in unilaterally dropping Griego from payroll union dues deduction without prior consultation with AFGE. Accordingly, he dismissed the complaint.

In your petition for review you contend, in essence, that the decision of the Assistant Secretary presents major policy issues and is arbitrary and capricious in that "[r]espondent violated section 19(a)(6) by its failure to notify, consult and meet and confer with complainant in regard to the dropping of employees from dues withholding and their removal from the bargaining unit," and, further, "[w]here there is a dispute as to the removal of an employee from dues withholding and from the bargaining unit the proper procedure is for the activity to file a clarification petition for resolution of the matter by the Assistant Secretary." In the latter regard, you rely on the Council's decision in Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168, FLRC No. 72A-30 (July 25, 1973), Report No. 42. You further allege that the decision is arbitrary and capricious since his determination that the position of Maintenance Scheduler is supervisory is contrary to the evidence presented.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues. As to your contention regarding the unilateral dropping of employees from dues withholding and doing so without notifying and consulting with the union or filing a clarification of unit petition, noting that it was first determined that Griego was a supervisor within the meaning of section 2(c) of the Order, the determination that unilaterally dropping him from payroll dues deduction did not violate the Order does not raise a major policy issue warranting review. Nor is a basis for review presented by your contention that the activity was required to file a clarification of unit petition to resolve the question of the employee's supervisory status before removing him from payroll union dues withholding. In this regard, your reliance on the Council's decision in AVSCOM is misplaced. As the Council indicated in AVSCOM (at p. 6), procedures must exist which will

> . . . permit an agency to file a representation petition in good faith, to await the decision of the Assistant Secretary with respect to that petition, and to be given a reasonable opportunity to comply with the consequences which flow from the representation decision, before that agency incurs the risk of an unfair labor practice finding. [Emphasis added.]

Thus, while an agency must be permitted to protect itself against an unfair labor practice finding by filing an appropriate representation petition, it is not required to do so by virtue of the Council's decision in AVSCOM. Of course, as the ALJ stated in the instant case (at footnote 4), "an agency acts at its peril when it unilaterally determines supervisory status [or any other representation question], since an erroneous determination could well support a violation of . . . the Order." However, such is not the case herein, noting that the Assistant Secretary found that the position of Maintenance Scheduler was in fact supervisory.

As to your contention regarding the Assistant Secretary's failure to find that the activity violated section 19(a)(6) and (1) by removing the employee from the bargaining unit without first notifying and consulting with AFGE and filing a CU petition to resolve his supervisory status; and with the Assistant Secretary's refusal to permit evidence of the activity's anti-union motivation in support of AFGE's section 19(a)(2) allegation, these matters were neither alleged in AFGE's complaint nor passed upon by the Assistant Secretary in his decision and, apart from other considerations, they therefore provide no basis for your appeal.2/ Finally, with respect to your contention that the Assistant Secretary's decision is contrary to the weight of the evidence and therefore arbitrary and capricious, it does not appear in the circumstances of this case that the Assistant Secretary acted without reasonable justification in reaching his conclusion that the position of Maintenance Scheduler is supervisory.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

S. Foss
Navy

2/ Section 2411.51 of the Council's rules, Matters not previously presented; judicial notice, provides in pertinent part:

> Consistent with the scope of review set forth in this part, the Council will not consider evidence offered by a party, or any issue, which was not presented in the proceedings before the Assistant Secretary, an agency head, or an arbitrator.

Veterans Administration Hospital, Montrose, New York, Assistant Secretary Case No. 30-6109 (RO). The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), and based on his reasoning, dismissed the representation petition filed by National Federation of Federal Employees, Local 1119 (NFFE), as untimely filed. The Assistant Secretary noted in that regard that a valid negotiated agreement between the activity and Local 2440, United Brotherhood of Carpenters and Joiners of America was in effect at the time the subject petition was filed; that the term of such agreement was not viewed as being of indefinite duration; and that there was an absence of any evidence that the exclusive representative was defunct. NFFE appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious in regard to certain major policy issues.

Council action (March 25, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and did not present a major policy issue. Accordingly, the Council denied review of NFFE's appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 25, 1976

Mr. John Helm, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Veterans Administration Hospital, Montrose, New York, Assistant Secretary Case No. 30-6109 (RO), FLRC No. 75A-116

Dear Mr. Helm:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, as found by the Assistant Secretary without contradiction and based upon the record herein, Local 2440, United Brotherhood of Carpenters and Joiners of America (Local 2440) entered into a two-year agreement covering Wage Grade employees at the Veterans Administration Hospital, Montrose, New York (the activity). The agreement provided that it would be automatically renewed from year to year unless either party gave 60 days written notice to the other of an intent either to terminate or to seek modification of the agreement "after the first two year period, or thereafter on any anniversary of the effective date." The agreement was automatically renewed for a period of one year on February 3, 1975.

On or about March 19, 1975, Local 2440 filed an Amendment of Certification petition with the Assistant Secretary (Case No. 6096 (AC)) seeking to change its affiliation from the Carpenters to the American Federation of Government Employees (AFGE). On March 28, the National Federation of Federal Employees, Local 1119 (NFFE) petitioned for an election in the activity-wide Wage Grade unit represented by Local 2440, assertedly supported by a 30 percent showing of interest among the unit employees. The Assistant Regional Director (ARD) dismissed the petition as untimely filed under Section 202.3(c) of the Assistant Secretary's regulations because:

> . . . the investigation determined that a valid collective bargaining agreement exists between Local 2440, United Brotherhood of Carpenters . . . and the Veterans Administration Hospital . . . and that the Activity continues to process grievances and withhold dues from members' earnings pursuant to provisions in the agreement. As the agreement was automatically renewed for a one year period on February 3, 1975, it was fully in effect at the time [NFFE's] petition was filed.

The Assistant Secretary, "in agreement with the [ARD], and based on his reasoning . . .," found that further proceedings were unwarranted. The Assistant Secretary:

> . . . noted particularly that a valid negotiated agreement was in effect at the time the subject petition was filed. Moreover, the term of such agreement, which was for a two year duration, automatically renewable from year to year thereafter, was not viewed as being of an indefinite duration. Therefore, in accordance with Section 202.3(c) of the Assistant Secretary's Regulations, the subject petition was concluded to have been filed untimely.

Noting further "the absence of any evidence that the exclusive representative was defunct," the Assistant Secretary denied NFFE's request for review seeking reversal of the ARD's dismissal of its petition.

In your petition for review on behalf of NFFE, you contend that the Assistant Secretary's decision is "arbitrary and capricious in regard to the following . . . Major Policy issues." You first contend that the agreement between Local 2440 and the activity is terminable at will, since it does not contain "a clearly fixed term or duration from which employees and labor organizations can ascertain, without the necessity of relying on other factors, the appropriate time for the filing of representation petitions," and hence cannot bar NFFE's RO petition herein under previous decisions of the Assistant Secretary. You further assert that Local 2440 is "defunct" because it is unwilling or unable to represent the employees in the exclusively recognized WG unit.*/

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious and does not present a major policy issue.

As to your first contention, the Assistant Secretary dismissed NFFE's petition herein as untimely filed based upon the interpretation and

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*/ In your appeal, you also question "[w]hether a petition for amendment of certification is the appropriate procedure to effect a change in labor union affiliation." However, the AC petition filed by Local 2440 to accomplish this objective was treated by the Assistant Secretary in a separate proceeding (Case No. 6096 (AC)), and was neither referred to nor discussed by him in the instant case. Moreover, the Assistant Secretary's denial of NFFE's request for review in Case No. 6096 (AC), which involved that issue, was never appealed to the Council. Therefore, apart from other considerations, as such matter is not properly before the Council and provides no basis for your appeal, the Council does not pass upon the correctness of the Assistant Secretary's use of an AC petition to effect changes in the affiliation of an exclusive representative.

application of Section 202.3(c) of his regulations to the circumstances of this case, and you neither allege that he was without authority to promulgate such regulation or that he applied it in a manner inconsistent with the purposes of the Order. Rather, your assertion that the agreement between Local 2440 and the activity was terminable at will constitutes, in effect, no more than a disagreement with the Assistant Secretary's factual determination that such agreement was "not . . . of an indefinite duration," a conclusion which you have failed to establish as inconsistent with his previous decisions. Accordingly, no basis for Council review is presented by such contention. Similarly, no basis for review is presented by your allegation that Local 2440 was "defunct," since the Assistant Secretary merely noted "the absence of any evidence that the exclusive representative was defunct," and his decision therefore does not raise the issue presented in your appeal.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and presents no major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

C. Heard, Jr.
Veterans Administration

J. D. Gleason
AFGE

246-469 O - 78 - 15

Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 547. The Assistant Secretary, upon a clarification of unit (CU) petition filed by the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (MTC), the exclusive representative of a unit composed primarily of Wage Board (WB) employees, requesting that certain unit employees, who had been reclassified from a WB classification of Radiation Monitor to a General Schedule classification of Physical Science Technician, be retained in its unit, and upon a separate CU petition filed by the activity seeking to exclude such employees from the unit represented by MTC, ordered that the MTC unit be clarified to include the Physical Science Technicians. In his decision, based on evidence as to the duties and working conditions of the subject employees, the Assistant Secretary noted the fact that, at the hearing held on both CU petitions, the MTC joined in a stipulation of evidence in support of the activity's proposed clarification (the parties stipulating that the employees were technical employees and appropriately belonged in the mixed "technical-professional" unit represented by the intervenor, International Federation of Professional and Technical Engineers, Local No. 1); but the Assistant Secretary stated that he was not necessarily bound by such stipulations in determining the scope of a unit and that he viewed MTC's determination not to withdraw its petition as an indication of its willingness to continue to represent the employees involved. The parties filed a joint petition for review with the Council, asserting that the decision of the Assistant Secretary was arbitrary and capricious and presented a major policy issue. The parties also requested a stay of the decision.

Council action (March 31, 1976). The Council held that the parties' joint petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the petition. The Council likewise denied the parties' request for a stay.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

March 31, 1976

Mr. A. Di Pasquale, Director
Labor & Employee Relations Division
Office of Civilian Manpower Management
Department of the Navy
Washington, D.C. 20390

James R. O'Connell, Esq.
O'Donoghue and O'Donoghue
1912 Sunderland Place, NW.
Washington, D.C. 20036

Mr. Rodney A. Bowers, President
International Federation of Professional
and Technical Engineers, AFL-CIO
1126 16th Street, NW., Suite 200
Washington, D.C. 20036

Re: Department of the Navy, Norfolk Naval Shipyard, A/SLMR No. 547, FLRC No. 75A-117

Gentlemen:

The Council has carefully considered your joint petition for review and request for a stay of the Assistant Secretary's decision in the above-entitled case.

In this case, Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (MTC), the exclusive representative of a unit composed primarily of Wage Board (WB) employees at the Department of the Navy, Norfolk Naval Shipyard (the activity), filed a petition seeking to clarify the status of approximately 32 Physical Science Technicians who had been classified to the WB classification of Radiation Monitor but, as a result of a reclassification action, became General Schedule (GS) employees. MTC's petition requested that such employees be retained in its unit. The activity filed a separate CU petition seeking to exclude the Physical Science Technicians from the unit represented by MTC. At the subsequent hearing, held on both CU petitions, MTC joined in a stipulation of evidence in support of the activity's proposed clarification to remove the Physical Science Technicians from the MTC unit, the parties stipulating that the Physical Science Technicians were technical employees since their reclassification and appropriately belonged in the mixed "technical-professional" unit represented by the intervenor, International Federation of Professional and Technical Engineers, Local No. 1 (IFPTE). However, MTC specifically declined to withdraw its petition seeking to retain these employees.

The Assistant Secretary, based on the record before him, found that:

> . . . While it appears that the duties of the Physical Science Technicians have undergone certain changes due to increased workload and technological advances, the evidence indicates that they are performing essentially the same duties as they performed prior to the reclassification action. . . . Nor have their numerous work contacts with WB employees been altered or reduced.

In a footnote in his decision, the Assistant Secretary stated:

> . . . While noting the participation of the MTC in stipulations in support of the Activity's proposed clarification to remove the Physical Science Technicians from the unit represented exclusively by the MTC, in my view, I am not necessarily bound by such stipulations in determining the scope of a unit. . . . Moreover, I view the MTC's determination not to withdraw its petition . . . as an indication of its willingness to continue to represent these employees.

The Assistant Secretary therefore concluded that "the Physical Science Technicians . . . continue to share a clear and identifiable community of interest with the WB employees of the Activity represented by the MTC," and accordingly ordered that the MTC unit be clarified to include them.

In your joint petition for review, it is asserted that the decision of the Assistant Secretary is arbitrary and capricious in that (1) he failed to consider and discuss pertinent evidence presented to him by the parties through factual stipulations; (2) he disregarded the stipulations of the parties concerning the unit placement of the Physical Science Technicians, contrary to principles and policies established in previously published unit clarification cases; (3) his conclusion that MTC was willing to continue as the representative of the Physical Science Technicians is unsupported by the record; and (4) his adherence to the result in Department of the Navy, Charleston Naval Shipyard, A/SLMR No. 302 (August 15, 1973), in reaching the decision in the instant case was unreasonable under the circumstances. In addition, you contend that the decision presents as a major policy issue "[w]hether or not the purposes of the Order to promote and maintain 'constructive and cooperative relationships' between labor organizations and agency management, are effectuated when the Assistant Secretary, in deciding unit clarification cases, disregards all-party stipulations and the desires of the parties reflected in them, and resolves employee placement issues which the parties believed to have been effectively withdrawn from litigation by their agreement."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious or present a major policy issue. With respect to your contentions concerning evidence considered and relied upon, it does not appear that

the Assistant Secretary acted without reasonable justification in finding that "the existing exclusively recognized unit represented by the MTC should be clarified to include the Physical Science Technicians in the Activity's Radiological Monitoring Division." More specifically, you have not established that the Assistant Secretary failed to consider any material evidence, including the parties' factual stipulations, in reaching his conclusions herein, noting particularly that he referred to such stipulations on several occasions in his decision. Nor have you shown that the decision herein is inconsistent with his previously published decisions in unit clarification cases. Indeed, the Assistant Secretary cited an earlier decision involving the same classification of employees at a sister facility in reaching a consistent conclusion in the instant case.

As to the alleged major policy issue, section 6(a)(1) of the Order provides that the Assistant Secretary shall "decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues submitted for his consideration." While the use of stipulations may be a useful tool to ascertain the views of the parties and to dispose of possible issues, the Assistant Secretary's refusal to be bound by such a stipulation in the exercise of his responsibility of deciding appropriate unit issues does not, in the circumstances of the case, raise a major policy issue warranting review. Accordingly, in the Council's view, the Assistant Secretary's treatment of the stipulation in the instant case does not present a major policy issue warranting review. See Illinois Air National Guard, 182nd Tactical Air Support Group, A/SLMR No. 105, FLRC No. 71A-59 (November 17, 1972), Report No. 30.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. The request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

Association of Academy Instructors, Inc. and Department of Transportation, Federal Aviation Administration, FAA Academy, Aeronautical Center, Oklahoma City, Oklahoma. The dispute involved the negotiability under the Order of various provisions of the union's multi-part proposal entitled "Reemployment, Restoration and Return Rights (3-R Program)."

Council action (April 12, 1976). The Council held that the union's proposal would so circumscribe as to, in effect, deny the right reserved to management by section 12(b)(2) of the Order to decide and act upon the assignment of employees to positions within the agency. Accordingly, pursuant to section 2411.28 of the Council's Rules and Regulations, the Council sustained the agency head's determination that the proposal was nonnegotiable.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Association of Academy Instructors, Inc.

and

FLRC No. 75A-85

Department of Transportation,
Federal Aviation Administration,
FAA Academy, Aeronautical Center,
Oklahoma City, Oklahoma

DECISION ON NEGOTIABILITY ISSUES

Background of Case

During negotiations between the Association of Academy Instructors (AAI) and the FAA Academy, a dispute arose as to the negotiability under the Order of various provisions of the union's multi-part proposal entitled "Reemployment, Restoration and Return Rights (3-R Program)" (set forth hereinafter).

Upon referral, the Department of Transportation determined that the disputed proposal is nonnegotiable on grounds that it violates section 12(b) of the Order. AAI appealed the agency determination to the Council under section 11(c)(4) of the Order.

The circumstances surrounding the negotiability dispute, as described by the union in its appeal (the agency did not submit a statement of position), are as follows. The union represents instructors at the FAA Academy. Currently, a number of those instructors are subject to an agency rotation system known as the "3-R Program." Under this program employees from throughout the agency serve as instructors for a period of two years with the possibility of extensions in increments of two years beyond the initial tour. The instructors under the rotation plan sign employment agreements advising them of the procedures and are given administrative return rights to their "parent" organizations. The union characterizes the existing "3-R Program" as a "Mandatory Rotation Policy" and indicates that the objective of its disputed proposal is to make the program "nonmandatory."

Opinion

The disputed proposal provides as follows:

ARTICLE

REEMPLOYMENT, RESTORATION, AND RETURN RIGHTS (3-R PROGRAM)

. . . . . .

Section 2. The standard tour of duty for instructors with return rights is two (2) years. The Employer will, except for just cause, permit the instructor at his (the instructor's) request, to serve two (2) additional tours with return rights after his first two-year tour.

. . . . . .

Section 4. Instructors appointed to positions with return rights shall sign an employment agreement (FAA Form 3330-5). These employment agreements shall be executed so they correspond with a standard two-year tour of duty. The instructor with return rights must execute a new agreement upon the completion of each tour. If the instructor does not execute a new agreement, the Employer will permit the instructor to return to his parent organization or forfeit his return rights. The Employer may waive any remaining time covered by an agreement.

. . . . . .

Section 6. Upon receipt of an offer for restoration, the instructor must accept or decline the offer within thirty (30) days from the date he receives the offer. If the instructor declines the offer, the Employer will extend, except for just cause, the instructor's tour for an additional two-year tour with the parent organization concurrence, or permit the instructor to forfeit his return rights.

As already indicated, the agency determined that the proposal is nonnegotiable, principally because it conflicts with rights reserved to management officials under section 12(b) of the Order. More particularly, the agency determined that:

> The proposed Article 4, Reemployment, Restoration and Return Rights (3-R Program), would permit an instructor, at his sole discretion, to elect to remain an instructor at the Academy or return to his parent organization at the expiration of his tour of duty, which is for a period of two years. To transfer, assign and retain employees within the agency are rights reserved to management under section 12.b., Executive Order 11491, as amended. Therefore, the proposal is contrary to an applicable provision of the Order and non-negotiable.

The union, however, contends principally that its proposal does not conflict with management's reserved rights under the Order but rather, is negotiable under section 11(a).

The bargaining obligation established by section 11(a) of the Order is expressly limited, among other ways, by provisions of the Order itself.[1/] In this regard, section 12, insofar as it relates to this dispute, provides:

1/ Section 11(a) provides, in pertinent part, that:

(Continued)

Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--

. . . . . .

(b) management officials of the agency retain the right, in accordance with applicable laws and regulations--

(2) to hire, promote, transfer, assign, and retain employees in positions within the agency. . . .

In applying section 12(b)(2), the Council consistently has emphasized that the rights reserved to agency officials under that section of the Order are mandatory and may not be bargained away. Specifically, the Council has stated that:2/

> Section 12(b)(2) dictates that in every labor agreement management officials retain their existing authority to take certain personnel actions, i.e., to hire, promote, etc. The emphasis is on the reservation of management authority to decide and act on these matters, and the clear import is that no right accorded to unions under the Order may be permitted to interfere with that authority.

Subsequently, the Council further noted that: "The language of section 12(b)(2) manifests an intent to bar from agreements provisions which

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(Continued)

> Sec. 11. Negotiation of agreements. (a) An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, . . . and this Order.

2/ Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31; accord, NFFE Local 1555 and Tobacco Division, AMS, USDA, FLRC No. 74A-32 (February 21, 1975), Report No. 64; Local 63, American Federation of Government Employees, AFL-CIO, and Blaine Air Force Station, Blaine, Washington, FLRC No. 74A-33 (January 8, 1975), Report No. 61; National Council of OEO Locals, AFGE, AFL-CIO, and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61; Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York (Miller, Arbitrator), FLRC No. 73A-42 (July 31, 1974), Report No. 55; Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., FLRC No. 72A-18 (September 17, 1973), Report No. 44.

infringe upon management officials' authority to decide and act concerning the personnel actions specified therein."3/

Turning to the disputed proposal in the instant case, as previously set forth herein, it is clear that management's authority to decide and act under section 12(b)(2) with respect to the transfer, assignment, and retention of instructors within the FAA Academy would be severely circumscribed. More particularly the proposal would, among other things, have the effect of granting employees the discretion to determine their own assignments in specified circumstances under the "3-R Program," unless the agency could establish "just cause" for requiring a different assignment. That is, the proposal would interfere with management's authority to decide and act with respect to reassigning an instructor to his parent organization upon expiration of a single 2 year tour of duty and/or upon his declining an "offer for restoration" under sections 2 and 6 of the proposal. Indeed, under section 4 of the proposal an instructor arguably could become a permanent employee of the Academy merely by refusing to execute a new employment agreement.

Hence, in the Council's view, the proposal clearly would so circumscribe as to in effect deny the right reserved to management by section 12(b)(2) of the Order to decide and act upon the assignment of employees to positions within the agency.

Conclusion

For the reasons stated above, and pursuant to section 2411.28 of the Council's Rules and Regulations, we find that the agency head's determination that the proposal here involved is nonnegotiable was proper and must be sustained.

By the Council.

Henry B. Frazier III
Executive Director

Issued: April 12, 1976

3/ NFFE Local 1555 and Tobacco Division, AMS, USDA, FLRC No. 74A-32 (February 21, 1975), Report No. 64; accord, Lodge 2424, IAM-AW and Kirk Army Hospital and Aberdeen Research and Development Center, Aberdeen, Md., FLRC No. 72A-18 (September 17, 1973), Report No. 44.

Department of the Air Force, Headquarters, Tactical Air Command, Langley Air Force Base, Virginia, Assistant Secretary Case Nos. 22-6261 (CA) and 22-6263 (CA). The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), and based on his reasoning, found that the 19(a)(1) and (6) complaints filed by Joan Greene had been properly dismissed by the ARD. The Assistant Secretary determined that inasmuch as Ms. Greene had no authority to act as a representative or agent of the National Association of Government Employees (NAGE) at the time of the filing of the complaints, and since Ms. Greene filed the pre-complaint charges on behalf of NAGE rather than in an individual capacity, she had no standing to file the subject unfair labor practice complaints. Ms. Greene appealed to the Council, alleging that the decision of the Assistant Secretary was arbitrary and capricious and, in essence, that the decision presented major policy issues.

Council action (April 12, 1976). The Council held that the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues warranting review. Accordingly, since the appeal failed to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, the Council denied review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

April 12, 1976

Ms. Joan Greene
2032 Cunningham Drive
Apartment 201
Hampton, Virginia 23666

Re: Department of the Air Force, Headquarters, Tactical Air Command, Langley Air Force Base, Virginia, Assistant Secretary Case Nos. 22-6261 (CA) and 22-6263 (CA), FLRC No. 75A-123

Dear Ms. Greene:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

This case arose when you, in your capacity as President Pro Tem of the National Association of Government Employees, Local R4-106 (NAGE), filed two unfair labor practice charges on behalf of NAGE. One charge alleged that the Department of the Air Force, Headquarters, Tactical Air Command, Langley Air Force Base, Virginia (the activity) had violated section 19(a)(1) of the Order by denying NAGE the right to be represented at a meeting on a grievance after the employee involved had requested union representation; the other alleged that the activity had violated section 19(a)(1) and (6) of the Order by refusing to discuss with you as a NAGE representative a grievance relating to the keeping of time and attendance. According to the record, you were thereafter removed as President Pro Tem of NAGE, and sometime thereafter you filed the subject unfair labor practice complaints, as an individual, on the same matters involved in the previously filed charges. The Assistant Secretary, in agreement with the Assistant Regional Director (ARD) and based upon his reasoning, found that the complaints had been properly dismissed by the ARD. The Assistant Secretary determined that inasmuch as you had no authority to act as a representative or agent of NAGE at the time of the filing of the complaints, and since you filed the pre-complaint charges on behalf of NAGE rather than in an individual capacity, you had no standing to file the unfair labor practice complaints.

In your petition for review, you allege that the decision of the Assistant Secretary is arbitrary and capricious in that it is "not supported by statutory or regulatory citations." You further contend, in essence, that the Assistant Secretary's decision presents major policy issues for the following reasons: The decision concerns itself with protecting the rights of NAGE, rather than the rights of employees, contrary to the intent of section 1 of the Order; the Assistant Secretary's dismissal of the subject unfair labor practice complaints resulted in "double jeopardy" for you,

since the dismissal was predicated on your removal by NAGE from the position of President Pro Tem, which was a violation of your section 1 right to form a union; and, further, the decision was "double jeopardy" for the "complainant" on whose behalf the instant complaints were filed, since your firing resulted in the "complainant" having her representative changed for her against her will.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues. As to your contention that the Assistant Secretary's decision is arbitrary and capricious in that it is not supported by statutory or regulatory citations, it does not appear, in the circumstances of this case, that the Assistant Secretary acted without reasonable justification in dismissing the complaints which you filed herein. With respect to your further contention that the instant decision concerns itself with protecting the rights of NAGE rather than the rights of employees, contrary to the intent of section 1 of the Order, in the Council's view, noting that the Assistant Secretary determined that you had no authority to act as a representative or agent of NAGE at the time of the filing of the complaints, and that the pre-complaint charges were filed on behalf of NAGE rather than in an individual capacity, no major policy issue is presented warranting review.*/

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

Captain E. K. Brehl
Air Force

*/ As to your contentions that the Assistant Secretary's decision resulted in "double jeopardy" for you and the "complainant," your arguments in support of these contentions concerning alleged violations of the Order by NAGE and the activity regarding your dismissal as President Pro Tem and a "conspiracy" to sign off on a "sweetheart contract" were not matters involved in or considered by the Assistant Secretary in reaching his decision. Accordingly, and apart from other considerations, such contentions therefore provide no basis for your appeal.

Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3551 (CA). The Assistant Secretary, in agreement with the Acting Assistant Regional Director (ARD), and based on his reasoning, found that a reasonable basis had not been established for the complaint of Local 491, National Federation of Federal Employees (NFFE), which alleged that the activity violated section 19(a)(6) of the Order by establishing a new supervisory position in the Psychology Service without affording NFFE an opportunity to meet and confer and/or negotiate on the establishment of such position, a matter allegedly affecting the unit employees' working conditions, and ruled that further proceedings on the complaint were unwarranted. Accordingly, the Assistant Secretary denied NFFE's request for reversal of the ARD's dismissal of the complaint. NFFE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented a major policy issue.

Council action (April 12, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied review of NFFE's appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

April 12, 1976

Mr. Gerald C. Tobin, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3551 (CA), FLRC No. 75A-124

Dear Mr. Tobin:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, Local 491, National Federation of Federal Employees (NFFE) filed a complaint alleging that the Veterans Administration Center, Bath, New York (the activity) violated section 19(a)(6) of the Order by establishing a new supervisory position in the Psychology Service without affording NFFE an opportunity to meet and confer and/or negotiate on the establishment of such position, a matter allegedly affecting the unit employees' working conditions. The Assistant Secretary, in agreement with the Acting Assistant Regional Director (ARD) and based on his reasoning, found that a reasonable basis for the complaint had not been established, and that further proceedings were unwarranted, since the activity "was under no obligation to meet and confer concerning the establishment and filling of a supervisory position." The Assistant Secretary further noted that "with regard to any dispute concerning the supervisory status of the employee occupying such position, . . . such a matter is appropriately raised through the filing of a petition for clarification of unit rather than under the unfair labor practice procedures." Accordingly, the Assistant Secretary denied NFFE's request for reversal of the ARD's dismissal of the complaint.

In your petition for review on behalf of NFFE, you contend that it was arbitrary and capricious for the Assistant Secretary to dismiss this case in view of the fact that a prima facie case had been established. In this regard, you allege that the Assistant Secretary considered only the activity's factual allegations and ignored the evidence submitted by NFFE. You further allege that the decision of the Assistant Secretary presents a major policy issue as to "[w]hether the [activity's] action [in] unilaterally changing the supervisory structure of the Psychology Service amounts to a change in working condition[s] about which the [activity] had to consult and confer or negotiate with the Local."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present any major policy issues.

With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that he acted without reasonable justification in reaching his decision herein. Section 6(d) of the Order provides: "The Assistant Secretary shall prescribe regulations needed to administer his functions under this Order," one of which is to "decide unfair labor practice complaints . . ." pursuant to section 6(a)(4) of the Order. Section 203.8(a) of the Assistant Secretary's regulations provides:

> If the Assistant Regional Director determines that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint.

Further, Section 203.6(e) states:

> The complainant shall bear the burden of proof at all stages of the proceeding regarding matters alleged in its complaint . . . .

As the Council previously noted in Department of the Army, Indiana Army Ammunition Plant, Charlestown, Indiana, FLRC No. 74A-90 (May 9, 1975), Report No. 69, the foregoing regulations were promulgated by the Assistant Secretary pursuant to the Order and consistent with the Study Committee Report and Recommendations, which provides that "[i]f the Assistant Secretary finds that . . . a reasonable basis for the complaint has not been established, . . . he may dismiss the complaint." His decision in the instant case was based upon the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish the above regulations, or that he applied these regulations in a manner inconsistent with the Order in the circumstances of this case. Nor does your appeal disclose any relevant evidence that the Assistant Secretary failed to consider in reaching his conclusion that a reasonable basis for NFFE's complaint had not been established.

As to the alleged major policy issue regarding whether the activity's actions amount to a change in working conditions about which it had an obligation to negotiate with the local, in the Council's view, noting that the parties do not dispute the fact that the individual occupying the disputed supervisory position is in fact a supervisor, the Assistant Secretary's finding that the activity was under no obligation to meet and confer concerning the establishment and filling of a supervisory position does not raise a major policy issue warranting review.1/

1/ In this regard, the Council, in its decision in Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (March 3,

(Continued)

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues,[2] your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

S. Shochet
VA

(Continued)

1976), has held as nonnegotiable a union proposal concerning promotion procedures for filling of threshold supervisory positions, stating (at 3-4):

> [U]nder the Order, supervisors and, hence, supervisory positions are structurally and functionally a part of management. This status results in, as well as being underscored by, their exclusion from any bargaining unit. [Therefore], the proposal solely relates to procedures for the filling of non-unit positions, which positions are concerned with management responsibilities and the performance of management functions. It clearly does not relate to the personnel policies and practices affecting the bargaining unit which are encompassed within the bargaining obligation under section 11(a). . . . Hence, . . . the union's proposal is outside the bargaining obligation established by section 11(a) of the Order. . . .

2/ Furthermore, your contention that the Assistant Secretary's decision as to the appropriate procedure for resolving a dispute concerning supervisory status is inconsistent with the Council's previous ruling in Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3253, FLRC No. 75A-92 (November 12, 1975), Report No. 89, does not present any basis for review. In so ruling, however, we do not interpret the Assistant Secretary's decision herein as foreclosing the resolution of disputes involving the inclusion or exclusion of positions from a bargaining unit through the use of unfair labor practice procedures under all circumstances. Rather, we decide only that his determination in this regard, based upon the particular facts and circumstances of this case, raises no major policy issue.

246-469 O - 78 - 16

U.S. Department of the Army, U.S. Army Materiel Command, Headquarters, Assistant Secretary Case No. 22-6280 (CA). The Assistant Secretary, upon a complaint filed by National Federation of Federal Employees, Local 1332 (NFFE) (which alleged that the activity violated section 19(a)(1), (5) and (6) of the Order by establishing an Employee Council to deal with matters affecting the working conditions of unit employees without first negotiating with NFFE as their exclusive representative, and through its establishment communicating directly with unit employees thereby undermining NFFE's following), found, in agreement with the Assistant Regional Director (ARD), that further proceedings on the complaint were unwarranted inasmuch as the evidence presented established that NFFE acquiesced in the establishment of the council. The Assistant Secretary therefore denied NFFE's request for review seeking reversal of the ARD's dismissal of the complaint. NFFE appealed to the Council, alleging that the Assistant Secretary's decision presented a major policy issue.

Council action (April 12, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not present a major policy issue, and NFFE neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied NFFE's petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

April 12, 1976

Ms. Lisa Renee Strax
Legal Department
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: U.S. Department of the Army, U.S. Army Materiel Command, Headquarters, Assistant Secretary
Case No. 22-6280 (CA), FLRC No. 75A-125

Dear Ms. Strax:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the agency, in the above-entitled case.

In this case, according to the petition for review and attachments thereto, on February 28, 1975, the U.S. Department of the Army, U.S. Army Materiel Command, Headquarters (the activity) contacted National Federation of Federal Employees, Local 1332 (NFFE), and requested that it designate a representative to sit on a parking-restaurant committee. On March 5, 1975, the activity announced that the "AMC Headquarters Employee Council," consisting of management and union representatives,[1/] had been established for the purpose of providing an informal channel of communications between civilian and military personnel of the activity and the private corporation responsible for parking, cafeteria and building operations at the facility in which the activity is located. Included among the Council's functions were monitoring parking, cafeteria and building operations, evaluating employee suggestions, complaints and grievances, and representing the work force in meetings with the private corporation. NFFE designated a representative who attended and participated in two Employee Council meetings. Nevertheless, NFFE thereafter charged the activity with violating section 19(a)(1), (5) and (6) of the Order by establishing the Employee Council to deal with matters affecting the working conditions of unit employees without first negotiating with NFFE as their exclusive representative, and through its establishment communicating directly with unit

1/ The composition of the Council included one representative from each of the unions holding exclusive recognition at the activity: NFFE Local 1332, AFGE Local 2 and AFGE Local 1052.

employees thereby undermining NFFE's following. In response, the activity again indicated that the purpose of the Employee Council was to have informal but concerted management and employee communications with the corporate officials who manage the privately-owned building to request improvements on matters which the lease agreement placed beyond the control of the activity or of the Federal Government. The activity further stated that NFFE and the other labor organizations representing its employees had been consulted prior to the establishment of the Employee Council. NFFE subsequently filed a complaint which repeated the allegations contained in its charge.

The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), found that further proceedings were unwarranted inasmuch as the evidence presented established that NFFE acquiesced in the establishment of of the Employee Council.2/ He therefore denied NFFE's request for review seeking reversal of the ARD's dismissal of the complaint.

In your petition for review on behalf of NFFE, you allege that the Assistant Secretary's decision presents a major policy issue as to "[w]hether a party's acquiescence to a given proposal may be found from their limited participation when it was performed under mistaken circumstances, as are presented in the instant case." In this regard, you assert that NFFE Local 1332 was never given the opportunity to request negotiations regarding the Employee Council, that NFFE was not given sufficient time in which to request negotiation regarding the Employee Council, and that its designated representative's brief participation in the Employee Council did not constitute ratification.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue, and you do not allege, nor does it appear, that his decision was arbitrary and capricious. In the Council's view, the Assistant Secretary's determination in the instant case that NFFE "acquiesced" in the establishment of the Employee Council does not raise a major policy issue warranting review. Thus, your appeal herein takes issue only with the determination of the Assistant Secretary that NFFE's actions, in the circumstances of this case, constituted acquiescence in the establishment of the Employee Council. Your contentions therefore constitute, in effect, nothing more than disagreement with the Assistant Secretary's factual findings and therefore do not present a basis for Council review.

2/ The Assistant Secretary further noted, however, that NFFE's acquiescence "would not relieve the Activity of its obligation under Section 11(a) of the Order to meet and confer with [NFFE] concerning matters considered by the [Employee] Council which affect unit employees." No issue has been raised before the Council concerning this statement, and in its consideration of and action upon the petition for review herein the Council does not pass upon this statement.

Because the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

W. J. Schrader
Army

Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, A/SLMR No. 578. The Assistant Secretary dismissed the complaint of National Federation of Federal Employees, Local 1167 (NFFE), which alleged that the activity's suspension of an employee of the activity, who was also the local union president, was violative of section 19(a)(1) and (2) of the Order. NFFE appealed to the Council, contending that the Assistant Secretary's decision presented major policy issues.

Council action (April 12, 1976). The Council held that NFFE's petition for review did not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary did not present a major policy issue, and NFFE neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, since NFFE's appeal failed to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure, the Council denied NFFE's petition.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

April 12, 1976

Ms. Lisa Renee Strax
Legal Department
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida, A/SLMR No. 578, FLRC No. 75A-129

Dear Ms. Strax:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, National Federation of Federal Employees, Local 1167 (the union) filed an unfair labor practice complaint against the Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida (the activity). A notice of hearing subsequently was issued concerning those portions of the complaint alleging that the activity had violated section 19(a)(1) and (2) of the Order. As found by the Administrative Law Judge (ALJ) and adopted by the Assistant Secretary, the union was the exclusive bargaining representative of the Air Force civilian employees at the activity. An employee of the activity, who was also President of the union, was engaged in performing his duties as a flight line aircraft mechanic when another employee approached him for several moments on union business during an "engine run up" on the flight line. The "engine run up" is designed to test whether a plane is operational after corrective maintenance has been performed. Five days after this incident, the President of the union was told by his supervisor that the presence of the other employee, who was an unauthorized individual in the flight line area, constituted a safety violation. The union President informed his supervisor that he had nothing to do with the other employee's appearance at the line and disputed that such occurrence constituted a safety violation. Since the union President refused to concede or acknowledge that a serious safety violation existed during the engine run up which should be avoided in the future, he was eventually suspended for five days.

The Assistant Secretary, in agreement with the ALJ and based upon his reasoning, ordered that the union's complaint be dismissed. Rejecting the union's contention that the suspension was discriminatorily motivated and hence violative of section 19(a)(1) and (2) of the Order, it was concluded that the evidence adduced was not persuasive that the suspension of the union President was motivated by his union activity. It was noted

in this regard that the union President was not censured for the nature of the discussion on the flight line, and it could not be concluded, based on the evidence adduced, that the supervisor was concerned about anything other than safety conditions during the run up.

In your petition for review on behalf of the union, you contend, in summary, that the Assistant Secretary's decision presents major policy issues as to the applicability of cited Assistant Secretary decisions in which, you assert, he found conduct similar to that alleged herein to be violative of the Order. You further assert that the Assistant Secretary's decision presents a major policy issue as to whether circumstantial evidence is sufficient to support the charge brought herein.

In the Council's view, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present a major policy issue, and you do not allege, nor does it appear, that his decision was arbitrary and capricious.

With respect to your contention, in effect, that the failure of the Assistant Secretary to apply his previous decisions raises major policy issues, your appeal does not establish that the instant decision is inconsistent with previous decisions of the Assistant Secretary or with other applicable precedent, noting particularly that in the instant case it was concluded that the evidence adduced was not persuasive that the suspension was motivated by union activity. As to your contention that the decision presents a major policy issue concerning whether circumstantial evidence is sufficient to support the charge brought herein, such assertion, in the circumstances of this case, in essence constitutes nothing more than disagreement with the Assistant Secretary's conclusion that the facts presented did not constitute a violation of the Order and, as such, does not present a major policy issue warranting Council review.

Since the Assistant Secretary's decision does not present a major policy issue, and since you do not contend that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

Capt. E. K. Brehl
Air Force

FLRC No. 75A-110

Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO and Norfolk Naval Shipyard (Seidenberg, Arbitrator). The arbitrator dismissed the grievance, which sought payment by the activity of a high work environmental wage differential under the related provision in the parties' agreement, finding that the grievance was not arbitrable because the work situation giving rise to the grievance could not be subsumed under any of the work situations set forth in the applicable agreement provision. The union filed exceptions to the arbitrator's award with the Council, alleging (1) that the award violates the Federal Personnel Manual; and (2) in substance, that the arbitrator reached an incorrect result in his interpretation of the negotiated agreement.

Council action (April 13, 1976). As to (1), the Council held that the union's petition failed to present the necessary facts and circumstances in support of the exception. As to (2), the Council ruled that the exception provided no basis for acceptance of the union's petition under section 2411.32 of the Council's rules. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

April 13, 1976

Mr. Richard F. Lake, President
Tidewater Virginia Federal Employees
Metal Trades Council
2700 Airline Boulevard
P. O. Box 3371 Olive Branch Station
Portsmouth, Virginia 23701

Re: Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO and Norfolk Naval Shipyard (Seidenberg, Arbitrator), FLRC No. 75A-110

Dear Mr. Lake:

The Council has carefully considered your petition for review of an arbitrator's award in the above-entitled case.

As stated in the arbitration award, the grievance involved electricians working in fuel tanks of the U.S.S. Kennedy at Norfolk Naval Shipyard. The fuel tanks varied in depth but did not exceed a depth of 25 to 30 feet. The electricians were provided staging in all the tanks. In the larger tanks scaffolding with boards and rails was supplied, while in the smaller tanks, stage boards 12 inches wide were placed on a horizontal beam and wedged against the side of the tank.

A grievance was filed founded upon Article 13, Section 2[1/] of the parties' collective bargaining agreement demanding payment by the activity of a 25

1/ According to the award, Article 13, Section 2 provides:

> Section 2. Where the Employer determines that an employee is assigned to and performs within one of the authorized work situations described in this Section, the appropriate environmental pay differential will be paid.
>
> PART I Payment on Basis of Actual Exposure
>
> A. High Work Differential Differential 25%
>
> (1) Working on any structure at least 100 feet above the ground, deck, floor, or roof, or from the bottom of a tank or pit.
>
> (2) Working at a lesser height

(Continued)

percent high work environmental wage differential because the activity had failed to furnish the grievant safe scaffolding, had failed to furnish the grievant staging upon which footing was sure, and had failed to furnish the grievant a stable structure upon which to work.

The activity asserted that the grievance was not arbitrable because the work situation in issue was not an authorized work situation within the purview of Article 13, Section 2. It further contended that even if the grievance were arbitrable, the work in issue did not qualify for a 25 percent differential under Article 13, Section 2. The issue submitted to the arbitrator was therefore in two parts:

(1) Is the grievance arbitrable?

(2) If the grievance is arbitrable, is the grievant entitled to the environmental pay set forth in Article 13, Section 2?

In response to the threshold issue of whether the grievance was arbitrable, the arbitrator dismissed the grievance finding that the grievance was not arbitrable because the work situation giving rise to the grievance could

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(Continued)

(a) if the footing is unsure or the structure is unstable; or

(b) if safe scaffolding, enclosed ladders or similar protective facilities are not adequate (for example, working from a swinging stage, boatswain chair, a similar support); or

(c) if adverse conditions such as darkness, steady rain, high wind, icing, lightning or similar environmental factors rendering working at such height(s) hazardous . . . .

When the conditions set forth above are satisfied, the work situations listed below shall be paid:

Authorized work situations:

1. Installation or removal of staging at ship masts or other high structures at least three levels above ground level.

2. Working from the boatswain chair, and swinging stages.

3. Working on masts and yardarms where staging is not provided.

4. Performing repair operations on the top of crane cabs or booms of portal cranes outside of catwalks or guard rails.

5. Working from masts, staging, or yardarms under adverse conditions such as steady rain, high wind, icing, lightning or similar environmental factors render working at such heights hazardous.

not be subsumed under the five authorized work situations set forth in Article 13, Section 2 of the agreement. Under these circumstances, the arbitrator concluded that the union's relief was through negotiation as set forth in Article 13, Section 3[2/] of the agreement.

The union requests that the Council accept its petition for review of the arbitrator's award based upon its two exceptions discussed below.

Under section 2411.32 of the Council's rules of procedure, review of an arbitrator's award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception the union contends that the award violates the Federal Personnel Manual (FPM). The Council will grant review of an arbitrator's award where it appears, based upon facts and circumstances described in the petition, that the exception to the award presents grounds that the award violates appropriate regulation -- the FPM. In support of this exception, the union cites FPM supplement 532-1, appendix J-2,[3/] and asserts that

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2/ According to the award, Article 13, Section 3 provides:

> If after this Agreement is in effect, either party believes that an environmental pay work situation, in addition to those authorized in Section 2, has developed; such issue shall be resolved through negotiation between the parties rather than grievance and arbitration.

In this regard it should be noted that FPM supplement 532-1, subchapter S8-7g(3) provides with respect to determining local situations when environmental differentials are payable that:

> Nothing . . . shall preclude negotiations through the collective bargaining process for determining the coverage of additional local situations under appropriate categories in appendix J or for determining additional categories not included in appendix J for which environmental differential is considered to warrant referral to the Commission for prior approval. . . .

3/ Federal Personnel Manual supplement 532-1, appendix J provides in pertinent part:

> 2. <u>High work</u>.
>
> . . . . . .
>
> b. Working at lesser height:
>
> (1) If the footing is unsure or the structure is unstable; or
>
> (2) If safe scaffolding, enclosed ladders or other similar protective facilities are not adequate . . . .

the work performed by the grievant was hazardous as defined therein. However, the union has not established a nexus between the FPM provisions defining categories of hazardous work and the arbitrator's award dismissing the instant grievance as nonarbitrable under the negotiated agreement. In this regard, it should be emphasized that the question decided by the arbitrator in this case was not whether the work performed by the grievant was compensable as hazardous work of an unusually severe nature as defined in FPM supplement 532-1, appendix J-2, but rather whether the parties' negotiated grievance procedure encompassed the instant dispute. The arbitrator decided that the grievance procedure did not encompass the dispute and dismissed the grievance as nonarbitrable. Therefore, the union's petition fails to present the necessary facts and circumstances in support of this exception that the award violates the FPM and no basis is thus provided for the acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception the union contends that the arbitrator has rewarded the activity for breach of the collective bargaining agreement. Thus, the union is, in substance, contending that the arbitrator reached an incorrect result in his interpretation of the negotiated agreement. However, the Council has consistently held that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. E.g., American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44; Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (January 30, 1976), Report No. 96. Therefore, this exception likewise provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the union's petition is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: T. Haycock
Dept. of the Navy

Social Security Administration, Headquarters Bureaus and Offices in Baltimore, Maryland and SSA Local 1923, American Federation of Government Employees, AFL-CIO (Feldesman, Arbitrator). The arbitrator determined that the activity violated the parties' current and immediately preceding agreement by failing: to comply with the applicable processing and recording requirements concerning details; to promote the grievant temporarily to the particular position involved; and to pay her commensurately for the period of time she performed the duties of that position. Accordingly, the arbitrator sustained the grievance and ordered the activity to process and place in the grievant's personnel file all necessary papers indicating her temporary promotion to the subject position for the period of time involved and to compensate her with appropriate backpay. The agency filed exceptions to the arbitrator's award with the Council, alleging (1) that the award violates applicable law and appropriate implementing regulations; and (2) that the award violates section 12(b)(2) of the Order. The agency also requested a stay of the arbitrator's award.

Council action (April 13, 1976). The Council held that the agency's petition did not set forth the necessary facts and circumstances to support its exceptions and, therefore, the exceptions provided no basis for acceptance of the petition under section 2411.32 of the Council's rules. Accordingly, the Council denied the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the Council denied the agency's request for a stay.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

April 13, 1976

Mr. Irving L. Becker
SSA Labor Relations Officer
Social Security Administration
6401 Security Boulevard
Room G-2608, West High Rise Building
Baltimore, Maryland 21235

Re: Social Security Administration, Headquarters Bureaus and Offices in Baltimore, Maryland and SSA Local 1923, American Federation of Government Employees, AFL-CIO (Feldesman, Arbitrator), FLRC No. 75A-119

Dear Mr. Becker:

The Council has carefully considered your petition for review of an arbitrator's award, and the union's opposition thereto, in the above-entitled case.

According to the arbitrator's award, this case arose upon the filing of a grievance alleging that the activity ignored and violated its obligations under Article 17, Section C., Subsections 2 and 3[1/] of their

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1/ According to the award, Article 17, Section C., Subsections 2 and 3 of the parties' collective bargaining agreement state, in pertinent part:

Section C. Details

. . . . . .

Subsection 2. Details are intended only for meeting temporary needs of the Agency's work program when necessary services cannot be obtained by other desirable or practical means. The Administration is responsible for keeping details within the shortest practicable time limits and assuring that the details do not compromise the open-competitive principle of the merit system or the principles of job evaluation. Except for brief periods, employees should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally the employee should be given a temporary promotion instead. If a detail is made to a higher grade position in accordance with Article 15 Section E. 2, or to a position with known promotion potential, it must be made under competitive procedures. Should the requirements of the Agency necessitate an

(Continued)

collective bargaining agreement[2/] by failing to promote the grievant temporarily to a GS-4 position, which tasks the arbitrator found she performed from February 17, 1974, to March 17, 1975, and to pay her commensurately for that period.

The grievant was hired on August 2, 1972, as a GS-2 Clerk-Typist. On March 5, 1973, the grievant was promoted to a GS-3 Clerk-Typist. From March 5, 1973, until February 17, 1974, the grievant, after 1 month of training, occasionally performed the work of the GS-4 Foreign Claims Clerk position. On February 17, 1974, when the incumbent of the GS-4 Foreign Claims Clerk was promoted and transferred elsewhere, the grievant

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(Continued)

> employee's being detailed to a lower-level position, this will in no way adversely affect the employee's salary, classification, or job standing.
>
> Subsection 3. Employees detailed to another position shall be given a job description or functional statement if such assignment is for 30 calendar days or more. Details in excess of 30 calendar days will be reported on Standard Form 52, "Request for Personnel Action," and maintained as a permanent record in the Official Personnel Folders. For details to higher positions of more than 10 consecutive work-days but less than 30 calendar days, the Administration shall provide employees with a memorandum for their Official Personnel Folder.

According to the award, Article 15, Section E. 2 of the parties' collective bargaining agreement states, in pertinent part:

> Section E. Applicability of Competitive Procedures
>
> . . . . . .
>
> 2. Reassignment or Detail: Competitive procedures are required for a reassignment or for a detail of over 30 days, where the reassignment or detail; (a) puts an employee in line for a promotion to a particular job or class of jobs; or (b) may be expected to result in greater opportunity for promotion based upon past patterns of experience.

2/ Currently in force between the parties is their 1974-1977 collective bargaining agreement, which by its terms was made effective as of September 24, 1974, and is to continue in operation until July 1, 1977. Another agreement had preceded this one. Thus, the timespan of the grievance, from February 17, 1974, until March 17, 1975, brings into play both agreements. However, the arbitrator found the relevant language difference between the agreements to be of comparatively minor significance and thus quoted only Article 17, Section C., Subsections 2 and 3 of the currently valid agreement in his decision. Language identical to that of Article 15, Section E. 2 was also contained in the preceding agreement, except that "30 days" read "60 days."

completely assumed the work which had been done by the incumbent. The grievant continued to perform that work until March 17, 1975, when the grievant was promoted and assigned to a completely different job.

The arbitrator determined "that the grievant became in every essential respect the GS-4 Foreign Claims Clerk," and concluded:3/

> . . . [T]he Employer violated Article 17 C. 3 of the current contract and the one immediately preceding by not complying with its processing and recording requirements; and Article 17 C. 2 of both agreements by failing to promote the Grievant temporarily to the Foreign Claims Clerk Job under the GS-4 Claims Clerk (Typing) Position Description, described above (Agency Position No. 50289), and failing to pay her commensurately for the period February 17, 1974 to March 17, 1975.

Accordingly, the arbitrator sustained the grievance and ordered the activity to process and place in the personnel file of the grievant all necessary papers indicating her temporary promotion to the position of GS-4 Claims Clerk for the period February 17, 1974, to March 17, 1975; and also to compensate her with backpay in an amount equal to the difference between what she was actually paid by the activity and the rate of pay for the GS-4, Step 1 level during that period.

The agency requests that the Council accept its petition for review of the arbitrator's award on the basis of two exceptions discussed below and requests a stay of the award. The union filed an opposition.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception, the agency contends that the award violates applicable law and appropriate implementing regulations, namely, title 5, Code of Federal Regulations, chapter 1, subchapter B, part 335 and the

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3/ In so deciding, the arbitrator stated that he had carefully considered the decisions of the Comptroller General and the Council which had been brought to his attention, and that he considered his award in this particular case "in harmony with pertinent Federal law and regulations, valid under the authority of the Comptroller General's decisions cited by the Union, and necessary to vindicate Executive Order 11491, as amended, dealing with Labor-Management Relations in the Federal Service."

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Federal Personnel Manual, chapter 335, subchapter 4-3[4/] and 4-4.[5/] In this regard, the agency asserts that it would be perpetuating a violation of the FPM, chapter 335, subchapters 4-3 and 4-4 if it complies with the award in that those provisions require the utilization of competitive promotion procedures for temporary promotions which exceed 120 days, and the instant award calls for a noncompetitive temporary promotion for a period far exceeding 120 days.[6/]

4/ FPM, chapter 335, subchapter 4-3, provides in pertinent part:

4-3. PROMOTIONS AS EXCEPTIONS TO COMPETITIVE PROCEDURES

a. General provisions. (1) An agency may make a promotion as an exception to competitive promotion procedures in any of the situations identified below if it finds the exception appropriate and if its internal instructions provide for exception under the circumstances.

. . . . . .

e. Promotion to a higher grade for 120 days or less. An agency may make a temporary promotion limited to 120 days or less as an exception to competitive promotion procedures. This exception is not to be used to circumvent competitive promotion requirements by a series of temporary higher-level assignments. Therefore, competitive promotion procedures must be used if after completing the period of service under temporary promotion an employee will have spent more than 120 days (prior service under details and previous temporary promotions included) in high-grade positions during the preceding year.

5/ FPM, chapter 335, subchapter 4-4, provides in pertinent part:

4-4. TEMPORARY PROMOTIONS

. . . . . .

b. Making a temporary promotion. Competitive promotion procedures must be used when a temporary promotion will exceed 120 days. When a temporary promotion is made as an exception to competitive procedures (see section 4-3e), any extension beyond 120 days must comply with these procedures.

6/ As the union points out in its opposition to the agency's petition, "[t]he SSA does not . . . contest Grievant's entitlement to a temporary promotion with backpay during the initial four months (120 days) of her GS-4 'assignment.' . . ." See Comptroller General Case No. B-181173 (November 13, 1974) (an arbitrator's finding that an agency violated its

(Continued)

The Council will grant review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates appropriate regulation. However, we are of the opinion that the agency's petition does not contain a description of facts and circumstances to support its exception that the award violates appropriate regulation.7/ The Civil Service Commission, through its Board of Appeals and Review (now Appeals Review Board) has interpreted the applicable FPM regulations concerning details and held that the discretionary authority of an agency official to grant a temporary promotion to an employee detailed to a higher grade position or to assign an employee to the position without a temporary promotion lasts, at most, for 120 days. At that point the agency must seek the approval of the Commission for any extension of the detail. The Comptroller General has adopted the position of the Civil Service Commission and held in Comptroller General Case No. B-183086 (December 5, 1975):

> . . . [A]n agency's discretionary authority to retain an employee on detail to a higher grade position continues no longer than 120 days and that the agency must either seek prior approval of the Commission for an extension of the detail or temporarily promote the detailed employee at the end of the specified time period. Therefore, where an agency fails to seek prior approval of the Commission to extend an employee's detail period in a higher grade position past 120 days, the agency has a mandatory duty to award the employee a temporary promotion if he continues to perform the higher grade position.8/ [Emphasis in original; footnote added.]

(Continued)

collective bargaining agreement by failing to give employees temporary promotions when it had been known in advance that the details to the higher grade positions would extend beyond 60 days constituted an unjustified and unwarranted personnel action within the purview of the Back Pay Act, warranting retroactive backpay to the first day of the details).

7/ See National Archives and Records Service and American Federation of Government Employees, Local 2578 (Strongin, Arbitrator), FLRC No. 75A-74 (October 10, 1975), Report No. 87.

8/ In a more recent decision, Comptroller General Case No. B-183142 (February 24, 1976), the Comptroller General relied on his decision in Comptroller General Case No. B-183086 (December 5, 1975) in holding that employees who had been detailed beyond 120 days in agencies whose officials failed to obtain prior Civil Service Commission approval to extend the detail beyond 120 days, were entitled to a temporary retroactive promotion and backpay from the 121st day after the detail began until the detail was terminated, even though the employee was not officially detailed, but rather "informally assigned" to the higher grade position, as in this instant case. Accord, Comptroller General Case Nos. B-184990 (February 20, 1976); B-185794 (February 20, 1976); B-185795 (February 24, 1976).

Moreover, it appears that the agency is, in effect, disagreeing with the arbitrator's interpretation of the provision which refers to "brief periods" contained in Article 17, Section C., Subsection 2 of the collective bargaining agreement, set forth, supra, in footnote 1. That collective bargaining agreement provision essentially corresponds to the FPM, chapter 300, subchapter 8-4e.9/ The Council, based upon interpretation by the Civil Service Commission of its own issuances, has held that FPM, chapter 300, subchapter 8-4e was intended as general advice to agencies on sound management principles, and that the subchapter did not speak to the question of exactly what constitutes a "brief period" or when a temporary promotion becomes preferable to a detail. Such determinations were viewed by the Commission as a matter of agency discretion.10/ By validly agreeing during negotiations to incorporate into the collective bargaining agreement, which contained a grievance and arbitration procedure, a matter over which the activity has discretion, the activity agreed that if a dispute was submitted to arbitration, an arbitrator had the authority to interpret and apply the provisions of the collective bargaining agreement, including the matter over which the agency had discretion, to the particular facts of the grievance.11/ The arbitrator, in essence, determined that a detail from February 17, 1974, until March 17, 1975, was not a detail for a "brief period" within the meaning of Article 17, Section C., Subsection 2 of the parties' collective bargaining agreement, as interpreted by him. The Council has held on numerous occasions that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment. See, e.g., American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44 and Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (January 30, 1976), Report No. 96. Therefore, the first exception provides no basis for acceptance of your petition under section 2411.32 of the Council's rules.

9/ FPM, chapter 300, subchapter 8-4e, states, in pertinent part:

> e. Details to higher grade positions. Except for brief periods, an employee should not be detailed to perform work of a higher grade level unless there are compelling reasons for doing so. Normally, an employee should be given a temporary promotion instead. . . .

10/ Local Lodge 2424, IAM-AW and Aberdeen Proving Ground Command, FLRC No. 72A-37 (May 22, 1973), Report No. 39.

11/ Cf. Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88 (July 24, 1975), Report No. 78.

In its second exception, the agency contends that the award violates section 12(b)(2)[12/] of the Order. While this exception states a ground upon which the Council will grant review of an arbitrator's award, the Council is of the opinion that the exception is not supported in the petition by the necessary facts and circumstances. The arbitrator found that the activity had "assigned" the grievant the work of the GS-4 Foreign Claims Clerk and had approved, acquiesced in, and accepted "the fruits of that work" performed by the grievant. Thus, the activity had already made its own decision as to the filling of the position and the arbitrator's award ordered only that the grievant be paid "commensurately for the more valuable services" which she already had performed pursuant to her assignment by the activity, and that her record should reflect this. Therefore, the second exception provides no basis for acceptance of your petition under section 2411.32 of the Council's rules.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the agency's request for a stay of the award is denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: W. J. Mahannah II
AFGE, Local 1923

12/ Section 12 of Executive Order 11491, as amended, states, in pertinent part:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements—
>
> . . . . . .
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations—
>
> . . . . . .
>
> (2) to hire, promote, transfer, assign, and retain employees in positions within the agency . . .;

Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629. The International Federation of Professional and Technical Engineers, Local 174 (IFPTE) appealed to the Council from the Assistant Secretary's decision, order and direction of election wherein, among other things, the Assistant Secretary directed a self-determination election among the police, security guards and detectives at the activity, in which election IFPTE is to be provided a place on the ballot. Such election has not been conducted and no certification of the results or certification of representative has issued. IFPTE also requested a stay pending Council determination on its appeal.

Council action (April 21, 1976). Since a final decision had not been rendered by the Assistant Secretary on the entire proceeding before him, the Council, pursuant to section 2411.41 of its rules, denied review of IFPTE's interlocutory appeal, without prejudice to the renewal of IFPTE's contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. The Council likewise denied IFPTE's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

April 21, 1976

Mr. Thomas Martin
Attorney at Law
19626½ South Normandie Avenue
Torrance, California 90502

Re: Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629, FLRC No. 76A-53

Dear Mr. Martin:

Reference is made to your petition for review and request for a stay of the Assistant Secretary's decision, order and direction of election in the above-entitled matter on behalf of the International Federation of Professional and Technical Engineers, Local 174 (IFPTE).

In his subject action, from which you are appealing, the Assistant Secretary, among other things, directed a self-determination election among the police, security guards and detectives at the activity, in which election IFPTE is to be provided a place on the ballot. Such election has not been conducted and no certification of the results or certification of representative has issued. Thus, no final disposition of the entire case has been rendered.

Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of a decision of the Assistant Secretary until a final decision has been rendered on the entire proceeding before him. More particularly, in a case such as here involved, the Council will entertain an appeal only after a certification of representative or of the results of the election has issued, or after other final disposition has been made of the entire representation matter by the Assistant Secretary.

Since a final decision has not been so rendered in the present case, your appeal is interlocutory and is hereby denied, without prejudice to the renewal of your contentions in a petition duly filed with the Council after

a final decision on the entire case by the Assistant Secretary. Your further request for a stay pending decision on your appeal is likewise denied.

For the Council.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Dept. of Labor

B. L. Mayes
Navy

R. Castle, Jr.
Teamsters

R. Griem
IBPO

FLRC No. 75A-122

Department of the Navy, Philadelphia Naval Regional Medical Center, A/SLMR No. 558. The Assistant Secretary dismissed the clarification of unit petition filed by the activity, which requested, in effect, that nonprofessional dispensary employees at various naval facilities in a four-state area (some of whom were represented in broad collective bargaining units at those facilities by labor organizations, including the Philadelphia Metal Trades Council, the intervenor in the instant proceeding before the Assistant Secretary), who had been assigned administratively to the activity as the result of a reorganization, be accreted to a unit of nonprofessional employees at the Philadelphia Naval Hospital exclusively represented by the American Federation of Government Employees, AFL-CIO. The agency appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (April 23, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision did not appear in any manner arbitrary and capricious or present a major policy issue. Accordingly, the Council denied review of the agency's appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

April 23, 1976

Mr. A. Di Pasquale, Director
Labor & Employee Relations Division
Office of Civilian Manpower Management
Department of the Navy
Washington, D.C. 20390

Re: Department of the Navy, Philadelphia Naval Regional Medical Center, A/SLMR No. 558, FLRC No. 75A-122

Dear Mr. Di Pasquale:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the Philadelphia Metal Trades Council, AFL-CIO, in the above-entitled case.

In this case, according to the findings of the Assistant Secretary and based upon the entire record, the American Federation of Government Employees, AFL-CIO (AFGE) exclusively represented a unit of some 448 nonprofessional civilian employees at the Philadelphia Naval Hospital. Other labor organizations, including the intervenor in this proceeding, the Philadelphia Metal Trades Council (MTC), held exclusive recognition for collective bargaining units at various naval facilities located in Pennsylvania, New Jersey, Maryland, and Delaware. Some 40 nonprofessional dispensary employees were included within these broad bargaining units located in the four-state area. On January 1, 1973, through a reorganization, the Chief of Naval Operations directed the establishment of the Philadelphia Naval Regional Medical Center (the activity), which provided that the 13 dispensaries, including those whose employees were represented by other labor organizations, be placed under the administrative control of the Medical Center. Thereafter, the activity filed a unit clarification (CU) petition with the Assistant Secretary requesting, in effect, that the nonprofessional dispensary employees who had been assigned administratively to the activity should be accreted to the unit of nonprofessional employees at the Naval Hospital exclusively represented by AFGE, since such dispensary employees no longer shared a community of interest with the other nondispensary employees at the various locations where the dispensaries are located.

The Assistant Secretary determined that the only issue to be considered was:

> . . . whether the employees of the various dispensaries have, as a result of a reorganization, accreted to the exclusively recognized unit at the Philadelphia Naval Hospital, which unit's continued existence after the reorganization is not deemed to be properly challenged in the instant proceeding.

The Assistant Secretary, after reviewing the circumstances of the Hospital and dispensaries, concluded:

> Under all of these circumstances, I find insufficient basis to support the Activity-Petitioner's contention that the employees at the dispensaries have accreted to the unit at the Naval Hospital represented exclusively by the AFGE. In this regard, particular note was taken of the fact that, notwithstanding the reorganization, the employees at the various dispensaries have remained at the particular locations where they were located prior to the reorganization, performing the same work under the same immediate supervision as before. Moreover, the evidence failed to reveal any significant degree of interchange, transfer or commingling between the dispensaries' personnel and the Hospital employees. Accordingly, I find that the employees in the dispensaries have not accreted to the AFGE's existing exclusively represented unit at the Naval Hospital, and that the employees in the various dispensaries who are part of broader units at the particular facilities involved remain a part of those units. In these circumstances, I shall order that the petition herein be dismissed. [Footnote omitted.]

In your petition for review on behalf of the activity, you allege that ". . . the Assistant Secretary's determination that the employees of the dispensaries have not accreted to the AFGE's existing unit of exclusive recognition in the former Naval Hospital and that the employees in the various dispensaries who are part of broader existing [units] remain a part of those units, was arbitrary and capricious in the circumstances." In support of this allegation, you assert essentially that, as a result of the reorganization of medical facilities on January 1, 1973, all of the employees of the Naval Hospital and the dispensaries were commingled and subject to the direction and control of the activity. You further allege that a major policy issue is raised by ". . . the Assistant Secretary's failure to make an affirmative determination as to whether the proposed [unit] clarification promoted effective dealings or efficiency of agency operations . . ." as required by section 10(b) of the Order and Council decisions. In this connection, you assert that the accretion of dispensary personnel to the Medical Center would promote effective dealings and efficiency of agency operations.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision does not appear in any manner arbitrary and capricious or present a major policy issue. As to your contention that the Assistant Secretary was arbitrary and capricious in finding that there had been no accretion in the facts and circumstances of this case, in the Council's view it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. In this regard, your assertions as to the extent of employee commingling and the degree of direction and control exercised by the activity with regard to the dispensary employees constitute, in effect, nothing

more than disagreement with the Assistant Secretary's factual determinations and therefore provide no basis for review. Nor is a major policy issue presented, in the facts and circumstances of this case, by your allegation that the Assistant Secretary failed to make specific affirmative findings as to effective dealings and efficiency of agency operations. Thus, while appropriate unit determinations, including those arising in the context of a claimed accretion, require the proper application of the three criteria specified in section 10(b) of the Order, noting particularly the activity's failure to provide record evidence or argument to the Assistant Secretary as to whether and in what manner the proposed unit as clarified would promote effective dealings and efficiency of agency operations within the meaning of section 10(b) of the Order, no major policy issue has been raised warranting Council review. Department of the Navy, Alameda Naval Air Station, A/SLMR No. 6, FLRC No. 71A-9 (May 17, 1971), Report No. 8; cf. Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364, FLRC No. 74A-28 (May 9, 1975), Report No. 69.*/

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and presents no major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Dept. of Labor

R. Matisoff, Esq.
MTC

*/ Your contentions and supporting evidence offered for the first time to the Council that the accretion of dispensary employees to the existing Naval Hospital unit would promote effective dealings and efficiency of agency operations is not properly before the Council. See section 2411.51 of the Council's rules which provides, in pertinent part, that ". . . the Council will not consider evidence offered by a party . . . which was not presented in the proceedings before the Assistant Secretary . . . ." Moreover, such contentions and supporting evidence should more properly be presented to the Assistant Secretary who has the authority under section 6(a)(1) of the Order to "decide questions as to the appropriate unit for the purpose of exclusive recognition and related issues . . . ."

The Adjutant General, State of Illinois, Illinois Air National Guard, and National Guard Bureau, Washington, D.C., A/SLMR No. 598. The Assistant Secretary, in agreement with the Administrative Law Judge, found that the conduct of the agency in disapproving, pursuant to section 15 of the Order, a negotiated agreement between the activity and the Illinois Air Chapter, Association of Civilian Technicians, Inc., which agreement incorporated the specific changes sought by the agency head in two previous disapproval actions under section 15, constituted a violation of section 19(a)(1) of the Order; and that the activity violated section 19(a)(1) and (6) of the Order by its failure to implement that agreement. The agency appealed to the Council on behalf of itself and the activity, contending that the Assistant Secretary's decision presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (April 23, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision did not raise a major policy issue and the agency neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition. The Council likewise denied the agency's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

April 23, 1976

Mr. Wayne A. Robertson
Director of Personnel
Departments of the Army
and the Air Force
National Guard Bureau
Washington, D.C. 20310

Re: The Adjutant General, State of Illinois, Illinois Air National Guard, and National Guard Bureau, Washington, D.C., A/SLMR No. 598, FLRC No. 76A-1

Dear Mr. Robertson:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the union's opposition thereto, in the above-entitled case.

The pertinent facts, as found by the Assistant Secretary, are as follows: In this case the Illinois Air Chapter, Association of Civilian Technicians, Inc. (the union) and the Adjutant General, State of Illinois (the activity) signed a negotiated agreement, covering a unit of civilian technicians employed by a component of the activity, and forwarded it to the National Guard Bureau, Washington, D.C. (the agency) for its approval under section 15 of the Order.[1/] One of the provisions in the agreement, Article 18, provided for certain exceptions to the requirement that unit employees, all of whom are civilian technicians, wear the military uniform in the performance of their technician duties. An agency regulation then in effect required the wearing of military uniforms by civilian technicians, but permitted State Adjutants General to authorize exceptions to the requirement.

1/ At the time, section 15 read as follows:

> Sec. 15. Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved if it conforms to applicable laws, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities. A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement, or, if none, under agency regulations.

The agency, pursuant to section 15 of the Order, returned the agreement to the parties for certain changes, including the deletion of one phrase from Article 18. Before any action could be taken by the parties, however, bargaining was temporarily suspended due to an unrelated controversy involving the union's certification.[2/] After the certification was reinstated, the parties recommenced bargaining and revised the agreement in accordance with the agency head's requests. On January 19, 1973, the parties signed a second negotiated agreement which had been revised to bring it into conformity with the specific changes requested by the agency when it earlier rejected the initial agreement. However, on February 23, 1973, the agency again refused, pursuant to its section 15 authority, to approve the agreement. With respect to Article 18, the agency requested that two minor editorial changes be made so that the Article would be brought into conformity with the language of the agency regulation dealing with uniform wearing by civilian technicians. On March 26, 1973, the union and the activity signed a third agreement incorporating the specific changes sought by the agency in its February 23, 1973, disapproval action. On April 20, 1973, the agency, for the third time, refused to approve the agreement, this time basing its rejection solely on its conclusion that Article 18 of the agreement violated the agency regulation, stating that the revised agreement provision "represents a total distortion of the purpose and usage of that directive." As a result of the agency's third disapproval of the agreement, the activity took the position that it could no longer agree to a provision which allowed exceptions to the uniform wearing regulation and the agreement was never implemented.

Thereafter, according to the agency's petition for review, on November 9, 1973, the agency published a revised regulation withdrawing discretion from the State Adjutants General to authorize exceptions to the wearing of military uniforms by all technicians, and placing such authority solely at the agency head level.

The Assistant Secretary, in agreement with the Administrative Law Judge, found that the actions of both the agency and the activity violated the Order. Thus, the Assistant Secretary reasoned that:

> . . . [W]hile an agency may indicate to an activity, in the course of its Section 15 review of a proposed agreement, the specific changes it deems necessary to order to bring the negotiated agreement into conformity with agency regulations, in my view, the agency manifests an intent to frustrate the bargaining relationship between its subordinate activity and an exclusive representative by subsequently rejecting the very changes it has indicated are required in order for their agreement to conform to its regulations.

2/ See Illinois Air National Guard, 182d Tactical Air Support Group, A/SLMR No. 105, FLRC No. 71A-59 (November 17, 1972), Report No. 30.

Finding that the parties' second amended agreement, dated March 26, 1973, "incorporated the specific changes sought by the Agency in its February 23, 1973, disapproval action," the Assistant Secretary concluded that the agency's conduct:

> . . . constituted an undermining of the exclusive representative selected by the employees of the Activity and resulted in improper interference with, restraint, or coercion of unit employees by the Agency in the exercise of their rights assured under the Order in violation of Section 19(a)(1).

He further concluded that while the activity had negotiated with the union in good faith, it nevertheless had failed to implement the agreement after it had been brought into conformity with the changes sought by the agency pursuant to its section 15 review authority, "a valid and binding negotiated agreement which the Agency was obligated to approve," and thereby violated section 19(a)(1) and (6) of the Order.[3/] The Assistant Secretary thereupon ordered, among other things, that the agency approve the March 26 agreement and that the activity implement it.

In your appeal on behalf of the agency and the activity, you allege that the Assistant Secretary's decision presents two major policy issues. First, "[d]oes the Assistant Secretary have the authority, under the Order and Assistant Secretary rules, to order any agency to approve substantive contract provisions which violate existing agency policies and regulations previously determined to be outside the scope of negotiations?" In this regard, you contend, in essence, that the March 26, 1973, agreement does not conform to currently existing agency policies and regulations as required by section 12(a) and 15 of the Order, since the regulation promulgated by the agency in November 1973 made the issue of proper uniforms "a nonnegotiable, nonbargainable subject," and that the Assistant Secretary exceeded his authority by ordering the agency to approve an agreement containing a provision which conflicts with an existing agency regulation. Second, "[c]an the Assistant Secretary order a party to post a cease and desist order acknowledging the commitment of an unfair labor practice when that party adhered to the expressed and specific terms of a negotiated agreement?" In substance, you assert that the activity cannot be found to have refused to implement the agreement in violation of the Order, since the agreement specifically stated that it would not become effective until the agency approved it, and the agency never approved it.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not raise a major policy issue,

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3/ The Assistant Secretary dismissed the allegation in the complaint that the agency violated section 19(a)(6) of the Order, since he found that the agency had no obligation to meet and confer with the union concerning the agreement.

and you neither allege, nor does it appear, that his decision is arbitrary and capricious. With respect to your first contention that, in effect, the agency cannot comply with the Assistant Secretary's remedial order which requires approval of an agreement that conflicts with an existing agency regulation, no major policy issue is presented, in the circumstances of the case, warranting Council review. In this regard, we note particularly that you rely upon a regulation issued after the agency head's failure under section 15 of the Order to approve an agreement which the Assistant Secretary found had been specifically revised to meet all of the objections previously raised by the agency head. Likewise, the Council finds no major policy issue raised by the Assistant Secretary's order requiring the activity to post certain notices and to implement the previously executed agreement incorporating all of the specific changes sought by the agency. As the Council stated in Department of the Navy, Naval Plant Representative Office, Baltimore, Maryland, A/SLMR No. 486, FLRC No. 75A-59 (August 14, 1975), Report No. 80, section 6(b) of the Order, by its express terms, confers considerable discretion on the Assistant Secretary to fashion a remedy "he considers appropriate to effectuate the policies of [the] Order." In the Council's view, you have not demonstrated that he has either exceeded the scope of his authority under section 6(b) or that his remedial order herein is inconsistent with the policies of the Order in the circumstances of this case.[4/]

4/ As we noted above (fn. 3), the Assistant Secretary dismissed the complaint insofar as it alleged a violation of section 19(a)(6) by the agency herein. Such dismissal has not been appealed to the Council and accordingly is not properly before the Council for review. However, it should be noted that we do not interpret the Assistant Secretary's dismissal as foreclosing under all circumstances such a finding against an agency. That is, where an agency abuses its authority under section 15 of the Order, a finding of a violation of section 19(a)(6) by the agency would usually be appropriate. See United States Department of Agriculture and Agricultural Research Service, A/SLMR No. 519, FLRC No. 75A-65 (December 24, 1975), Report No. 94, wherein the Council denied review of a decision by the Assistant Secretary in which he found that agency management at an organizational level above the level of recognition had violated section 19(a)(6) by taking action inconsistent with section 15. In such circumstances, where higher level agency management is found to have violated section 19(a)(6) by refusing improperly under section 15 to approve a negotiated agreement and thereby preventing activity management at the level of recognition from implementing the agreement, a finding of a violation of section 19(a)(6) and (1) by the local activity solely for refusing to implement the disapproved agreement would not be appropriate. However, in the present case, the agency was not found to have violated section 19(a)(6); further, the Assistant Secretary's order that the agency approve and the activity implement the agreement would quite likely have been unchanged by a finding of a 19(a)(6) violation against the agency rather than the activity.

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Since the Assistant Secretary's decision does not present a major policy issue, and since you do not contend that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Dept. of Labor

V. J. Paterno
ACT

Bellingham Flight Service Station, Federal Aviation Administration, N.W. Region, Department of Transportation, Bellingham, Washington, A/SLMR No. 597. The Assistant Secretary, upon a complaint filed by the individual complainant, Robert J. Crane, found, based on the particular circumstances of this case, that the activity violated section 19(a)(1) and (4) of the Order by failing to abide by a ruling of the Administrative Law Judge in an unfair labor practice proceeding that Crane was a necessary witness and was to be paid for his travel and per diem expenses, and by disciplining Crane for his appearance at that proceeding. The agency appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented major policy issues.

Council action (April 23, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious or present major policy issues. Accordingly, the Council denied the agency's petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

April 23, 1976

Mr. R. J. Alfultis
Director of Personnel and Training
Office of the Secretary
Department of Transportation
Washington, D.C. 20590

Re: Bellingham Flight Service Station, Federal Aviation Administration, N.W. Region, Department of Transportation, Bellingham, Washington, A/SLMR No. 597, FLRC No. 76A-3

Dear Mr. Alfultis:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by Robert J. Crane, in the above-entitled case.

In this case, as found by the Assistant Secretary, a request had been made for the presence of Robert J. Crane to be a witness at an unfair labor practice hearing to be held in Puerto Rico. Crane is an Air Traffic Control Specialist at the Bellingham Flight Service Station, Federal Aviation Administration, N.W. Region, Department of Transportation, Bellingham, Washington (the activity). This request was referred by the Assistant Regional Director (ARD) to the Administrative Law Judge (ALJ) assigned to hear the case for a ruling on whether the employee should be present to testify. Before the ALJ had ruled on this request and without receiving permission, authorization, or consent from the activity, Crane left for the hearing. No testimony was taken at the hearing, since the parties had entered into a stipulation as the basis for a request to the ARD to withdraw the complaint. However, prior to the adjournment of the proceeding, the ALJ was requested to rule that Crane was a necessary witness. The ALJ ruled that he was a necessary witness and ordered the Federal Aviation Administration (FAA), which was the other party at the hearing, to pay his travel and per diem expenses as required under the Assistant Secretary's rules. The FAA, in response to a specific question by the ALJ, indicated that it did not intend to take exception to this ruling and, in fact, did not except to the ruling. Subsequent to his return to duty, Crane was informed that he had been placed in an absent without leave status for the 2 days on which he was present at the hearing in Puerto Rico, that he was suspended for 3 days without pay, and that the activity would not reimburse him for his travel and per diem expenses. As a result, Crane ultimately filed an unfair labor practice complaint with the Assistant Secretary alleging

that, by suspending him for 3 days without pay because he had testified in a proceeding held under the Order and by failing to comply with a lawful order of an ALJ issued in that proceeding, the activity had violated section 19(a)(1) and (4) of the Order.

The Assistant Secretary found that "allowing employees to make judgments for themselves as to whether they are necessary witnesses at hearings within the meaning of Section 206.7[1/] of the Assistant Secretary's Regulations would be disruptive of the orderly processes required to implement properly the Executive Order, even if some of those judgments ultimately were to be vindicated." In the Assistant Secretary's view, "the purposes of the Order would be better served if the parties adhere to the implicit mandate of Section 206.7 of the Regulations that prior approval of a 'Request for Appearance of Witnesses' be obtained before any employee is granted such official time and expenses as are described in Section 206.7(g) of the Assistant Secretary's Regulations."

However, the Assistant Secretary took note of the particular circumstances of this case: that Crane had "notified the [activity] of his intention to appear at the hearing in Puerto Rico;" that there had been a "discussion of alternative assignments in the event of [Crane's] absence from the . . . facility;" that there was a "lack of specific instructions to [Crane] that he was not to leave the [activity's] facility to appear at the hearing in Puerto Rico;" that the ALJ at the hearing in Puerto Rico had ruled that Crane "was a necessary witness within the meaning of Section 206.7 of the Assistant Secretary's Regulations;" and that the representative of the FAA at the hearing in Puerto Rico had decided "not to take exception to the ruling by the Administrative Law Judge therein with respect to [Crane's] appearance . . . ." Based upon these circumstances, the Assistant Secretary found that "the [activity's] failure to

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1/ In summary, Section 206.7 of the Assistant Secretary's Regulations provides, in relevant part, that absent agreement by the parties on the appearance of a witness at a hearing, a request for such an appearance may be made on the motion of the Assistant Regional Director (ARD), or on the motion of one of the parties. Such a motion must be in writing, and filed with the ARD 15 days prior to the hearing, or with the ALJ at the hearing. Objections may be filed with the ARD, who will either rule on the motion or refer it to the ALJ for a ruling 5 days prior to the hearing. Objections may also be made orally on the record at the hearing. The ARD or the ALJ shall grant such a motion upon determination that the testimony appears to be necessary to the matters under investigation. Employees who have been determined to be necessary as witnesses at a hearing shall be granted official time only for such participation as occurs during the period they would otherwise be in a work or a paid leave status, including time for travel and for waiting to give and giving testimony. The employing agency shall also pay all necessary travel and per diem expenses.

abide by the ruling of the Administrative Law Judge in the Puerto Rico hearing and its subsequent disciplining of [Crane] was in violation of Section 19(a)(4) of the Order [and] . . . that such conduct interfered with, restrained, or coerced [Crane] in the exercise of his rights assured by the Order to join and assist a labor organization and, therefore, was violative of Section 19(a)(1) of the Order." Accordingly, he ordered the activity to cease and desist from such conduct and, among other things, to make Crane whole "for any loss of monies he may have suffered" by the activity's failure to abide by the ALJ's ruling in the Puerto Rico hearing.

In your petition for review on behalf of the agency, you contend that the decision of the Assistant Secretary is "totally unsupported by laws, regulations or evidence and is, therefore, arbitrary and capricious and contrary to the Executive Order." Specifically, in this regard, you contend that the activity was found to have violated the Order "only on the Assistant Secretary's failure to enforce his own controlling regulations;" that "[t]his action by the Assistant Secretary is contrary to the principles of the Administration [sic] Procedures Act, 5 U.S.C. 551" in that "regulations published pursuant to that Act cannot be disregarded by the issuing agency;" and that the decision "could not have been reasonably arrived at on the facts present in the record." Further, you contend that the decision presents two major policy issues: First, "whether an employee may absent himself from duty without approval or authorization in the hope that a law judge of the Department of Labor can be persuaded to make an after-the-fact ruling which will frustrate the agency's efforts to maintain knowledge and control of employees' whereabouts during periods of duty;" and, second, "whether a party can be found in violation of Section 19 as a result of the failure of the Assistant Secretary to follow his own regulations."

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious or present major policy issues.

As to your contentions that the Assistant Secretary's decision is arbitrary and capricious and presents a major policy issue in that he failed to follow or enforce his own controlling regulations, the Council has previously stated that section 6(d) of the Order empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, and that, as the issuer of those regulations, the Assistant Secretary is responsible for their interpretation and implementation.[2/] In the instant case, the Assistant Secretary's decision was based upon his interpretation and application of Section 206.7 of his regulations to "the particular circumstances herein" in reaching the

2/ Department of the Air Force, Ellsworth Air Force Base, South Dakota, Assistant Secretary Case No. 60-3412 (RO), FLRC No. 73A-60 (October 30, 1974), Report No. 59.

conclusion that the activity violated section 19(a)(4) and (1) of the Order, and you do not allege that the Assistant Secretary was without authority to promulgate such regulations or that he applied them in a manner inconsistent with the purposes of the Order.3/ Rather, you merely disagree with the Assistant Secretary's application of his regulations to the facts and circumstances of this case. In the Council's opinion, the Assistant Secretary neither acted without reasonable justification in reaching his decision herein, nor does his decision in this regard present a major policy issue warranting Council review.

Finally, as to your contention that the decision of the Assistant Secretary "will frustrate the agency's efforts to maintain knowledge and control of employees' whereabouts during periods of duty," in the Council's view, noting particularly the Assistant Secretary's findings that the employee had notified the activity of his intention to appear at the hearing in Puerto Rico, that alternative assignments had been discussed in the event of his absence, and that the activity did not issue specific instructions to him not to leave the activity's facility, no major policy issue is presented in this regard. Moreover, the Assistant Secretary stated as a general policy that ". . . allowing employees to make judgments for themselves as to whether they are necessary witnesses at hearings within the meaning of Section 206.7 of the Assistant Secretary's Regulations would be disruptive of the orderly processes required to implement properly the Executive Order . . . . Thus, in my view, the purposes of the Order would be better served if the parties adhere to the implicit mandate of Section 206.7 of the Regulations that prior approval of a 'Request for Appearance of Witnesses' be obtained before any employee is granted such official time and expenses as are described in Section 206.7(g) of the Assistant Secretary's Regulations."

Since the decision of the Assistant Secretary does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, your petition for review is denied.

By the Council.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Dept. of Labor
R. Van Siclen, Esq.

3/ For this reason we do not reach, nor do we pass upon, your related contention that the decision of the Assistant Secretary is contrary to the principles of the Administrative Procedures Act.

Defense General Supply Center, Richmond, Virginia and American Federation of Government Employees, Local 2047, AFL-CIO (Di Stefano, Arbitrator). The arbitrator directed, among other things, that the activity set aside the promotion of an employee and provide an opportunity for all interested and qualified employees to apply for the vacant position. The arbitrator further directed that the employee may remain in the position until "another" successful applicant has been selected. The Council accepted the agency's petition for review with respect to: (1) the question of whether, under law, regulations and the Order, the arbitrator had the authority to rule on the qualifications of the incumbent employee for the position and, if so, whether such ruling conformed with applicable law and regulations; and (2) the allegation that the award violates applicable law and appropriate regulations because it, in effect, denies the incumbent of the position in question the right to compete for that position when it is refilled (Report No. 72).

Council action (April 27, 1976). Based in part upon an interpretation by the Civil Service Commission, rendered in response to the Council's request, the Council found that the arbitrator's award, insofar as it directed that the promotion of the employee to the position in question be set aside and that the vacancy be refilled in accordance with the terms of the parties' collective bargaining agreement, did not violate applicable law, appropriate regulations or the Order. However, the Council further found, based on the Commission's response to the Council's request, that the arbitrator's use of the word "another" in his remedy was violative of appropriate regulations since it would deprive the incumbent employee of an opportunity to compete for the position when it was refilled. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award so as to permit the employee such opportunity. As so modified, the Council sustained the arbitrator's award.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Defense General Supply
Center, Richmond, Virginia

and

American Federation of
Government Employees,
Local 2047, AFL-CIO

FLRC No. 74A-99

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose as the result of an arbitrator's decision in which he directed, inter alia, that the Defense General Supply Center (DGSC) set aside the promotion of an employee and provide an opportunity for all interested and qualified employees to apply for the vacant position. The arbitrator further directed that the employee may remain in the position until another successful applicant has been selected.

Based upon the entire record before the Council the circumstances of the case appear as follows:

In February 1974, by Announcement No. 60-74, DGSC announced an opening for the position of Industrial Specialist (Paper and Chemicals), GS-1150-12. Thereafter DGSC issued a promotion referral list with the names of several candidates ranked as qualified, including that of one employee who was ranked both highly qualified and the best qualified of all candidates. Following the issuance of the promotion referral list, several of the candidates apparently voiced their dissatisfaction concerning the ranking of the employee who had been ranked best qualified and alleged a lack of qualifications by that employee. The dispute which resulted in the instant arbitration arose when the Commanding General of DGSC rendered a decision to proceed with the selection for the position in question and the employee ranked best qualified was selected. The union contended that in doing so DGSC had failed to comply with the grievance procedure set forth in the parties' collective bargaining agreement[1/] since the union had not been

1/ Specifically the union contended that DGSC had violated section 4 of Article XXVII of the collective bargaining agreement which is entitled "Grievance Procedure" and which sets forth the step-by-step procedures to be followed by each party in the filing and processing of a grievance.

provided with a written decision concerning the complaint regarding the selected employee's qualifications, nor had the DGSC Commander met with all parties concerned prior to issuing an order to proceed with the selection to fill the vacancy. DGSC, on the other hand, denied that the union had actually presented a grievance in the prescribed manner and maintained, therefore, that it was under no duty to proceed as it would have done had a grievance been properly presented.

The Arbitrator's Award

At the arbitration hearing, according to the award, the parties could not reach agreement on the issue to be arbitrated. Therefore the arbitrator stated that the issue as framed jointly by the parties in their initial letter to the Federal Mediation and Conciliation Service requesting a list of arbitrators would stand, namely:

> Did the Defense General Supply Center violate Article XXVII, Section 4, when the DGSC Commander rendered a decision to proceed with the selection in Vacancy Announcement No. 60-74?

In his "DISCUSSION AND FINDINGS" the arbitrator determined that:

> [T]he Union's protest and complaint to the promotion of [the employee] for the position of Industrial Specialist (paper and chemicals) GS-1150-12, was established and executed unilaterally by Management (DGSC) absent proof that [the employee] has better and higher qualifications than the other employees involved in this case, the arbitrator holds that the Management of DGSC breached the intent and meaning of the contract terms and must correct this 'out-of-order' and unilateral action, by setting aside the promotion in question which was wrongfully awarded to [the employee].

The arbitrator therefore sustained the union's grievance and as a remedy directed the parties to comply with the following:

1. (a) Management (DGSC) is directed to set aside the promotion of [the employee], to the position of Industrial Specialist (paper and chemicals) GS-1150-12.

   (b) Top Management of DGSC and representatives of AFGE Local 2047, shall promptly meet in joint conference to review, and conduct good-faith negotiations to reach an amicable settlement on the application of the specific contract provisions that are related to this dispute, namely, VACANCY ANNOUNCEMENTS, ARTICLE XX, PROMOTIONS - ARTICLE XXI, DETAILS - ARTICLE XXI, and grievance Procedure - Article XXVII.

2. Management, DGSC is directed to promptly post and advertise on official bulletin boards, that a vacancy exists in the position in dispute and identified as "Industrial Specialist (paper and chemicals)."

3. Management DGSC is further directed to provide and give all interested and qualified employees an opportunity to apply or bid for the vacancy position of . . . Industrial Specialist (paper and chemicals) GS-1150-12. The incumbent holder of this position may remain on the job until another successful applicant has been selected. This vacancy position shall be strictly awarded and filled in accordance with the expressed written terms of the Agreement, Promotion, Details, Vacancy Announcements, and the Grievance Procedure of the Labor Agreement.

4. The parties herein shall submit a joint-letter report to the arbitrator upon their final disposition on this arbitration matter.

Subsequent to the award DGSC sought clarification from the arbitrator of the word "another" in the second sentence of paragraph 3 of the arbitrator's remedy, inquiring as to whether, by the use of that word, he intended to preclude the incumbent employee from competing for the position when it is refilled. However, in the absence of a similar request for such clarification from the union the arbitrator declined to clarify his award.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review with respect to: (1) the question of whether, under law, regulations and the Order, the arbitrator had the authority to rule on the qualifications of the incumbent employee for the position and, if so, whether such ruling conformed with applicable law and regulations, and (2) the allegation that the award violates applicable law and appropriate regulations because it, in effect, denies the incumbent of the position in question the right to compete for that position when it is refilled. The agency presented no further argument on the merits of the case, while the union filed a brief.[2/]

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

2/ In its brief the union requests that the award be sustained or, in the alternative, that it be modified to read "The incumbent holder of this position may remain on the job until a successful applicant has been selected" rather than ". . . another successful applicant . . . ." (See paragraph "3" of the arbitrator's remedy set forth above.)

As stated previously, the questions before the Council are: (1) whether, under law, regulations and the Order, the arbitrator had the authority to rule on the qualifications of the incumbent employee for the position and, if so, whether such ruling conformed with applicable law and regulations, and (2) whether the award violates applicable law and appropriate regulations because it, in effect, denies the incumbent of the position in question the right to compete for that position when it is refilled.

For purposes of discussion and analysis these questions will be considered as follows:

A. Whether, under the Order, the arbitrator had the authority to rule on the qualifications of the incumbent employee for the position.

B. Whether, under law and regulations, the arbitrator had the authority to rule on the qualifications of the incumbent employee for the position, and if the arbitrator had such authority under law, regulations and the Order, whether his ruling conformed with applicable law and regulations; and whether the award violates applicable law and appropriate regulation because it, in effect, denies the incumbent of the position in question the right to compete for that position when it is refilled.

A. Whether, under the Order, the arbitrator had the authority to rule on the qualifications of the incumbent employee for the position.

The agency contends that the arbitrator, in ruling on the qualifications of the incumbent employee for the position, went "beyond the scope of matters which are properly decided by grievance procedures which arise from negotiated agreements." In support of this contention the agency relies upon section 12(b)(2) of the Order[3/] which reserves to management the right to take certain personnel actions such as hiring and promotions. The agency also cites the Council's decision in Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, FLRC No. 71A-31 (November 22, 1972), Report No. 31, for the proposition that the emphasis is on the reservation of management authority to decide and act on these matters, and the import is that no right accorded to unions under that Order may be permitted to interfere with that authority. In effect, the agency contends that to

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3/ Section 12(b)(2) of Executive Order 11491, as amended, provides as follows:

> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--
>
> . . . . . .
>
> (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees.

permit an arbitrator to rule on the qualifications of the incumbent employee for the position would permit an arbitrator to do indirectly that which he cannot do directly, i.e., select an employee for promotion.

We cannot agree with the agency's contention. In ruling on the employee's qualifications and in rendering his award in the circumstances herein, the arbitrator has not exercised, nor has he interfered with the exercise of, management's retained authority under section 12(b)(2) of the Order. Indeed, the remedy fashioned by the arbitrator directs management to consider all interested and qualified employees in making a selection for the position. Under the award management will select the individual for promotion. Thus, the agency's reliance on section 12(b)(2) is misplaced, Section 12(b)(2) does not preclude an arbitrator from rendering a decision pertaining to an employee's qualifications for promotion and such action by an arbitrator does not interfere with management's reserved rights under that section.4/ Accordingly, the Council concludes that the arbitrator's award in this case does not violate the Order.

B. Whether, under law and regulations, the arbitrator had the authority to rule on the qualifications of the incumbent employee for the position, and if the arbitrator had such authority under law, regulations and the Order, whether his ruling conformed with applicable law and regulations; and whether the award violates applicable law and appropriate regulations because it, in effect, denies the incumbent of the position in question the right to compete for that position when it is refilled.

Since the Civil Service Commission is authorized to prescribe regulations to implement statutory provisions relating to selection and promotion in the Federal service, the Council requested an interpretation from the Commission of the relevant statutes and implementing Commission regulations as they pertain to the arbitrator's award in this case. The Commission replied in relevant part as follows:

> In this case the arbitrator ordered, inter alia, that a promotion action be set aside, that the position be re-advertised and the action re-run, and that the incumbent be allowed to remain in the position

4/ With respect to the agency's reliance on section 12(b)(2), there is no contention by the agency that the award interferes with management's reserved authority to decide whether or not to fill a vacant position, i.e., that the agency has vacated the position, decided not to refill it, and that the award directs them to do so. National Council of OEO Locals, AFGE, AFL-CIO, and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61, wherein the Council held that "the portion of the arbitrator's award directing management to fill the position in question cannot be permitted to stand." In that case the Council stated that "implicit and coextensive with management's conceded authority to decide to take an action under section 12(b)(2), is the authority to decide not to take such action, or to change its decision, once made, whether or not to take such action." FLRC No. 73A-67, Report No. 61 at 4 of the Decision.

until another successful candidate was selected. You requested our opinion on three issues involved in this case: 1) whether under applicable law and regulation an arbitrator has authority to rule on whether an employee meets the qualifications standards established by the Commission; 2) provided the arbitrator has such authority, whether his ruling in the instant case represents a valid application of Commission standards; and 3) whether the incumbent may be denied the right to compete for the position when it is refilled, as the arbitrator apparently intended, without violation of law or Commission requirements. . . .

Under authority provided by 5 USC 3301, 5105 and Civil Service Rule II, the Commission issues qualifications standards which are binding on the agencies and which are applied by the agencies in making qualifications determinations in individual cases. While the Commission retains the authority to overrule an agency's determination, an employee does not have a right to appeal an agency's determination to the Commission under statute or current appellate procedures. Therefore, provided a qualifications issue were otherwise properly before the arbitrator, we would know of no bar to his rendering a decision on it. His decision would, of course, have to be consistent with the controlling qualifications standards of the Commission in order to be legally implementable.

The file you provided contains insufficient information on the incumbent employee's experience and training for us to make a positive determination as to whether or not the arbitrator's finding that she lacked certain required specialized experience for the position in question was a valid application of Commission standards. It has come to our attention, however, that the entire qualifications question that was raised in the instant case was subsequently submitted by the parties to a second arbitration. We refer to FMCS File 75K08325. In the second case arbitrator James P. Whyte distinguished between the procedural matter that was the central issue in the first arbitration and the substantive question concerning qualifications on which he was asked to rule. He went on to deny the union's grievance, after finding that the employee selected did meet all requirements for the job and that management's selection, at least insofar as the qualifications issue was concerned, was not "arbitrary, capricious or unreasonable." Since no exception has been filed to this second arbitration decision, which was rendered on July 18, 1975, we assume that it is acceptable to the parties concerned. Therefore, the issue as to the qualifications of the incumbent employee would appear to be moot.

Finally, you asked us whether the incumbent of the position may be denied the right to compete for the position when it is refilled. The answer to this question proceeds directly from the determination as to the incumbent's basic qualifications for the job. Generally speaking, an employee may be excluded from consideration in the reconstruction of a promotion action only if that employee could not have been considered had the original action been properly run. FPM Chapter 335-3-3(c) requires that "all employees within the minimum area of consideration

must have the opportunity to be considered for promotion to positions for which they are eligible." Subchapter 3-5(a) defines basic eligibility as meeting the minimum qualifications standards of the Civil Service Commission. Since there is no question that the incumbent in the instant case is within the area of consideration and since she has been determined by the second (and unchallenged) arbitration decision to meet the qualifications requirements of the job, she may not be excluded from competing in any re-filling of the position in question without violation of Commission policy and instructions.

Based upon the foregoing interpretation of the Civil Service Commission, it is clear that under law and regulation, the arbitrator had the authority to rule on the qualifications of the incumbent employee for the position. With respect to the question of whether the arbitrator's ruling on the qualifications of the incumbent employee for the position conformed with applicable law and regulations, absent a determination by the Civil Service Commission that the arbitrator's ruling was not in conformity with applicable law and regulations, the Council concludes the arbitrator's award in this case does not conflict with applicable law and regulation.

As to whether or not the award violates applicable law and appropriate regulations because it, in effect, denies the incumbent of the position in question the right to compete for that position when it is refilled, the Commission's response indicates that the incumbent employee, in the circumstances of this case, may not be excluded from competing in any re-filling of the position in question without violation of Commission policy and instructions. Therefore, in light of the Commission's response, in light of the use by the arbitrator of the word "another" in his award and in light of the union's unchallenged motion to modify the award (note 2, supra), we believe that the arbitrator's award should be modified so that paragraph "3" of his "REMEDY AND DECISION" reads "The incumbent holder of this position may remain on the job until a successful applicant has been selected," rather than ". . . until another successful applicant has been selected."

Conclusion

For the reasons discussed above, and pursuant to section 2411.37(b) of the Council's rules of procedure, we find that the arbitrator's award, insofar as it directs that the promotion of the employee to the position of Industrial Specialist (Paper and Chemicals) GS-1150-12 be set aside and that the vacancy be refilled in accordance with the terms of the parties' collective bargaining agreement, does not violate applicable law, appropriate regulations or the Order, and is hereby sustained.

However, we further find that the arbitrator's use of the word "another" in his remedy is violative of appropriate regulations since it would deprive the incumbent employee of an opportunity to compete for the position when it is refilled. Accordingly, the award is modified so that paragraph "3" of the arbitrator's "REMEDY AND DECISION" reads as follows:

3. Management DGSC is further directed to provide and give all interested and qualified employees an opportunity to apply or bid for the vacancy position of . . . Industrial Specialist (paper and chemicals) GS-1150-12. The incumbent holder of this position may remain on the job until a successful applicant has been selected. This vacancy position shall be strictly awarded and filled in accordance with the expressed written terms of the Agreement, Promotion, Details, Vacancy Announcements, and the Grievance Procedure of the Labor Agreement.

As so modified, the award is sustained.

By the Council.

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

Issued: April 27, 1976

Defense Mapping Agency, Hydrographic Center, Department of Defense and American Federation of Government Employees, Local 3407 (Ables, Arbitrator). The arbitrator found that the activity violated certain provisions of the parties' collective bargaining agreement by issuing a job vacancy announcement which was not clearly stated and subsequently by specifying skills required for the job that were contrary to negotiated criteria for promotion, and directed that certain corrective action be taken by the activity. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the arbitrator's award, in directing corrective action which included the removal of an employee and consideration of all 19 candidates in refilling the position, violated applicable Civil Service Commission regulations. The Council also granted the agency's request for a stay of the award (Report No. 76).

Council action (April 27, 1976). Based upon an interpretation by the Civil Service Commission, rendered in response to the Council's request, the Council concluded that implementation of the arbitrator's award, insofar as it directed the vacating of the position in advance of the re-running of the promotion action, violated Commission policy and instructions since the arbitrator did not determine that the previously successful candidate could not properly have been considered for the position in the first place and should not be allowed to compete in the second round. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified, those portions of the award which directed the activity to vacate the position in advance of the re-running of the promotion action. As so modified, the Council sustained the arbitrator's award and vacated the stay which it had previously granted.

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UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Defense Mapping Agency,
Hydrographic Center,
Department of Defense

and

FLRC No. 75A-33

American Federation of
Government Employees,
Local 3407

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the award issued by the arbitrator, wherein he found that the Defense Mapping Agency, Hydrographic Center (activity) had violated certain provisions of the parties' collective bargaining agreement by issuing a job vacancy announcement which was not clearly stated and subsequently by specifying skills required for the job that were contrary to negotiated criteria for promotion. As a result the arbitrator directed that certain corrective action be taken by the activity.

Based on the findings of the arbitrator and the entire record, it appears that on June 28, 1974, the activity announced a vacancy for Cartographer Nautical at the GS-12 level. General duties of the position were described; qualifications were specified in accordance with Civil Service requirements; and specialized experience was stated as "at least three years specialized experience in Mapping, Charting and Geodesy (MC&G), that has provided a thorough professional background in cartography and a good knowledge of the associated fields of surveying and mapping." Pursuant to the announcement, 19 cartographers, including the two grievants, applied for the job.

Subsequent to the closing date on the vacancy announcement, the office in which the vacancy existed advised the Civilian Personnel Office that "directly related experience" would be evaluated as that which includes definitive chart planning "to procure, evaluate and recommend cartographic and intelligence source material for charts as well as the systematic maintenance through formal notices and revised printing of these charts." All 19 candidates for the vacancy were found eligible; the successful candidate was that applicant who, as determined by management, had the highest performance rating of all Best Qualified applicants in accordance with the requirements stated in the criteria pertaining to "directly related experience."

Charging that the activity had illegally bypassed the criteria agreed to by the parties in the Supplement to Article X, Section 10,[1/] the union

1/ Article X, Section 10 (Supplement #1) provides in pertinent part:

> Section 10. Merit Promotion Ranking Criteria
> For the purpose of ranking candidates for vacant positions within the Unit, DMAHC will utilize two promotion plans described as follows:
>
> . . . . . .
>
> Plan #2 - (Covers non-supervisory positions in the professional series)
>
> . . . . . .
>
> A. Experience: Maximum = 55 points - Experience will be evaluated as being "directly" or "indirectly" related to the requirements of the duties defined in the position description. The applicant(s) receiving the highest point value will be assigned 55 points, with the other applicant's scores weighted proportionately.
>
> Experience will be credited at higher grades, the equivalent grade, or the two previous grades normally attained in the professional series, going back not to exceed 10 years.
>
> When an applicant's experience continuity has been interrupted by a RIF action, the 10 year cutoff will be extended to the extent of the time lost due to the RIF, not to exceed 2 additional years.
>
> 1. Directly-related experience is that which clearly reflects the specific skills that characterize the duties of the position.
>
> 2. Indirectly-related experience is that which would supply useful supportive skills or background skills leading to the effective performance of the duties of the position.
>
> CREDIT:
>
> | | Higher, Equivalent or Previous Grade | Next Lower Grade |
> |---|---|---|
> | Directly Related | 1 pt. per month | 1/2 pt. per month |
> | Indirectly Related | 1/3 pt. per month | 1/6 pt. per month |

grieved. It requested that the promotion of the successful candidate be vacated, that the position be readvertised and that there be a full review of all proceedings by the union.

After the parties failed to resolve the grievance, the union invoked the arbitration provision of the agreement.

The Arbitrator's Award

The issues submitted to the arbitrator by the parties were as follows:[2]

1. Whether the provisions of Article X, Section 10 (Supplement #1) have been properly applied.

2. Irrespective of #1, does either party unilaterally determine which of the two corrective actions listed in Article X, Section 9[3] is to be taken to correct promotion actions found to be erroneous. [Footnote added.]

As to the first issue the arbitrator determined that:

> . . . management did violate Supplement No. 1 to the negotiated agreement by issuing a job vacancy announcement which was not clearly stated and subsequently by specifying skills required for the job that were contrary to negotiated criteria for promotion.

2/ Letter from W. Colligan, union president, and S. E. Drummond, activity director, to Federal Mediation and Conciliation Service, October 23, 1974.

3/ Article X, Section 9 provides:

> Section 9. DMAHC will take the following action to correct promotion actions deemed erroneous through the grievance and/or arbitration procedures.
>
> a. Require that the position be vacated and the employee (or employees) not promoted or given proper consideration because of the violation will be considered for promotion to the vacated position before other candidates are considered; or,
>
> b. If the action does not include vacating the position, the employee (or employees) not promoted or given proper consideration will be given priority consideration for the next appropriate vacancy.

As to the second issue, whether either party ". . . may unilaterally determine which of the two corrective actions listed in Article X, Section 9, is to be taken to correct promotion actions found to be erroneous," the arbitrator determined that since the activity is to take the action, all other things being equal, the activity decides which of the alternative actions is to be taken. However, he noted that the equalizer between the parties is that the activity is required to take the stated action to correct promotion actions deemed erroneous "through the grievance and/or arbitration procedures." Thus, the union is not likely to settle the grievance, during the grievance procedure, if there is not agreement on corrective action. And, if the dispute goes to arbitration, as here, the arbitrator decides which corrective action the activity will take.

In summary, the arbitrator decided that the provisions of Article X, Section 10 (Supplement #1) were not properly applied and that corrective action under Article X, Section 9 must be taken under section 9a. Consequently, his award directed that the corrective action should include the following:

a. Vacate the job in dispute.
b. Consider all 19 candidates for promotion under the panel procedure.
c. Publish new "directly related experience" criteria for the vacant job in dispute, in the activity's discretion, but under a good faith commitment by the activity to observe the findings in the award, the spirit of management memoranda and the policy of top management to equalize promotion opportunities for cartographers with aeronautical and nautical experience.4/

4/ In a major reorganization of the agency in 1970, the specialized work of preparing aeronautical charts was transferred to a facility in the St. Louis, Missouri area. For reasons not pertinent in this dispute, many of the cartographers who had worked on aeronautical charts remained with the activity in Washington, D.C. where the emphasis was on preparation of nautical charts. In the period between 1970 and early 1974, it appears that those cartographers with nautical chart experience had greater opportunities for promotion than cartographers with aeronautical chart experience. Upon complaint, through their union, by cartographers with aeronautical chart experience that they were in a dead-end job, the director of the Naval Charts Division agreed in two memoranda written in May of 1974 to equalize opportunities for promotion for those with experience in the aeronautical division. In particular, he stated that cartographer experience gained in the preparation of aeronautical charts "will be considered as directly related experience for promotion purposes." Further, he indicated that duty statements in a job description are to be interpreted "so that there is a broad definition of cartographer" and should not be interpreted as to be restricted "to a specific product or production procedure." At about the same time, the union negotiated a contract amendment to section 10 of Article X (supra note 1) on Merit Promotion Policy which established standards to equalize aeronautical and nautical chart experience.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the arbitrator's award, in directing corrective action which included the removal of an employee and consideration of all 19 candidates in refilling the position, violates applicable Civil Service Commission regulations.[5/] The agency filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review insofar as it related to its exception which alleged that the arbitrator's award, in directing corrective action which includes the removal of an employee and consideration of all 19 candidates in refilling the position, violates applicable Civil Service Commission regulations. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of Commission regulations as they pertain to the questions raised in the present case. The Commission replied in relevant part as follows:

> In this case the arbitrator determined that the agency had improperly applied the merit promotion criteria found in Supplement No. 1 of the negotiated agreement in filling a vacancy to the detriment of the grievants. As a remedy he ordered that the agency vacate the position in question and consider all 19 of the original candidates for the job (including the previously successful candidate), using new, "directly related experience" criteria. The only part of this award that poses a problem as far as Commission requirements are concerned, is the order to vacate the position before the development of the new experience criteria and the re-running of the promotion action.
>
> Under Commission policy an erroneously promoted employee may be retained in the position only "if the promotion action can be corrected to conform

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5/ The agency requested and the Council granted, pursuant to section 2411.47(d) of the Council's rules of procedure, a stay of the award pending the determination of the appeal.

essentially to all Commission and agency requirements as of the date the action was taken" (FPM Chapter 335, 6-4(b)). The employee should not be removed from the position in advance of the corrective action (in this case the re-running of the promotion), however, unless it has been determined by an arbitrator or other competent authority that he could not properly have been considered for the position in the first place and hence, should not be allowed to compete in the second round. In the absence of such a determination, no action should be taken with regard to the employee pending the outcome of the reconstructed promotion.

Based on the cited provision of the Federal Personnel Manual, we conclude that that part of the arbitrator's award in the instant case which requires the vacating of the position in advance of the re-running of the promotion action violates Commission policy and instructions.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that the implementation of the arbitrator's award, insofar as it directs the vacating of the position in advance of the re-running of the promotion action, violates Commission policy and instructions since the arbitrator did not determine that the previously successful candidate could not properly have been considered for the position in the first place and should not be allowed to compete in the second round.

Conclusion

For the foregoing reasons and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify those portions of the award which direct the activity to vacate the position in advance of the re-running of the promotion action.

As so modified, the award is sustained and the stay of the award is vacated.

By the Council.

Harold D. Kessler
Acting Executive Director

Issued: April 27, 1976

Social and Rehabilitation Service, Department of Health, Education, and Welfare and American Federation of Government Employees, Local 41, AFL-CIO (Mallet-Prevost, Arbitrator). The arbitrator concluded that the agency violated its Merit Promotion Plan and the parties' collective bargaining agreement in considering and selecting two candidates from private industry for certain position vacancies; and ordered the agency (1) to vacate the two positions, (2) to run the selection process again, limiting the field of choices to four highly qualified employee candidates from the agency, and (3) to give backpay to the two employees selected. The Council accepted the department's petition for review insofar as it related to the department's exception which alleged that the arbitrator exceeded his authority by directing removal of two employees and by directing the agency to take corrective action, which direction limits the agency in refilling the positions to consideration of the four highly qualified candidates employed by the agency. The Council also granted the department's request for a stay of the arbitrator's award (Report No. 76).

Council action (April 27, 1976). Based upon an interpretation by the Civil Service Commission, rendered in response to the Council's request, the Council concluded that the arbitrator did not exceed his authority. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council sustained the arbitrator's award and vacated the stay which it had previously granted.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Social and Rehabilitation Service,
Department of Health, Education,
and Welfare

and

FLRC No. 75A-42

American Federation of Government
Employees, Local 41, AFL-CIO

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

Based on the findings of the arbitrator and the entire record, it appears that the Social and Rehabilitation Service (the agency) issued a merit promotion vacancy announcement for two Computer Systems Analyst positions. Of the 10 candidates rated both "Highly Qualified" and "Best Qualified" by the agency's Qualifications Review Board, 4 (including the grievant) were from the agency; 2 were from other areas of the Department of Health, Education, and Welfare (the department); 2 were from other Federal agencies; and 2 were from private industry. The agency selected the two candidates from private industry.

The grievant, 1 of the 10 rated candidates and an employee of the agency, grieved, alleging that the agency had preselected the 2 candidates from private industry.

The Arbitrator's Award

The question submitted to arbitration was stated as follows in the arbitration award:

> The Agency concedes that it engaged in pre-selection in filling two positions posted under its Merit Promotion Plan. Grievant . . . and other Agency employees applied but were not selected. The question is what remedy is appropriate under the Union Contract and applicable Civil Service regulations.

The arbitrator in this award noted that:

> Article 12 of the Contract deals with Merit Promotion. While the Merit Promotion Plan itself is embodied in a separate document . . . Article 12, Section A, says that the Plan, "developed in consultation with the Union, is designed" (par. 5) "to provide attractive career opportunities for employees. The Employer agrees therefore to promote employees in a fair and equitable manner without pre-selection in accordance with its Merit Promotion Plan ***." Section D provides that "The Employer will consider concurrently outside candidates only

if a determination has been made that there are not enough highly qualified SRS candidates" (emphasis supplied).

The Promotion Plan provides that "Normally a certificate (of the Qualification Review Board) will include the names of from three to ten highly qualified candidates" (Part I, Section H. I.) . . . . It follows that four (which falls within the bounds of "three to ten") highly qualified SRS employees would be "enough" to bring into play Section D of the contract, quoted above, and bar the Agency from considering "concurrently outside candidates" . . . .

He concluded that the agency, in considering and selecting the outside candidates from private industry, had violated its Merit Promotion Plan and the collective bargaining agreement. He ordered the agency (1) to vacate the two positions filled by candidates from private industry, (2) to run the selection process again, limiting the field of choices to the four highly qualified employee candidates from the agency, and (3) to give backpay to the two employees selected.

Department's Appeal to the Council

The department filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the department's exception which alleged that the arbitrator exceeded his authority by directing removal of two employees and by directing the agency to take corrective action, which direction limits the agency in refilling the positions to consideration of the four highly qualified candidates employed by the agency.[1/] Both parties filed briefs.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

The question before the Council is whether the arbitrator, in directing the agency (1) to vacate the two positions filled by candidates from private industry, (2) to run the selection process again, limiting the field of choices to the four highly qualified employee candidates from the agency, and (3) to give backpay to the two employees selected, exceeded his authority. In this connection, the Civil Service Commission has prescribed regulations governing the reconstruction of promotion actions

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1/ The department requested and the Council granted, pursuant to section 2411.47(d) of the Council's rules of procedure, a stay pending the determination of the appeal.

where violations of merit promotion plans have occurred. Further, the Civil Service Commission has issued regulations governing the awarding of backpay under the Back Pay Act (5 U.S.C. § 5596). Consequently, in accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements and Commission regulations as they pertain to the questions raised in the present case. The Commission replied in relevant part as follows:

> In this case the arbitrator determined that the agency violated its Merit Promotion Plan and its collective bargaining agreement by preselecting candidates from outside the bargaining unit for two positions. His award directed that the two positions be vacated and that consideration in refilling those positions be limited to the four highly qualified candidates within the unit whose names had appeared on the original certificate. The arbitrator further directed that the successful candidates in the reconstructed action be awarded backpay--the difference between what they would have earned in the posted positions and what they actually earned--for the period between the date the posted jobs were originally filled and the date appointments were made pursuant to his award.
>
> The pre-selection of candidates from outside the bargaining unit was conceded by management during the course of the arbitration. The arbitrator makes his award, however, not only on the grounds of pre-selection, but on his finding, pursuant to his reading of the merit promotion plan and the negotiated agreement, that management had no right to even consider candidates outside the bargaining unit in the face of four highly qualified candidates within SRS. In short, the arbitrator finds that management violated the merit promotion plan and the agreement not only by pre-selecting the successful candidates, but by extending the area of consideration beyond the bargaining unit, which first enabled those candidates to be considered. Provided the latter issues were properly before the arbitrator,[2/] his finding would mandate the vacating of the positions in question. FPM Chapter 335, 6-4b stipulates that an erroneously promoted employee "may be retained in the position only if reconstruction of the promotion action shows that he could have been selected had the proper procedures been followed at the time the action was taken." If the two successful candidates in this case could not have been considered without violation

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2/ The department contends that the arbitrator exceeded his authority by considering the question of extending the area of consideration beyond the bargaining unit. However, as the parties and the arbitrator indicated (e.g., Transcript at 2-11), the issue in this case was basically one of remedy and the Council finds that the question of area of consideration is one which is related to and necessarily included within that issue. See Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (March 18, 1976), Report No. 101 and cases cited therein. Therefore, the Council finds that this question was properly before the arbitrator.

of the promotion plan and/or the agreement, then obviously they could not have been selected. Further, if, as the arbitrator finds, consideration should originally have been limited to those highly qualified candidates within the unit, then his order to limit competition in the refilling of the positions to those candidates would accord with Commission practice. [Footnote added.]

The agency, of course, retains the right to decide if it wishes to fill the positions after removing the incumbents. (The method of removal is to be determined by the agency in conformance with applicable law, regulations, negotiated agreements and appellate rights.) If it does, it will be limited to the names of the four SRS candidates. As we understand the arbitrator's decision, the agency will have to determine which of the four it would have selected originally but for the erroneous appointment of the two outside candidates. That determination would serve to meet the test for backpay required by the Comptroller General (see group of CG decisions numbered B-180010 and issued on and subsequent to October 31, 1974). The agency would then be required to grant these selectees backpay pursuant to the arbitrator's award and consistent with the cited Comptroller General decisions and pertinent Commission regulations.

Based upon the foregoing interpretation by the Civil Service Commission, we conclude that the arbitrator did not exceed his authority.

Conclusion

For the reasons discussed above, we find that the arbitrator did not exceed his authority. Pursuant to section 2411.37(b) of the Council's rules of procedure, we therefore sustain the arbitrator's award and vacate the stay.[3/]

By the Council.

Harold D. Kessler
Acting Executive Director

Issued: April 27, 1976

3/ Of course, the removal of the incumbents must be accomplished by a method, to be determined by the agency, which conforms with applicable law, regulations, the parties' negotiated agreement, and the incumbents' appellate rights. The department did not contend herein that the agency has decided to change its decision, previously made, to fill the vacant positions. However, the agency retains the right to decide if it wishes to fill the positions after removing the incumbents. In this regard, see National Council of OEO Locals, AFGE, AFL-CIO and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61.

FLRC No. 75A-46

American Federation of Government Employees, Local 1661, AFL-CIO and Federal Correctional Institution (Department of Justice), Danbury, Connecticut (McCloskey, Arbitrator). The arbitrator sustained the grievance under the parties' agreement, which resulted from management's offer to the grievant, a GS-6 secretary, of a position (Assistant Records Control Specialist, announced by the activity as a GS-5, 6 or 7 position) at the GS-5 level; and, in substance, directed the activity to offer the position involved to the grievant at the GS-6 level and, upon completion of certain conditions, to promote her to GS-7. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award was contrary to Civil Service Commission regulations (Report No. 79).

Council action (April 27, 1976). Based upon an interpretation by the Civil Service Commission, rendered in response to the Council's request, the Council concluded that the award violated Commission reguations. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

American Federation of Government
Employees, Local 1661, AFL-CIO

and

FLRC No. 75A-46

Federal Correctional Institution
(Department of Justice), Danbury,
Connecticut

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award in which he sustained a grievance resulting from management's offer to the grievant of a different job at a lower grade and wage than that at which she was then employed.

Based on the findings of the arbitrator and the entire record, it appears that the Federal Correctional Institution, Danbury, Connecticut (the activity), pursuant to the Merit Promotion Plan incorporated in the parties' Master Agreement,[1/] posted a vacancy announcement for the position of Assistant Records Control Specialist, GS-5, 6, or 7. The grievant, a GS-6 secretary to the Chief, Classification and Parole, at the activity, applied for the position and, according to the activity, indicated that the lowest grade she would accept was GS-6. The activity, according to the agency's petition, found her not qualified at the GS-6 level. She was then offered the job at the entry level, GS-5, which would have meant a loss of pay of approximately $800 per annum, and was told she would have to wait a year in order to be repromoted to her current grade, GS-6. After she declined the offer, another employee was awarded the position as a GS-5.

1/ Article 17 of the Master Agreement provides:

ARTICLE 17 - PROMOTIONS

Promotion shall be governed by the current Merit Promotion Plan, which is a part of this Agreement.

The grievant filed a grievance which, according to the activity, alleged that management had violated Paragraph 13 of the Merit Promotion Plan.[2/] The grievance was submitted to arbitration.

The Arbitrator's Award

The arbitrator stated the issue before him as follows: "Promotional opportunity for [the grievant] or what will the remedy be?" In reaching his award, the arbitrator stated: "Offering an employee a position at a reduced grade and a reduced wage is tantamount to no offer at all. The employee was put in an unfair position that forced her to refuse the offer of this position." As his award, he determined that "[t]he position should be offered to [the grievant] at the Grade GS-6 level and upon completion of six months experience on the job or satisfactory knowledge of the computation of sentences to satisfy the demands of the position, be awarded the GS-7 grade."

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the

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2/ Paragraph 13 of the Merit Promotion Plan provides:

13. DETERMINING BASIC ELIGIBILITY. Candidates meeting the following requirements are determined to be basically qualified:

a. Minimum Qualification Requirements. In all cases, candidates must meet the minimum requirements of the applicable Civil Service Commission qualification standards. Time-in-grade requirements must also be met, unless a detail to the position is indicated, or when the person will not be expected to perform at the full level of the position for a period not to exceed one year during which he will receive closer supervision. An applicant will be considered to have met the Whitten Amendment requirement if he will have completed the time-in-grade requirement within 30 days after the closing date of the announcement. BP-ADM-120 will be completed by the Personnel Office which services the candidate.

b. Selective Placement Factor. Other requirements essential to successful performance in the position to be filled -- selective placement factors -- must also be met. These requirements will be specified in the vacancy announcement for the position. The determination that a candidate meets or does not meet any such requirement will also be recorded on BP-ADM-120. Sex may be used as a selective placement factor where the Civil Service Commission has granted authority to restrict consideration to a single sex.

agency's exception which alleged that the award is contrary to Civil Service Commission regulations.[3/] Both parties filed briefs.[4/]

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review insofar as it alleged that the award is contrary to Civil Service Commission regulations. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of Commission regulations as they pertain to the questions raised in the present case. The Commission replied in pertinent part as follows:

> In this case a vacancy announcement was posted for an Assistant Records Control Specialist GS-5 through 7. A unit employee who was currently employed as a GS-6 Secretary applied for the position. She was deemed qualified for the position at the GS-5 level and the job was offered to her. She declined and subsequently filed a grievance. The arbitrator found the grievant qualified for the position in question at the GS-6 level and ordered that the agency offer her the position at that grade. He further ordered that, upon completion of six months on the job or upon the grievant's attainment of the ability to compute sentences to the satisfaction of the demands of the position, she be promoted to GS-7. The arbitrator's decision and award present several questions as far as their compatibility with Commission regulations and instructions is concerned.
>
> While an arbitrator may rule on whether an employee meets the qualification standards issued by the Commission pursuant to our authority under 5USC3301, 5105 and Civil Service Rule II, his ruling must be consistent with those standards. In the instant case, the file you

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3/ The agency requested and the Council granted, pursuant to section 2411.47(d) of the Council's rules of procedure, a stay of the award pending the determination of the appeal.

4/ The union moved that two attachments to the agency's brief be stricken from the record, and the agency opposed these motions. In view of the fact that there is no need to rely on these attachments to reach a determination in this case, the Council deems it unnecessary to rule on the union's motions.

provided contains insufficient information on the grievant's employment history, training, etc. to enable us to render an opinion on the validity of the arbitrator's finding with regard to her qualifications for the position in question at GS-6. We will be glad to provide an opinion on this matter upon receipt of the employee's Official Personnel Folder and other relevant documents.

Quite apart from the issue of whether or not the grievant met the qualification requirements at GS-6, however, is the question of whether the agency was bound to offer her the position at the highest grade for which she could qualify. Under Commission regulations, an agency has the discretion to determine the grade at which a position is to be filled. Unless the agency limits its discretion through regulation or negotiated agreement, it is under no obligation to offer a position at any particular grade even when, as in this case, the position is advertised at multiple grade levels. The Commission's regulations recognize that there may be bona fide management reasons for not offering a position at the highest level permitted. It is not uncommon and, in fact, it is specifically recognized in FPM Chapter 335, Subchapter 2, Requirement 1 (1), that a demotion may properly be involved in the process of a candidate's securing a position with a known promotion potential. The agency has the discretion to offer the position at the grade level it sees fit, and such offer, moreover, is a bona fide one and not, as the arbitrator found it in this case, "tantamount to no offer at all." Hence, unless the agency determines that it would have offered the grievant the position at GS-6 had she been deemed qualified at that level, then the mere fact of her being found qualified would be insufficient to support the arbitrator's order that she be offered the job at the GS-6 level.

Finally, the purpose of corrective action is to rectify an error or violation that has been committed and the injury sustained as a consequence thereof. In this case the possible future promotion to GS-7 is unrelated to the injury the grievant allegedly sustained (denial of the position at GS-6). Further, even assuming that the job in question is a career ladder position (the announcement fails to identify it as such), non-competitive promotion up to the journeyman level in the minimum allowable time is not an automatic process. FPM Chapter 335, Subchapter 4-2 sets out conditions which must be met before such non-competitive promotions may be made. If the issue is properly before him an arbitrator may order that a non-competitive career ladder promotion be taken in the future, but the award must be related to the actual injury sustained and conditioned on the requirements of the FPM being met. Since the award of a future promotion in the instant case does not meet these criteria, we find it incompatible with Commission regulations and instructions.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that the arbitrator's award, insofar as it directs the activity to promote the grievant to GS-7 upon completion of certain conditions,

246-469 O - 78 - 20

violates Commission regulations, and therefore must be set aside. Further, with respect to that part of the arbitrator's award which directs the activity to offer the position to the grievant at GS-6, we must conclude that in these circumstances, where there is no showing that the activity's discretion was limited by agency regulation or the negotiated agreement, or that it made a determination, to offer the grievant the position at GS-6 had she been deemed qualified at that level, that part of the award violates Commission regulations and must be set aside.5/

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award.

By the Council.

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

Issued: April 27, 1976

5/ In view of our decision herein, it is not necessary to consider the question of the grievant's qualifications.

National Treasury Employees Union and Chapter 071, National Treasury Employees Union and U.S. Department of Treasury, Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania. The Council granted the union's request for an extension of time to file an appeal in the present case until the close of business on April 23, 1976. However, the union's appeal, which was mailed on April 22, 1976, was not filed with the Council until April 26, 1976, and no further extension of time for filing was either requested by the union or granted by the Council.

Council action (May 10, 1976). Because the union's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

May 10, 1976

Mr. Andrew L. Freeman
National Field Representative
National Treasury Employees Union
1730 K Street, NW. - Suite 1101
Washington, D.C. 20006

Re: National Treasury Employees Union and Chapter 071, National Treasury Employees Union and U.S. Department of Treasury, Internal Revenue Service, Philadelphia Service Center, Philadelphia, Pennsylvania, FLRC No. 76A-60

Dear Mr. Freeman:

This refers to your petition for review in the above-entitled case. For the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

By letter dated March 19, 1976, confirming oral advice, an extension of time for filing an appeal with the Council in the above-entitled case was granted until the close of business on April 23, 1976. Therefore, under section 2411.45(a) and (c) of the Council's rules, your appeal was due in the office of the Council on or before the close of business on April 23, 1976. However, your appeal was not received by the Council until April 26, 1976, and no further extension of time for filing was either requested by you or granted by the Council.

Accordingly, as your appeal was untimely filed, and apart from other considerations, your petition for review is denied.

For the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: R. Kaplan
IRS

American Federation of Government Employees, AFL-CIO (Marine Corps Recruit Depot Exchange, San Diego, California), Assistant Secretary Case No. 72-5382 (CO). Based on the date of the subject Assistant Secretary decision (December 23, 1975), the appeal of the individual complainant, Edward F. Mangrum, from that decision, was due in the office of the Council no later than the close of business on January 27, 1976, However, the appeal was not filed with the Council until April 6, 1976. While Mr. Mangrum twice requested reconsideration by the Assistant Secretary of the subject decision, which requests were denied, no extension of the Council's time limits for filing was either requested by Mr. Mangrum or granted by the Council.

Council action (May 13, 1976). The Council ruled, in accordance with section 2411.45(d) of its rules of procedure, that any such request for reconsideration by the Assistant Secretary of his decision, as described above, does not operate to extend the time limits prescribed under the Council's rules. Accordingly, as Mr. Mangrum's appeal was untimely filed, and apart from other considerations, the Council denied his petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

May 13, 1976

Mr. Edward F. Mangrum
4403 Muir Avenue
San Diego, California 92107

Re: American Federation of Government Employees, AFL-CIO (Marine Corps Recruit Depot Exchange, San Diego, California), Assistant Secretary Case No. 72-5382 (CO), FLRC No. 76A-49

Dear Mr. Mangrum:

This refers to your petition for review of the Assistant Secretary's decision in the above-entitled case. For the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

Your appeal, dated March 27, 1976, which was misdirected to the Office of Federal Labor Management Relations of the U.S. Department of Labor, was filed with the Council on April 6, 1976. Preliminary examination of your appeal revealed certain apparent deficiencies in meeting the requirements in the Council's rules of procedure. Among the deficiencies noted was a failure to include copies of the decision of the Assistant Secretary with your petition. By letter dated April 14, 1976, the Council informed you of the deficiencies in your appeal, and granted you until the close of business on May 12, 1976, to complete your appeal by taking necessary action and filing the additional required materials. Your completed appeal was filed with the Council on April 30, 1976.

It appears from your completed appeal that the subject decision of the Assistant Secretary is dated December 23, 1975; that by letters of January 5, 1976, and February 27, 1976, you, in effect, requested reconsideration by the Assistant Secretary of his decision; and that your requests for reconsideration were, in effect, denied on February 5, 1976, and March 22, 1976, respectively.

Under sections 2411.13(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council before the close of business 35 days from the date the Assistant Secretary's decision was served on you by mail, that is, no later than the close of business on January 27, 1976. As already mentioned, your appeal was not filed until April 6, 1976, or more than 2 months late, and no extension of time was either requested by you or granted by the Council.

While you twice requested reconsideration by the Assistant Secretary of his decision, as stated above, section 2411.45(d) of the Council's rules provides that any such request for reconsideration does not operate to extend the time limits prescribed under the Council's rules.

Accordingly, as your appeal was untimely filed, and apart from other considerations, your petition for review is denied.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

C. M. Webber
AFGE

Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3560 (CA). The Assistant Secretary upheld the Assistant Regional Director's dismissal of the 19(a)(1) and (6) complaint of National Federation of Federal Employees, Local 491 (NFFE), ruling that neither the pre-complaint charge nor the complaint was timely filed in accordance with the requirements in his regulations. NFFE appealed to the Council, alleging that the decision of the Assistant Secretary presented major policy issues and was arbitrary and capricious.

Council action (May 14, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied NFFE's petition for review.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

May 14, 1976

Mr. Gerald C. Tobin, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3560 (CA), FLRC No. 76A-21

Dear Mr. Tobin:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, National Federation of Federal Employees, Local 491 (NFFE), filed a pre-complaint unfair labor practice charge and subsequent complaint, as amended, against Veterans Administration Center, Bath, New York (the activity). The amended complaint alleged that the activity violated section 19(a)(1) and (6) of the Order by entering into a formal discussion with an employee in June 1974 to discuss the implementation of a settlement concerning the employee's grievance without affording NFFE, the exclusive representative, an opportunity to be present.

The Assistant Secretary refused to reverse the Assistant Regional Director's dismissal of NFFE's complaint, finding that further proceedings were unwarranted. Noting that section 203.2 of his regulations[1/] requires,

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1/ Section 203.2 provides, in pertinent part:

> (a) Action to be taken before filing a complaint. A party desiring to file a complaint alleging an unfair labor practice under section 19 of the order, other than section 19(b)(4), must take the following action first:
>
> . . . . . .
>
> (2) The charge must be filed within six (6) months of the occurrence of the alleged unfair labor practice;
>
> . . . . . .
>
> (b) Timeliness of a complaint.

(Continued)

in part, that an unfair labor practice charge must be filed within 6 months of the occurrence of the alleged unfair labor practice and that an unfair labor practice complaint must be filed within 9 months of the occurrence of such unfair labor practice, the Assistant Secretary concluded that neither the pre-complaint charge nor the complaint was timely filed in accordance with such requirements. In so ruling, the Assistant Secretary rejected NFFE's contention that the date of discovery, rather than the occurrence of the alleged unfair labor practice, should be the controlling date for determining timeliness, citing the Council's decision in Federal Aviation Administration, Western Region, San Francisco, California, Assistant Secretary Case No. 70-4068, FLRC No. 74A-27 (July 31, 1974), Report No. 55, as an adoption of the Assistant Secretary's finding that the date of the occurrence of the event is controlling in the absence of any evidence of fraudulent concealment, which he concluded was not present in the instant case. He also rejected NFFE's further contention that the activity's failure to notify the union of the subject meeting constitutes a continuing violation and that consequently the instant complaint was timely, finding that the activity's alleged failure to notify NFFE "did not establish a reasonable basis for a continuing violation and a waiver of the timeliness requirements."

In your petition for review on behalf of NFFE, you allege that the decision of the Assistant Secretary presents major policy issues as to: (1) Whether the Assistant Secretary complied with his own regulation, specifically Section 206.9,2/ when he upheld the dismissal of the case, and (2) whether the Assistant Secretary misinterpreted the Council's decision in Federal Aviation Administration, supra, in just looking for fraudulent concealment. You further allege that the dismissal is arbitrary and capricious as the Assistant Secretary did not comply with his own regulations or with Council decisions.

(Continued)

. . . . . .

(3) A complaint must be filed within nine (9) months of the occurrence of the alleged unfair labor practice or within sixty (60) days of the service of a respondent's written final decision on the charging party, whichever is the shorter period of time.

2/ Section 206.9 of the Assistant Secretary's regulations provides, in pertinent part:

(a) The regulations in this chapter may be construed liberally to effectuate the purposes and provisions of the order.

(b) When an act is required or allowed to be done at or within a specified time, the Assistant Secretary may at any time order the period altered where it shall be manifest that strict adherence will work suprise or injustice or interfere with the proper effectuation of the order.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his findings and decision do not appear arbitrary and capricious nor do they present any major policy issues. As to the alleged major policy issues, pursuant to the authority of the Assistant Secretary under section 6(d) of the Order to prescribe regulations needed to administer his functions under the Order, the Assistant Secretary has promulgated regulations which provide, in pertinent part, that a pre-complaint charge and a complaint must be filed within 6 and 9 months, respectively, of the occurrence of the alleged unfair labor practice. His decision herein was based on the application of these regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish such a regulatory requirement or that he wrongly applied these regulations to the facts and circumstances of this case. In this regard, we note that while you allege, in essence, that the Assistant Secretary abused his discretion under Section 206.9 of his regulations by dismissing the complaint as untimely filed, your petition for review to the Council fails to set forth any mitigating circumstances that the Assistant Secretary failed to consider or to demonstrate that his dismissal is inconsistent either with the purposes of the Order or with other applicable authority. Puget Sound Naval Shipyard, Bremerton, Washington, Assistant Secretary Case No. 71-3246, FLRC No. 75A-47 (August 14, 1975), Report No. 80. With respect to your contention that the Assistant Secretary misinterpreted the Council's decision in Federal Aviation Administration, supra, noting particularly that your appeal fails to set forth any grounds, such as fraudulent concealment, that might warrant the granting of a "waiver" of the timeliness requirement, no major policy issue is presented for Council review. With regard to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in his decision.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

R. Coy
VA

Departments of the Army and the Air Force, Headquarters Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, Local Union 2921 (Schedler, Arbitrator). The agency requested reconsideration of the Council's decision of March 3, 1976, denying the agency's petition for review as untimely filed (Report No. 100). The request for reconsideration indicated that the petition was mailed in a manner prescribed in section 2411.43(b) of the Council's rules, i.e., by certified mail; that the subject mailing was effected more than 5 full days before the deadline for filing; that the experience of the agency and Postal Service standards evidenced 5 days was a more than sufficient period of time to expect the appeal to reach the office of the Council; and that the union, the other party to the case, received a copy of the appeal the day after it was mailed.

Council action (May 20, 1976). The Council noted that this was the first instance in which it had to consider a request for waiver of expired time limits, based on a delay in the mails, under the Council's rules of procedure, as revised September 24, 1975; and that this was the first case in which an appeal was received untimely, but had been mailed to the Council at least 5 days before the due date for the appeal, i.e., at least the number of days (now 5) added to prescribed time periods for mail service under section 2411.45(c) of the Council's rules. The Council held that where, as in the present case, the evidence is clear and uncontroverted that a particular document was deposited in the mails 5 or more days before the deadline for filing such document, and the document is received in the office of the Council after the deadline, such delay will be considered as constituting "extraordinary circumstances," within the meaning of section 2411.45(f) of the Council's rules, warranting waiver of expired time limits. In this regard, the Council stated that such policy is necessary to afford all parties, particularly those outside the Washington, D.C. area, similar actual time for case preparation, and is necessary to implement the purposes of the Council's rules. Accordingly, as the agency's petition for review was mailed more than 5 days before the deadline for filing such petition, and as there was no showing of prejudice by the union, the Council granted the agency's request for reconsideration.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

May 20, 1976

Mr. Robert E. Edwards
Associate General Counsel
Chief, Labor Relations Law Branch
Headquarters Army and Air Force
Exchange Service
Departments of the Army and the
Air Force
Dallas, Texas 75222

Re: Departments of the Army and the Air Force, Headquarters Army and Air Force Exchange Service, Dallas, Texas and American Federation of Government Employees, Local Union 2921 (Schedler, Arbitrator), FLRC No. 76A-20

Dear Mr. Edwards:

The Council has carefully considered your submission of March 12, 1976, forwarded by Department of Defense letter of March 16, 1976, and your supplemental submission of April 20, 1976, requesting reconsideration of the Council's decision of March 3, 1976, denying as untimely filed your appeal in the above-entitled case. The Council has likewise considered the opposition to your request by the American Federation of Government Employees, AFL-CIO (AFGE) submitted on April 28, 1976.

As indicated in the Council's decision, the Council granted your activity an extension of time for filing an appeal in the subject case until the close of business on February 2, 1976. Therefore, under sections 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the Council's office no later than the close of business on February 2, 1976. However, your appeal was not filed in the office of the Council until February 13, 1976, and no further extension of the time limits for filing had either been requested by you or granted under section 2411.45(e) of the Council's rules. Accordingly, on March 3, 1976, your petition for review was denied as untimely filed.

It appears from your request for reconsideration that your petition was mailed in a manner prescribed in section 2411.43(b) of the Council's rules,

i.e., by certified mail; that the subject mailing was effected on January 28, 1976, more than 5 full days before the deadline for filing; that your experience and Postal Service standards indicate 5 days was a more than sufficient period of time to expect your appeal to reach the office of the Council; and that the other party to the case, AFGE Local 2921, received a copy of your appeal on January 29, 1976.

As you pointed out in your request, this is the first instance in which the Council has had to consider a request for waiver of expired time limits, based on a delay in the mails, under the Council's rules of procedure, as revised September 24, 1975. Moreover, this is the first case in which an appeal was received untimely, but had been mailed to the Council at least 5 days before the due date for the appeal, i.e. at least the number of days (now 5) added to prescribed time periods for mail service under section 2411.45(c) of the Council's rules.*/

In the Council's opinion, where, as here, the evidence is clear and uncontroverted that a particular document was deposited in the mails 5 or more days before the deadline for filing such document, and the document is received in the office of the Council after the deadline, such delay will be considered as constituting "extraordinary circumstances," within the meaning of section 2411.45(f) of the Council's rules, warranting waiver of expired time limits. Such policy is necessary to afford all parties, particularly those outside the Washington, D.C. area, similar actual time for case preparation, and is necessary to implement the purposes of the Council's rules of procedure.

Accordingly, as your petition for review was mailed more than 5 days before the deadline for filing such petition with the Council, and as there is no showing of prejudice by the union, your request for reconsideration of the Council's decision of March 3, 1976, is hereby granted.

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*/ In earlier cases, where appeals were denied as untimely filed, and it was subsequently claimed that the untimeliness was due to delays in the mails, it did not appear that the appeals had been mailed to the Council at least the number of days (then 3) as were added to prescribed time periods for mail service under the Council's then current rules of procedure (e.g., Farmers Home Administration, United States Department of Agriculture, Little Rock, Arkansas, A/SLMR No. 506, FLRC No. 75A-62 (July 21, 1975), Report No. 77, request for reconsideration denied September 2, 1975, Report No. 81; Department of the Navy, Pearl Harbor Naval Shipyard, Assistant Secretary Case No. 73-573, FLRC No. 75A-11 (February 14, 1975), Report No. 63, request for reconsideration denied April 16, 1975; and Mid-America Program Center, Social Security Administration and Local 1336, American Federation of Government Employees (Yarowsky, Arbitrator), FLRC No. 74A-62 (November 21, 1974), Report No. 60, request for reconsideration denied December 23, 1974.

Pursuant to section 2411.45(e) of the Council's rules, the time for filing an opposition to Council acceptance of your petition for review is extended until 35 days from the date of this letter.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: W. C. Valdes
DOD

M. G. Blatch
AFGE

State of New Jersey Department of Defense and National Army-Air Technicians Association, Local 371 (Howard, Arbitrator). The Council granted the union's request for an extension of time to file an appeal in the present case until the close of business on May 21, 1976. However, the appeal, which was mailed on May 21, 1976, was not filed with the Council until May 24, 1976, and no further extension of time was either requested by the union or granted by the Council.

Council action (May 27, 1976). Because the union's appeal was untimely filed, and apart from other considerations, the Council denied the petition for review.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

May 27, 1976

Mr. Richard W. Spencer
Business Representative
National Army-Air Technicians
Association, Local 371
Suite L, Mainline Professional Building
1104 U.S. Route 130
Cinnaminson, New Jersey 08077

Re: State of New Jersey Department of Defense and National Army-Air Technicians Association, Local 371 (Howard, Arbitrator), FLRC No. 76A-72

Dear Mr. Spencer:

This refers to your petition for review in the above-entitled case. For the reasons indicated below, the Council has determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

By letter dated April 30, 1976, confirming oral advice, an extension of time for filing an appeal with the Council in the above-entitled case was granted until the close of business on May 21, 1976. Therefore, under section 2411.45(a) and (c) of the Council's rules, your appeal was due in the office of the Council on or before the close of business on May 21, 1976. However, your appeal was not received by the Council until May 24, 1976, and no further extension of time was either requested by you or granted by the Council.

Accordingly, as your appeal was untimely filed, and apart from other considerations, your petition for review is denied.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: Col. J. G. Johnson
N.J. Dept. of Defense

246-469 O - 78 - 21

Naval Ordnance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers (Thomson, Arbitrator). The arbitrator sustained the grievance under the parties' agreement relating to the activity's denial of the grievant's request for a retroactive promotion to a higher graded position. As a remedy, the arbitrator directed the retroactive promotion of the grievant with backpay. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated applicable law and regulation as set forth in the Federal Personnel Manual and as interpreted by the Comptroller General. The Council also granted the agency's request for a stay of the award. (Report No. 89)

Council action (June 14, 1976). Based upon a decision of the Comptroller General, rendered in response to the Council's request, the Council found that the portion of the arbitrator's award which ordered that the grievant be promoted retroactively violated applicable law and regulation, and that the award may not be implemented. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the award to the extent it was inconsistent with the decision. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Naval Ordnance Station,
Louisville, Kentucky

and

FLRC No. 75A-91

Local Lodge No. 830,
International Association of
Machinists and Aerospace Workers

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award providing the grievant retroactive promotion with backpay for the period September 29, 1974, to December 22, 1974.

Based on the findings of the arbitrator and the entire record, it appears that the grievant was a Mail Clerk, GS-305-03, at the activity. At the request of the grievant's supervisor, grievant made a survey of the work which she performed during the period July 1, 1974, through August 2, 1974. The survey revealed that grievant spent about one-fourth of her work time performing the duties of a Bindery Helper. The grievant then discussed the feasibility of receiving a different job classification and a higher rate of pay with her supervisor and on November 27, 1974, the grievant requested a promotion retroactive to September 29, 1974, to the position of Helper, Bindery Worker, WP-4402-04. The request was denied and a formal grievance was filed on December 19, 1974.

In the meantime, on December 9, 1974, the position of Helper (Bindery) was classified, the position description stating that 70 percent of the typical work performed in the position would involve bindery work and 30 percent would involve mail distribution. The grievant was given a temporary promotion to this position on December 22, 1974, and, following announcement of the vacancy and grievant's application, she received a permanent promotion on February 16, 1975.

The Arbitrator's Award

The arbitrator determined that it was "incumbent upon the [activity] to promptly establish, classify and announce this new position to which they had already assigned the duties thereof to the [g]rievant," adding that "[o]nly by prompt classification can the promotion process [of the parties'

agreement] not be impaired." As his award, the arbitrator sustained the grievance in its entirety, i.e., that the grievant be promoted retroactively to September 29, 1974.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleges that the award violates applicable law and regulation as set forth in the Federal Personnel Manual and as interpreted by the Comptroller General.1/

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Council accepted the agency's petition for review insofar as it related to its exception which alleges that the arbitrator's award of retroactive promotion violates applicable law and regulation as set forth in the Federal Personnel Manual and as interpreted by the Comptroller General. Because this case concerns issues within the jurisdiction of the Comptroller General's Office, especially the applicability of prior Comptroller General decisions to the facts of this case, the Council requested from him a decision as to whether the arbitrator's award violates applicable law and regulation. The Comptroller General's decision in the matter, B-180010.08, May 4, 1976, is set forth below:

> This action involves the request of December 16, 1975, by the Federal Labor Relations Council (FLRC) for an advance decision as to the legality of a retroactive promotion with backpay awarded by an arbitrator in the matter of Naval Ordnance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers (Thomson, Arbitrator), FLRC No. 75A-91. The case is before the Federal Labor Relations Council as a result of a petition for review filed by the agency alleging that the award violates applicable laws and regulations.
>
> The grievant in this case, Ms. Willie W. Cunningham, had been employed by the Naval Ordnance Station in the position of Mail Clerk, GS-305-03,

1/ The agency requested and the Council granted a stay of the award pending determination of the appeal, pursuant to section 2411.47(f) of the Council's rules of procedure.

since 1970, and, since at least July 1974, she had been spending part of her time performing duties as a Bindery Helper at the specific request of her supervisor. The grievant apparently informally discussed with her supervisor the possibility of a higher job classification and higher pay, and on November 27, 1974, she formally requested a promotion to the position of Helper, Bindery Worker. This request was denied and she filed a grievance on December 19, 1974, requesting a promotion to the position of Helper, Bindery, effective September 29, 1974. The agency, on December 9, 1974, officially classified the position of Helper (Bindery), WP-4404-04, and the position description stated that 70 percent of the typical work performed in the position would involve bindery work and 30 percent would involve mail distribution. Ms. Cunningham was given a temporary promotion to this position on December 22, 1974, and was permanently promoted to the position on February 16, 1975.

The arbitrator, on July 7, 1975, found that under the negotiated agreement the agency was required to temporarily promote an employee assigned to and performing duties of a higher graded position (under certain time conditions). He further found that the agency had to promptly establish, classify, and announce the new position to which it had already assigned the duties thereof to the grievant, and he, therefore, sustained the grievance. The award required the temporary promotion of Ms. Cunningham with higher pay during the period of September 29 through December 21, 1974, although the position had not been officially classified until December 9, 1974.

The Department of the Navy filed a timely petition with the Federal Labor Relations Council for review of the arbitrator's award. The FLRC has accepted the petition and has requested our decision as to whether the arbitrator's award of retroactive promotion and backpay violates applicable laws and regulations.

The agency contends that there was no officially graded position or vacancy in existence prior to December 9, 1974, and that, therefore, a temporary promotion could not be effected prior to that date. It argues that the provision in the negotiated agreement requiring temporary promotions (under certain conditions) is "inoperative" unless a position exists which has been classified by a classification or job grading authority. It cites several decisions of our Office regarding retroactive promotions in which the agency states the existence of a position or vacancy was implicit.

The union contends that the arbitrator found an implicit nondiscretionary obligation on the part of the agency to either classify the position "within the contractual time frame" or withdraw the higher level duties, and that without this obligation the agency could assign new duties and withhold higher compensation "for a never ending period." It also challenges the factual determination that the position Helper (Bindery) was not classified.

The exception to the arbitrator's award relating to the facts will not be ruled upon by this Office. We shall limit our consideration to the propriety of implementing the award in question based on the facts as found by the arbitrator that the position had not been classified prior to December 9, 1974.

The negotiated agreement between the union and the agency provides, in Article 15, Section 9, that temporary promotions are to be utilized in situations requiring the temporary service of an employee in a higher graded position. That section provides further that if the assignment to the higher level position is for a period of 15 days or more the employee shall be promoted no later than the second pay period from the date of the assignment. The agreement provides further, in pertinent part:

"ARTICLE 18

"Changes in Job Descriptions and Requirements

"Section 1. JOB DESCRIPTION POLICY

"The Wage and Classification Program shall be administered within the guidelines issued and authority delegated by the Civil Service Commission and higher Navy authority.

"Section 2. JOB DESCRIPTION CHANGES

"a. Job and position descriptions are written to accurately describe the major duties and responsibilities of the incumbent. These descriptions are then classified by the Civilian Personnel Department to determine rate, title, pay level, and qualifications requirements. Modifications to job descriptions are required to describe changes in work assignments and the current state of the art as technological advances are made.

"b. In any case where action is proposed to modify the position or job description of any employee in the bargaining unit for any reason, and such change may affect the rating, title, pay level, or qualification requirements for the job or position, it is agreed that the proposed changes will be discussed with the employee(s) concerned prior to the effective date of the change. Such changes will not be made to evade the merit promotion principles or any other condition negotiated in this Agreement. In any discussion pertaining to such changes, the employee(s) concerned may be accompanied by his Steward.

"Section 3. JOB DESCRIPTION REVIEWS AND APPEALS

"a. Any employee in the unit who feels that his job or position is improperly rated or classified, shall have the right to

request his supervisor to have his job rating or position classification reviewed.

"c. If the supervisor and the employee cannot reach a mutual agreement, the employee may file a classification or rating appeal, or the supervisor may request a Wage and Classification Specialist from the Industrial Relations Department to conduct an audit of the employee's regular work assignment.

"e. If the employee is not satisfied with the Wage and Classification Specialist's decision, he may file a classification appeal.

"Section 4. CLASSIFICATION INEQUITIES

"a. All employees in the bargaining unit shall be freely and fully provided the opportunity to appeal what they consider to be inequities in their existing grade or rating or any proposed downgrading.* * *"

The arbitrator found that the grievant was performing the work of a higher level position and could not be "denied the benefits thereof owing to the Company's (agency's) lack of diligence in classifying the position." The arbitrator stated that only by prompt classification would the promotion process of Article 15 not be impaired. However, Article 18 of the negotiated agreement does not appear to impose any time deadlines on the agency for classifying positions. In this connection, it is noted that classification of positions is basically a matter within the jurisdiction of the employing agency and the Civil Service Commission. 5 U.S.C. 5107 (1970) and 5346 (Supp. IV, 1974).

Classification of positions is within the discretion of the agency, subject to requests for review and appeals by employees. See Article 18, Section 3 of the negotiated agreement; 5 C.F.R. 511.601 et seq., and 532.701 et seq. (1975). In this connection, the arbitrator stated that only by prompt classification could the promotion process provided under the negotiated agreement not be impaired. However, as the arbitrator recognized, this case involves promotion to a new position which had not been classified at the time the grievant began to perform the duties thereof. It does not involve assignment to an established higher grade position. The provisions of Article 15 of the agreement (concerning promotions) were not involved. Rather the case concerned the provisions of Article 18 which recognized that the matter of the job description was subject to the classification review and appeal process set forth in civil service regulations.

As noted in 55 Comp. Gen. 515 (1975), the Civil Service Commission's regulations for position classification provide that the effective date of a classification action taken by an agency or a classification action

resulting from an employee's appeal is the date the action is approved or the appeal is decided or a date subsequent to that date. See C.F.R. 511.701 et seq., and 532.701 et seq. (1975). Absent any indication that the grievant's position was illegally or intentionally misclassified, there is no authority to allow a retroactive promotion with backpay on the ground that there was an erroneous classification decision. 52 Comp. Gen. 631 (1973); 50 id. 581 (1971); and B-173831, September 3, 1971. Therefore, until the position was classified upward and she was promoted, the grievant was not entitled to the pay of the higher graded position. Dianish et al. v. United States, 183 Ct. Cl. 702 (1968). In this connection we point out that the above rule concerning classification actions has recently been confirmed by the Supreme Court of the United States in United States v. Testan et al., 44 U.S.L.W. 4245, decided March 2, 1976.

Accordingly, it is our conclusion that the arbitrator's award may not be implemented.

Conclusion

The Comptroller General has determined that under applicable law and regulation, absent any indication that the grievant's position was illegally or intentionally misclassified, there is no authority to allow a retroactive promotion with backpay on the ground that there was an erroneous classification decision, and, under the facts and circumstances of this case, until the position was classified upward and she was promoted, the grievant was not entitled to the pay of the higher graded position. In this case the position in question was classified upward on December 9, 1974, and the activity promoted the grievant to the position on December 22, 1974. Accordingly, we find that that portion of the arbitrator's award which orders the grievant be promoted retroactively to September 29, 1974, violates applicable law and regulation, and the award may not be implemented. Pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award to the extent that it is inconsistent with the decision herein. As so modified, the award is sustained and the stay is vacated.

By the Council.

Henry B. Frazier III
Executive Director

Issued: June 14, 1976

Norfolk Naval Shipyard, Portsmouth, Virginia, A/SLMR No. 618. The Assistant Secretary dismissed the complaint of the Tidewater Virginia Federal Employees Metal Trades Council, which alleged that the activity violated section 19(a)(2) of the Order by failing or refusing to rehire Frank J. Nowak because of his union activities while previously employed by the activity. Mr. Nowak appealed to the Council, contending that the decision of the Assistant Secretary presented a major policy issue and was arbitrary and capricious.

Council action (June 14, 1976). The Council held that Mr. Nowak's petition for review did not meet the requirements of the Council's rules; that is, the decision of the Assistant Secretary did not present a major policy issue nor did it appear arbitrary and capricious. Accordingly, since Mr. Nowak's appeal failed to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and without passing upon the questions of Mr. Nowak's standing to file the subject petition or whether such petition was timely filed, the Council denied review of the appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

June 14, 1976

Mr. R. Michael Smith
Howell, Anninos, Daugherty & Brown
Maritime Tower, Suite 808
Norfolk, Virginia 23510

Re: Norfolk Naval Shipyard, Portsmouth, Virginia, A/SLMR No. 618, FLRC No. 76A-39

Dear Mr. Smith:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the agency, in the above-entitled case.

In this case, as found by the Assistant Secretary, the Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (MTC) filed a complaint alleging that the Norfolk Naval Shipyard, Portsmouth, Virginia (the activity) violated section 19(a)(2) of the Order by failing or refusing to rehire one Frank J. Nowak because of his union activities. Mr. Nowak, who was employed by the activity from 1959 until April of 1973, is a former president and chief steward of Operating Engineers Local 710, the exclusive representative of certain crafts or classes of the activity's employees. On April 22, 1973, he was separated from the activity by transfer of function to the Defense Supply Agency. Since that time, he has been employed continuously by the Defense Supply Agency. As an employee of that agency, he was not eligible to function as the chief steward of Local 710 at the activity. In October and November of 1973, Nowak filed applications for reappointment at the Shipyard. Between April 21, 1974, and July 25, 1974, the Shipyard hired nine Crane Operators, one by transfer from another Navy activity and eight from Civil Service Commission certifications. Nowak's name was not included in any of the Civil Service certificates and he has not been hired.

The Assistant Secretary adopted the conclusion of the ALJ that, "upon all the evidence adduced, it had not been shown that the failure to re-employ Nowak constituted discrimination that discouraged membership in the union, nor that such failure discouraged membership in the union by means of discrimination, and consequently, that a violation of section 19(a)(2) of the Order had not been proved." Accordingly, he dismissed the complaint in its entirety.

In your petition for review, you allege that the decision of the Assistant Secretary presents a major policy issue as to ". . . whether or not the [activity] discriminated against Nowak due to his union activities because the Administrative Law Judge found the necessary discouragement to Nowak's

union membership," and that the Assistant Secretary is arbitrary and capricious for failing to find a violation of section 19(a)(2) upon the record as a whole. You argue that the only logical conclusion that may be reached is that management recalled Nowak's union activity and did not wish to have him back where he could renew his efforts in that regard.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present a major policy issue nor does it appear arbitrary and capricious. Your contention that the record supports a finding of a violation constitutes, in effect, nothing more than disagreement with the Assistant Secretary's factual findings and therefore does not present a major policy issue warranting Council review. It does not appear, in the circumstances of this case, that the Assistant Secretary acted without any reasonable justification in reaching his conclusion that there was insufficient evidence to support a finding that the activity's failure to rehire Nowak constituted discrimination that discouraged union membership in violation of section 19(a)(2) of the Order.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, without passing upon the questions of Nowak's standing to file the petition for review or whether such petition has been timely filed, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

A. G. Niro
Navy

Veterans Administration Hospital, New Orleans, Louisiana, A/SLMR No. 637. The National Federation of Federal Employees (NFFE) appealed to the Council from the Assistant Secretary's decision and direction of election. The conduct of such election among the employees in the unit the Assistant Secretary found to be appropriate had not been completed at the time NFFE's appeal was filed with the Council, and no certification of the results or representative had issued.

Council action (June 17, 1976). Since a final decision had not been rendered by the Assistant Secretary on the entire proceeding before him, the Council, pursuant to section 2411.41 of its rules, denied review of NFFE's interlocutory appeal, without prejudice to the renewal of NFFE's contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

June 17, 1976

Mr. John P. Helm, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20006

Re: Veterans Administration Hospital, New Orleans, Louisiana, A/SLMR No. 637, FLRC No. 76A-77

Dear Mr. Helm:

This refers to your petition for review of the Assistant Secretary's decision and direction of election in the above-entitled case, which you filed with the Council on June 1, 1976.

In his subject action, from which you are appealing, the Assistant Secretary, among other things, directed a representation election among the employees in the unit he found appropriate. The conduct of such election had not been completed at the time your appeal was filed with the Council, and no certification of the results or representative has issued as of this date. Thus, no final disposition of the entire case has been rendered.

Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of a decision of the Assistant Secretary until a final decision has been rendered on the entire proceeding before him. More particularly, in a case such as here involved, the Council will entertain an appeal only after a certification of representative or of the results of the election has issued, or after other final disposition has been made of the entire representation matter by the Assistant Secretary.

Since a final decision has not been so rendered in the present case, your appeal is interlocutory and is hereby denied, without prejudice to the renewal of your contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. A. Smith
VA

R. J. Malloy
AFGE

Headquarters, U.S. Army Artillery Center, Fort Sill, Oklahoma and NFFE Local 273 (Stratton, Arbitrator). The arbitrator denied the grievance relating to the activity's action in charging the grievant's absence from work as absence without leave, rather than sick leave as claimed by the grievant, and suspending her without pay. The union filed exceptions to the arbitrator's award with the Council, alleging (1) that the award violated appropriate regulation, and (2) that the arbitrator exceeded his authority. The union also contended that the arbitrator improperly affirmed the disciplinary decision despite an alleged failure by the activity to comply with the procedural requirements of the parties' agreement in its actions leading to the suspension.

Council action (June 22, 1976). As to (1), without passing upon the question whether the regulation cited by the union was an "appropriate regulation" as that term is used in section 2411.32 of the Council's rules, the Council held that the exception did not appear to be supported by facts and circumstances described in the petition. As to (2), the Council held that the union's petition did not present facts and circumstances to support its contention. With regard to the union's further contention concerning the activity's alleged failure to adhere to the procedural requirements of the parties' agreement, the Council held that this contention did not assert a ground upon which the Council will grant a petition for review of an arbitrator's award. Accordingly, the Council denied the union's petition since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

June 22, 1976

Mr. John P. Helm
Staff Attorney, National
Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Headquarters, U.S. Army Artillery Center, Fort Sill, Oklahoma and NFFE Local 273 (Stratton, Arbitrator), FLRC No. 75A-126

Dear Mr. Helm:

The Council has carefully considered your petition for review of an arbitrator's award, and the agency's opposition thereto, in the above-entitled case.

According to the papers submitted by the parties, it appears that the grievant, a nonappropriated fund employee at the NCO Open Mess (club) at Fort Sill, Oklahoma, requested 10 days' annual leave beginning June 21, 1975, so that she could visit her husband who was temporarily out of state. Her supervisors denied her request, explaining that ". . . the club was short on personnel due to some being on sick leave and others on annual leave or scheduled for annual leave." Then, as admitted by the grievant at the arbitration hearing (according to the arbitrator's award), she ". . . threatened to take sick leave if not granted annual leave . . . ."

On June 20, 1975, at approximately 9:30 p.m., the grievant called her immediate supervisor and told him that she was ill and "would be on sick leave for ten days starting 21 June."[1/] On that date the grievant traveled out of state to visit her husband. Upon her return, on June 30, 1975, the grievant presented a doctor's prescription dated June 20, 1975, that stated: "Needs to be off from work for medical reasons for 10 days." (In the interim, the doctor, who had been on 2 weeks' active duty as a reservist, had departed the area.) The activity, however, concluded that her ". . . claim of illness was a ploy to circumvent the denial of . . . requested annual leave . . ." and that she "purposely delayed calling [her] supervisor and presenting the statement from [the doctor] to preclude [her] supervisor questioning him as to whether [she was] actually incapacitated for duty."

1/ The union's petition for review indicates that the grievant informed her supervisor that evening of "the doctor's instructions for 10 days absence from work." Copies of the activity's correspondence with the grievant, however, indicate that the grievant did not present to the activity a doctor's prescription containing such instructions until after she returned on June 30, 1975, by which time the doctor who had issued the instructions had departed the area.

It then charged her absence of June 21-28, 1975, as absence without leave ("AWOL") and suspended her without pay for 3 consecutive workdays.

The arbitrator determined that ". . . management has sustained the burden of proving by clear and convincing evidence (even though circumstantial) that the grievant abused her sick leave privilege at the times material herein." He based his determination ". . . primarily on the testimony of the grievant herself who seemed interested in basing her entire case on the arbitrary manner in which management had refused to grant her annual leave rather than attempting to justify the taking of sick leave." The determining factor for the arbitrator was that the grievant admitted threatening to take sick leave if not granted annual leave and in fact did take sick leave when the activity failed to grant her annual leave request.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of two exceptions discussed below.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception, the union contends that the arbitrator's award violates appropriate regulations--"Non-Appropriated Fund Employee Regulations governing granting of sick leave."[2/] The union argues that since the activity's doctors found the employee to be ill and directed her to be off from work for medical reasons, and all the appropriate forms were submitted and the procedures followed for requesting sick leave, the arbitrator's decision to affirm the action of the activity in this matter is contrary to the authority of the regulations despite any coincidence with her annual leave request.

Without passing upon the question whether the cited regulation is an "appropriate regulation" as that term is used in section 2411.32 of the

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2/ According to the union's petition for review, the Manual for Nonappropriated Fund Instrumentalities states, in pertinent part:

> Granting Sick Leave - All regular full-time and regular part-time employees who have sick leave to their credit may be granted such leave in accordance with the following procedures:
>
> (1) Employee is to receive Medical, dental, or optical examination or treatment;
>
> (2) Employee is incapacitated for the performance of duty by sickness, injury, or pregnancy and confinement . . .

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Council's rules, we conclude that the union's first exception does not appear to be supported by facts and circumstances described in the petition, as required by section 2411.32. The union has not established a nexus between the cited regulation and the arbitrator's determination that the grievant abused her sick leave privilege. That is, the union has failed to show in what manner this determination may violate the regulations governing sick leave. Further, the union's contention in this regard appears to constitute disagreement with the arbitrator's award on the merits of the grievance. However, as the Council has held previously, the resolution of the grievance is a matter to be left to the arbitrator's judgment. The Supervisor, New Orleans, Louisiana Commodity Inspection and Grain Inspection Branches, Grain Division, United States Department of Agriculture and American Federation of Government Employees, AFL-CIO, Local 3157 (Moore, Arbitrator), FLRC No. 74A-75 (June 26, 1975), Report No. 74. Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception, the union contends that the arbitrator exceeded the limits of his contractual authority. In support of this exception, the union alleges that the arbitrator failed to base his decision on a contractual provision and missed the issue in the grievance.

The Council will grant a petition for review of an arbitration award where the arbitrator exceeded his contractual authority by determining an issue not included in the question(s) submitted to arbitration. Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (March 18, 1976), Report No. 101; Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60; American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42.

The Council, however, has concluded that the union's petition does not present facts and circumstances necessary to support its contention that the arbitrator exceeded his authority. In regard to the union's allegation that the arbitrator failed to base his decision on a contractual provision, the Council holds, as was held in prior Council cases, that the arbitrator is not required to discuss the specific agreement provision involved and the fact that he did not mention the provision does not establish that he did not rule upon it. Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60; Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (November 14, 1975), Report No. 89. Furthermore, in regard to the union's allegation that the arbitrator "missed the issue in this grievance," the Council finds that the issue,

as stated by the arbitrator[3/] (". . . whether or not the grievant had been properly docked for forty-eight (48) hours sick leave and wrongfully suspended for three (3) days arising out of an alleged abuse of sick leave by the grievant.") was precisely that answered by him. Therefore, this exception likewise provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Finally, the union also contends that the arbitrator "affirmed the agency's disciplinary decision," despite the fact that "the proposal letter [proposed disciplinary action] did not comply with the requirements of . . . the contract that an extra copy of the letter be given to the employee for the employee's representative."[4/] Thus, the union is, in effect, challenging not the award itself, but the alleged failure of the activity to comply with the procedural requirements of the collective bargaining agreement in its actions leading to the suspension. This contention, however, does not assert a ground upon which the Council will grant a petition for review of an arbitration award. Therefore, this contention provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the union's petition is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: W. J. Schrader
Army

3/ It is unclear from the papers submitted by the parties whether or not there was a joint submission agreement presented to the arbitrator. Nevertheless, in the absence of such an agreement, the unchallenged formulation of the question by the arbitrator may be regarded as the equivalent of a submission agreement. Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88 (July 24, 1975), Report No. 78.

4/ The arbitrator's award does not indicate whether or not this contention was presented to him.

National Treasury Employees Union, Chapter 10 (Internal Revenue Service, Chicago, Illinois), Assistant Secretary Case No. 50-13004(CO). The Assistant Secretary denied the request of the individual complainant, Miss Margot Caro, for reversal of the Assistant Regional Director's dismissal of her complaint, which alleged that the union violated section 19(b)(1) of the Order. Miss Caro appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented major policy issues.

Council action (June 22, 1976). The Council held that Miss Caro's petition for review did not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, as Miss Caro's appeal failed to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure, the Council denied review of her petition.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

June 22, 1976

Miss Margot Caro
333 East Ontario Street-#1905
Chicago, Illinois 60611

Re: National Treasury Employees Union, Chapter 10, (Internal Revenue Service, Chicago, Illinois), Assistant Secretary Case No. 50-13004 (CO), FLRC No. 76A-7

Dear Miss Caro:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, the Assistant Secretary denied your request for reversal of the Assistant Regional Director's (ARD) dismissal of your complaint against the National Treasury Employees Union, Chapter 10 (the union). The complaint alleged that the union violated section 19(b)(1) of the Order by stating in the union newsletter, with respect to employees who were not union members and consequently did not pay union dues, that "[t]hose parasitic scabs who refuse to join the Union because they are too cheap to pay their fair share must be confronted!"

The Assistant Secretary, citing his decision in American Federation of Government Employees, Local 987, A/SLMR No. 420 [review denied by the Council, FLRC No. 74A-60 (April 10, 1975), Report No. 68], concluded that insufficient evidence was submitted to establish a reasonable basis for the allegation that the language constituted improper interference, restraint or coercion with respect to employee rights assured by the Order. Further, the Assistant Secretary determined that evidence submitted with regard to an incident in June 1975 involving certain employees smoking in your presence would not require a contrary result.

In your petition for review, you allege that the decision of the Assistant Secretary is arbitrary and capricious and that there are major policy questions involved, specifically relating to whether the facts, as alleged in your petition, constitute a violation of the Order.

In the Council's view, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear in the circumstances of

this case that the Assistant Secretary acted without any reasonable justification in reaching his decision. As to your assertion that the decision presents major policy issues, your assertion, in essence, constitutes nothing more than disagreement with the Assistant Secretary's conclusion that insufficient evidence was submitted to establish a reasonable basis for your complaint alleging a violation of section 19(b)(1) of the Order, and, as such, in the circumstances of the case, does not present a basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

R. Tobias
NTEU

Veterans Administration, Veterans Administration Hospital, Montgomery, Alabama, Assistant Secretary Case No. 40-6562(CU). The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), found, upon a clarification of unit (CU) petition filed by the American Federation of Government Employees, Local 997, AFL-CIO (AFGE), that the former Outpatient Clinic employees represented by National Federation of Federal Employees, Local 95 (NFFE), who were physically transferred to and reassigned throughout the activity, had accreted to the existing unit represented by AFGE. The Assistant Secretary thereupon denied NFFE's request for review of the ARD's decision. NFFE appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious.

Council action (June 22, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious, and NFFE neither alleged, nor did it appear, that his decision presented a major policy issue. Accordingly, the Council denied review of NFFE's petition.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

June 22, 1976

Mr. John P. Helm, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Veterans Administration, Veterans Administration Hospital, Montgomery, Alabama, Assistant Secretary Case No. 40-6562 (CU), FLRC No. 76A-9

Dear Mr. Helm:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, as found by the Assistant Secretary, in 1966 the National Federation of Federal Employees, Local 95 (NFFE) was granted exclusive recognition for a unit of employees at the Veterans Administration Regional Office, including employees of the Regional Office Outpatient Clinic located in Montgomery, Alabama. In 1967, as part of a local reorganization of the Veterans Administration, administrative control of the Outpatient Clinic was transferred to the Veterans Administration Hospital, Montgomery, Alabama (the activity). Shortly thereafter, NFFE negotiated a separate agreement with the activity covering the unit of Outpatient Clinic employees. In 1970, the Outpatient Clinic employees were physically transferred to and reassigned throughout the Hospital.1/ In the present case, the American Federation of Government Employees, Local 997, AFL-CIO (AFGE), the exclusive representative of a unit of all nonprofessional employees at the activity, filed a CU petition seeking to include the former Outpatient Clinic employees in its unit.

The Assistant Regional Director (ARD) found that:

> The thirteen former Outpatient Clinic employees . . . are assigned to five different Hospital services . . . . They work alongside and share common supervision with other employees. Additionally they occupy the same job classifications and perform the same duties as other Hospital employees.

Based on the foregoing circumstances, he therefore concluded that "the transferred employees constitute an accretion to the currently recognized

1/ Of the 16 Outpatient Clinic employees physically transferred, 13 are still employed at the activity, which has maintained a dues checkoff arrangement with NFFE covering them. Three employees are still on dues deduction.

unit of Hospital employees." The Assistant Secretary subsequently denied NFFE's request for review, finding, in agreement with the ARD and based on his reasoning, that the evidence established that the former Outpatient Clinic employees had accreted to the existing unit represented by AFGE.

In your petition for review on behalf of NFFE, you allege that the Assistant Secretary's decision is arbitrary and capricious in that he erred in his determination that "the employees of the Outpatient Clinic have accreted to the existing unit represented by the AFGE," contending in substance that it has not been shown either that "the original unit [represented by NFFE] was incorrect" or that AFGE's proposed unit "would contribute to more efficient labor-management relations."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious, and you do not allege, nor does it appear, that his decision presents a major policy issue.

As to your allegation that the Assistant Secretary was arbitrary and capricious in finding that there had been an accretion in the facts and circumstances of this case, in the Council's view it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision. Rather, your specific contentions in this regard constitute, in effect, nothing more than disagreement with the Assistant Secretary's factual findings and therefore provide no basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that his decision presents a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Harold D. Kessler
for
Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

D. Thomas
VA

C. Lanthrip
AFGE

Quantico Education Association, A/SLMR No. 601. The Assistant Secretary dismissed the complaint of the individual complainant, Gilbert Gene Leonard, which alleged that the Quantico Education Association violated section 19(c) of the Order. Mr. Leonard appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues.

Council action (June 22, 1976). The Council held that Mr. Leonard's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious or present major policy issues warranting Council review. Accordingly, the Council denied review of Mr. Leonard's petition.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

June 22, 1976

Mr. Gilbert Gene Leonard
811 Hanover Street
Fredericksburg, Virginia 22401

Re: Quantico Education Association, A/SLMR No. 601, FLRC No. 76A-15

Dear Mr. Leonard:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

The facts of this case, as found by the Assistant Secretary, are as follows: The Quantico Education Association (QEA) is the exclusive bargaining representative for teachers in the Quantico Dependents School System, Marine Corps Base, Quantico, Virginia (MCB). During the 1973-1974 school year, the membership of QEA voted to unify with its state and national parent organizations, the Virginia Education Association (VEA) and the National Education Association (NEA), respectively. The QEA Constitution also was amended to provide that QEA "is a unified member with (1) Virginia Education Association and (2) the National Education Association" and that "[m]embers must join QEA, VEA, and NEA as it is a unified membership." As a teacher in the Quantico Dependents School System, you tendered the $11 annual dues required under the Constitution for membership in QEA and requested membership therein. You were informed that membership in QEA required a total payment of $74 in annual dues. (This larger amount represented $38 in membership dues for VEA and $25 for NEA in addition to the $11 in QEA dues.) This dues requirement was subsequently affirmed by the President of QEA, and your request for membership was officially denied. You thereafter filed a complaint alleging that QEA had violated section 19(c) of the Order by denying you membership for reasons other than "failure to meet occupational standards uniformly required for admission, or for failure to tender initiation fees and dues uniformly required as a condition of acquiring and retaining membership."

The Assistant Secretary, adopting the findings, conclusions and recommendations of the Administrative Law Judge (ALJ) without comment, dismissed the complaint in its entirety. The ALJ found that the provision of the QEA Constitution which specified the payment of $11 membership dues must

be read in conjunction with the provision of the Constitution which required "membership in VEA and NEA as a prerequisite to membership in QEA," and, thus, that "membership in VEA and NEA impliedly necessitates the payment of dues to these organizations." He also found that even if the QEA Constitution were considered ambiguous in this respect, it did not follow that QEA was in violation of the Order because section 19(c) requires that union membership dues be applied to all employees uniformly. Accordingly, the ALJ found that uncontroverted testimony that "QEA's dues requirements have indeed been applied uniformly" was dispositive of the case. Further, the ALJ found "that the negotiated agreement between QEA and MCB, which recognizes only QEA and not VEA and NEA, does not preclude QEA from making membership in state or national organizations a condition to membership in QEA." He also rejected your contention that the amendments to the QEA Constitution effecting the affiliation with VEA and NEA were adopted in violation of a procedural requirement contained in the QEA Constitution, noting that the irregularity was slight and did not affect the validity of the amendments, and that such irregularity was "immaterial to the merits of this Section 19(c) complaint."

In your petition for review, you allege that the Assistant Secretary's decision dismissing the complaint herein is arbitrary or unreasonable and presents major policy issues. In this regard, you raise numerous questions as to the facts relied on by the Assistant Secretary and pose questions as to whether "an organization granted exclusive recognition can unite with two other organizations not recognized by the Civil Service" and compel its members to join and pay dues to the three organizations or be denied membership therein. You further allege that the manner in which the affiliation of QEA with its parent organizations was accomplished in the circumstances of this case was procedurally defective.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious or to present major policy issues. With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in finding that in the absence of any evidence that you were denied membership in the QEA for any reason other than failure to pay the annual dues required for all QEA members, an insufficient basis exists for finding a violation of section 19(c) of the Order. As to the alleged major policy issues, the Council is of the opinion, noting particularly the Assistant Secretary's finding that membership in QEA required the payment of dues to VEA and NEA and that such requirement was uniformly applied, in the circumstances of the case, the Assistant Secretary's decision does not warrant Council review. Moreover, the Assistant Secretary's rejection of your contentions regarding the manner in which the affiliation of QEA with its parent organizations was accomplished as being immaterial to the section 19(c) complaint in the circumstances of this case does not, in the Council's view, raise any major policy issues warranting review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present major policy issues warranting Council review, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

S. Richey
QEA

Shonto Boarding School, Shonto, Arizona, Department of the Interior, Bureau of Indian Affairs, Assistant Secretary Case No. 72-5654(RO). The Assistant Secretary denied the request of the National Council of BIA Educators (NCBIAE) for reversal of the Assistant Regional Director's dismissal of NCBIAE's representation petition seeking to sever a group of employees described as "professional educators" from an existing exclusively recognized unit. NCBIAE appealed to the Council, contending only that NCBIAE was a professional organization and no professional organization exists at the activity, and that a 1971 Assistant Secretary case allows NCBIAE to hold elections for professional educators.

Council action (June 22, 1976). The Council held that NCBIAE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is NCBIAE did not allege and it did not appear that the decision of the Assistant Secretary was in any manner arbitrary and capricious or, noting established Assistant Secretary and Council precedent, that it presented any major policy issues warranting Council review. Accordingly, the Council denied review of NCBIAE's appeal.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

June 22, 1976

Mr. Donald R. Prince, Director
National Council BIA Educators
P. O. Box 476
Gallup, New Mexico 87301

Re: Shonto Boarding School, Shonto, Arizona, Department of the Interior, Bureau of Indian Affairs, Assistant Secretary Case No. 72-5654 (RO), FLRC No. 76A-41

Dear Mr. Prince:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, the National Council of BIA Educators (NCBIAE) filed a representation petition seeking to sever a group of employees described as "professional educators" from an existing exclusively recognized unit. The Assistant Secretary denied your request for review seeking reversal of the Assistant Regional Director's (ARD) dismissal of the petition. In his denial the Assistant Secretary noted that there was no evidence of unusual circumstances which would warrant severance of the claimed employees from an existing exclusively recognized unit and noted that the ARD had cited U.S. Department of Interior, Bureau of Indian Affairs, Fort Apache Agency, Phoenix, Arizona, A/SLMR No. 363 as a basis for the dismissal.

In your petition for review, you contend only that NCBIAE is a professional organization and no professional organization exists at the activity, and that a 1971 Assistant Secretary case allows NCBIAE to hold elections for professional educators.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, you do not allege and it does not appear that the decision of the Assistant Secretary is in any manner arbitrary and capricious or presents major policy issues. It does not appear that the Assistant Secretary acted without reasonable justification in finding that the instant petition was properly dismissed. Further, no major policy issue is presented, noting particularly that the criteria applied in the cited decision in A/SLMR No. 363 were those criteria for granting a request for severance of a proposed bargaining unit from a more comprehensive unit, which he first enunciated in United States Naval Construction Battalion Center, A/SLMR No. 8, which criteria were specifically approved by the Council in Department of the Navy, Naval Air Station, Corpus Christi, Texas, A/SLMR No. 150, 1 FLRC 375, [FLRC No. 72A-24

(May 22, 1973), Report No. 39]. Further, in Veterans Administration Center, Togus, Maine, A/SLMR No. 84, 1 FLRC 170, [FLRC No. 71A-42 (June 22, 1972), Report No. 23] and Veterans Administration Center, Mountain Home, Tennessee, A/SLMR No. 89, 1 FLRC 170, [FLRC No. 71A-45 (June 22, 1972), Report No. 23], the Council held that nothing in section 10(b)(4) of the Order implies or requires that a segment of professionals be accorded any special right of severance from more comprehensive units of an activity's employees. In the instant case, no persuasive reasons are advanced for overturning these precedents.*/ Therefore, we conclude that the subject decision of the Assistant Secretary presents no major policy issue warranting Council review. Veterans Administration Hospital, Portland, Oregon, A/SLMR No. 308, FLRC No. 73A-54 (March 20, 1974), Report No. 51.

Accordingly, because your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Dept. of Labor

J. R. Franklin
BIA

J. Cooper
NFFE

*/ In this regard, your appeal fails to establish that the Assistant Secretary's dismissal of the instant petition was inconsistent with or contrary to such applicable precedent.

NAGE Local R12-183 and McClellan Air Force Base, California. The dispute involved the negotiability under the Order of two union proposals entitled "Hours of Work/Tours of Duty" and "Working Conditions."

Council action (June 23, 1976). The Council found that the union's proposals were excluded from the agency's obligation to bargain under section 11(b) of the Order. Accordingly, pursuant to section 2411.28 of its Rules and Regulations, the Council sustained the agency head's determination that the proposals were nonnegotiable.

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UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

NAGE Local R12-183

and

FLRC No. 75A-81

McClellan Air Force Base, California

DECISION ON NEGOTIABILITY ISSUES

Background

NAGE Local R12-183 represents a unit of nonappropriated fund employees at McClellan Air Force Base. During the course of negotiations between the parties, disputes arose concerning the negotiability of two union proposals (set forth hereinafter) entitled Article VIII, Hours of Work/Tours of Duty and Article XXIII, Working Conditions.

Upon referral, the Department of Defense determined principally that the proposals are nonnegotiable under section 11(b) of the Order. The union petitioned the Council for review under section 11(c)(4) of the Order and the agency submitted a statement of its position.

Opinion

The union's proposals will be discussed separately.

1. The union's proposed Article VIII provides as follows: [Only the underscored provisions are in dispute.]

> Article VIII, Hours of Work/Tours of Duty
>
> Section 2. The basic workweek will be five consecutive days with two consecutive days off. The hours of work for employees will be as follows:
>
> a. Full-time employees will have the opportunity to work a forty hour week unless the workload is such that it will not support forty hours. However, in no instance will the full-time employees have their hours reduced by using part-time or intermittent employees. At no time shall the hours for full-time employees go below thirty-five hours per workweek.

b. Part-time employees will have the opportunity to work a thirty-four hour week unless the workload is such that it will not support thirty-four hours. However, in no instance will the part-time employees have their hours reduced by using intermittent employees. At no time shall the hours for part-time employees go below twenty hours per workweek.

The agency determined among other things that the underscored portions of the proposal are excepted from the obligation to bargain under section 11(b) of the Order because they concern the numbers of positions or employees assigned to an organizational unit, work project or tour of duty. More particularly, the agency determined that:

> . . . [management] would be prohibited from utilizing any part-time or intermittent employees on any work unless all full-time and part-time employees were assigned to regularly scheduled workweeks of 40 hours and 34 hours, respectively. If such conditions precedent were to be placed on the utilization of part-time and intermittent personnel, it would have a direct bearing on the number of full-time, part-time and intermittent employees to be assigned each organizational unit, work project or tour of duty.

The union, however, claims that the proposal is negotiable, arguing in effect that its negotiability is consistent with the Order, as well as with pertinent agency regulations.[1/]

Section 11(b) of the Order provides in relevant part as follows:

> . . . the obligation to meet and confer does not include matters with respect to the . . . [agency's] organization . . . and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty.

The underscored provision of section 11(b) quoted above was intended to clarify the right of an agency to establish "staffing patterns" for its organization and for accomplishing its mission.[2/] Hence, in its decisions

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1/ In regard to agency regulations, whether or not the proposal is consistent with internal regulations unilaterally adopted by the agency is not relevant to deciding the question of whether the proposal concerns matters excluded from the obligation to bargain under section 11(b). Therefore, we find it unnecessary to reach and make no ruling concerning this union contention. See AFGE Local 2118 and Los Alamos Area Office, ERDA, FLRC No. 74A-30 (May 22, 1975), Report No. 71 at part 2 of decision.

2/ See Section E.1. of Report accompanying E.O. 11491, Labor-Management Relations in the Federal Service (1975), at 70.

applying this provision of section 11(b), the Council consistently has adhered to the principle that a proposal is excepted from the agency's obligation to bargain under section 11(b) if, in the circumstances of a particular case, such proposal is integrally related to and consequently determinative of the staffing patterns of the agency, that is, the numbers, types and/or grades of positions or employees assigned to an organizational unit, work project or tour of duty.[3/]

Turning to the proposal before the Council in this case, as previously set forth, it plainly concerns matters which are integrally related to and consequently determinative of the staffing patterns in the bargaining unit. Specifically among other effects, it would prevent the agency from changing established staffing patterns unless the conditions prescribed in the proposal could be met: that is, the use of, and hence an increase in the number of, part-time or intermittent employees would be prohibited whenever their use would reduce the hours of full-time employees below 40; the use of, and hence an increase in the number of intermittent employees would be prohibited whenever their use would reduce the hours of full-time employees below 40 or the hours of part-time employees below 34. Thus, it is clear that this proposal would limit the agency's discretion in allocating the total number of employees assigned to an organizational unit, work project or tour of duty (as well as the proportions of and numbers within that total which would be full-time, part-time or intermittent employees). The fact that the present proposal does not prescribe a particular number of employees which the agency must assign to an organizational unit, work project or tour of duty is without controlling significance. It is well established that proposals which require an agency to assign a specific number of employees are excluded from the bargaining obligation under the staffing patterns provision of section 11(b).[4/] It is equally well established under prior Council decisions that proposals which are integrally related to and hence

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3/ See American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (June 10, 1975), Report No. 73 at part 2 of decision, aff'd, National Broiler Council, Inc. v. Federal Labor Relations Council, Civil Action No. 147-47-A (E.D. Va., September 5, 1975).

4/ Immigration and Naturalization Service and American Federation of Government Employees, FLRC No. 74A-13 (June 26, 1975), Report No. 75 at part 8 of decision. AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, FLRC No. 73A-25 (September 30, 1974), Report No. 57 at part 2 of decision.

determinative of the numbers of employees that the agency might assign to a particular organizational unit, work project or tour of duty also are encompassed by the exclusion of staffing patterns from the bargaining obligation under section 11(b) of the Order.[5/]

Therefore, in the circumstances of this case, since the proposal is integrally related to and consequently determinative of the numbers of employees that the agency might assign to a particular organizational unit, work project or tour of duty, we must find that the disputed language in Article VIII, Section 2 of the union's proposal is excluded from the obligation to bargain under section 11(b) of the Order.

2. The disputed portion of the union's proposed Article XXIII provides as follows:

> Article XXIII, Working Conditions
>
> Section 5. All work assignments will be equitably distributed among personnel within the same job classification.

The agency determined that this proposal is nonnegotiable under section 11(b) of the Order, claiming that the proposal would "inevitably impact on job content and staffing patterns," matters which the Council has held to be excepted from the obligation to bargain. The union principally argues that the proposal does not infringe on the agency's authority to assign employees and is not violative of the Order. Rather, it concerns a negotiable working condition — "fair and equitable treatment for all employees in each job classification."

Section 11(b), as previously set forth herein in relevant part, excepts from the bargaining obligation the organization of an agency and its patterns of staffing that organization. In this regard, the Council held in its Griffiss decision[6/] that the exception of the agency's "organization" and "staffing patterns" from its obligation to bargain under section 11(b) includes the grouping of duties and responsibilities into individual positions, i.e., the content of the individual job.

5/ Immigration and Naturalization Service and American Federation of Government Employees, FLRC No. 74A-13 (June 26, 1975), Report No. 75 at part 9 of decision; Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, FLRC No. 72A-35 (June 29, 1973), Report No. 41 at part 2 of decision.

6/ International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., FLRC No. 71A-30 (April 19, 1973), Report No. 36. (Union proposal prohibiting assignment of certain allegedly unrelated duties to positions in unit.)

Turning now to the proposal presently before us, it would require management to distribute equitably among employees in the same job classification, all work assignments. However, the record indicates that unit employees in positions within the same job classification at McClellan Air Force Base are not necessarily assigned the same duties and do not necessarily perform the same kinds of work assignments or have the same responsibilities, i.e., do not have the same job content.7/ More particularly, the agency indicates in its determination, without contradiction by the union, that there are 12 separate nonappropriated fund instrumentalities (NAFI's) at the activity, each with its own specific function, and that with regard to job classifications which are common to more than one NAFI, the functional context and individual work assignments of employees assigned to such common classifications vary extensively among the different NAFI's.

Therefore, the proposal, which would require management to equitably distribute all work assignments among all personnel whose jobs bear the same generic job classification, would perforce require adjustment to the content of such jobs. Consequently, we must find that the proposal concerns matters excepted from the bargaining obligation by section 11(b).

In so holding, we expressly distinguish our decision in this case from the Council's decision in the Immigration and Naturalization Service (INS) case where a union proposal concerning the rotation of certain employees to a particular duty on a fair and equitable basis was found to be negotiable, the Council stating:8/

> The proposal merely requires that among those Immigration Officers who management has determined will perform duties associated with vehicular inspection, management will distribute specific assignments to such duties on a fair and equitable basis. As the union in its brief points out, "[m]anagement unilaterally determines when inspections are necessary," and will then under this proposal, "implement this procedure in the terms of the labor agreement which requires a fair and equitable rotation." Thus, the proposal would not prevent agency management from

7/ See Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio, FLRC No. 74A-2 (December 5, 1974), Report No. 60, for a general discussion of difference between job classification and job content.

8/ Immigration and Naturalization Service and American Federation of Government Employees, FLRC No. 74A-13 (June 26, 1975), Report No. 75. The proposal held to be negotiable provided as follows:

> Immigration Officers shall rotate to vehicular inspection on a fair and equitable basis. Immigration Officers shall not be prohibited from using inspection booths and/or other available shelter during inclement weather conditions while not actually engaged in the inspection. [Underscoring in body supplied to denote disputed portion.]

determining that some or all Immigration Officers will not perform vehicular inspection duties or that only Immigration Officers of a certain grade level or of a certain organizational unit, for example, will perform such inspections. [Emphasis in body supplied.]

Unlike the proposal in the INS case which only required the equitable distribution of a duty already assigned to a particular group of employees, the present proposal would instead require that new duty assignments be made so that all work assignments, even though not previously part of the job content of particular personnel, must be equitably distributed to all employees in each job classification. Thus, the INS case is clearly inapposite and not dispositive in the circumstances of the instant case.

Conclusion

For the reasons set forth above, and pursuant to section 2411.28 of the Council's Rules and Regulations, we find that the agency head's determination that the proposals here involved are nonnegotiable was proper and must be sustained.

By the Council.

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

Issued: June 23, 1976

Tooele Army Depot, Tooele, Utah and American Federation of Government Employees, AFL-CIO, Local 2185 (Linn, Arbitrator). The arbitrator sustained the grievance which alleged that the activity had circumvented the merit promotion system in filling a vacancy, in violation of the parties' agreement, and directed that the grievant be promoted retroactively with backpay. The Council accepted the agency's petition for review based on the agency's exceptions, which, among other grounds, alleged, in effect, that the award violated appropriate regulation (the Federal Personnel Manual). The Council also granted the agency's request for a stay of the arbitrator's award (Report No. 93).

Council action (July 7, 1976). Based upon an interpretation by the Civil Service Commission, rendered in response to the Council's request, the Council found that the portion of the arbitrator's award which ordered that the grievant be promoted retroactively with backpay violated appropriate regulation and may not be implemented. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council modified the arbitrator's award to the extent that it was inconsistent with the decision. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Tooele Army Depot, Tooele, Utah

and

FLRC No. 75A-104

American Federation of Government
Employees, AFL-CIO, Local 2185

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award directing that the grievant be promoted retroactively and receive backpay.

Based on the findings of the arbitrator and the entire record, it appears that a division of the activity initiated action to fill a Management Analyst, GS-0343-11, vacancy. A selection roster was compiled by the Civilian Personnel Division and forwarded to the selection official for this purpose which contained the names of candidates entitled to special consideration for promotion, owing to prior reduction-in-force demotions, and candidates eligible for competitive promotion. After examining the roster, the selection official determined that it contained some inaccuracies and returned it to the Civilian Personnel Division for corrections. Prior to receiving the corrected roster, the selection official then completed action to fill the vacancy by a noncompetitive lateral transfer of an employee from within the division. The grievant, one of those identified on the initial roster as a candidate entitled to special consideration, filed a grievance alleging that management had circumvented the merit promotion system in filling the vacancy.

The Arbitrator's Award

The arbitrator determined, in part, that the roster compiled initially violated the parties' agreement, by combining the names of special consideration and competitive promotion candidates, and that management had violated the parties' agreement, by taking the transfer action prior to completing review of the grievant's candidacy on the corrected roster. He found that the grievant was highly qualified for the vacancy and that there was a substantial likelihood that he would have been promoted if he had been objectively considered. As a remedy, the arbitrator stated that the grievant should be promoted retroactively with backpay.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the

Council accepted the petition for review based on the agency's exceptions which, among other grounds, alleged, in effect, that the award violates appropriate regulation--the Federal Personnel Manual.*/ The agency filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the agency's exceptions allege, among other things, that the arbitrator's award violates provisions of the Federal Personnel Manual. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of applicable legal requirements and Commission regulations as they pertain to the questions raised in the present case. The Commission replied in pertinent part:

> The basic facts of the case are as follows: a vacancy arose for which the selecting official was provided with a Referral and Selection Register (containing names of "special consideration" candidates and employees eligible for competitive promotion) which was inaccurate in several regards; the selecting official subsequently decided to fill the vacancy by laterally and noncompetitively reassigning one of his other employees to the position; an employee whose name was on the Referral and Selection Register and who was entitled to "special consideration" because of an earlier demotion, grieved the decision to reassign, maintaining that the agency had improperly circumvented the merit promotion system; the arbitrator agreed with the grievant, finding that since the grievant would have had a "substantial likelihood" of being promoted to the position by virtue of his being (1) highly qualified for the position, and (2) deserving of "special consideration", the grievant was entitled to retroactive promotion, with backpay, to the position in question.
>
> Special consideration, and the employees entitled to it, are defined by inference in Federal Personnel Manual (FPM) Chapter 335, Subchapter 2 (Requirement 1):
>
> > "(c) The competitive procedures of the (agency promotion) plans will not apply to:

*/ The agency requested and the Council granted a stay of the award pending determination of the appeal, pursuant to section 2411.47(f) of the Council's rules of procedure.

(3) Repromotion to a grade or position from which an employee was demoted without personal cause and not at his request . . . Competitive procedures of the promotion plans will not be used before non-competitive consideration of these employees."

Subchapter 4-3 (c) (2) of the same chapter further defines special consideration as follows:

"(2) Special consideration for repromotion. An employee demoted without personal cause is entitled to special consideration for repromotion in the agency in which he was demoted. Although he is not guaranteed repromotion, ordinarily he should be repromoted when a vacancy occurs in a position at his former grade . . . for which he has demonstrated that he is well qualified, unless there are persuasive reasons for not doing so. Consideration of an employee entitled to special consideration for repromotion must precede efforts to fill the vacancy by other means . . ." (underlining added)

The wording in this chapter clearly directs selecting officials to accord special consideration to those employees so entitled before considering any other persons. While an employee entitled to special consideration should ordinarily be promoted, this is not guaranteed.* Therefore, this chapter may not be the basis for an arbitrator's award that a particular person be promoted.

That the grievant and two other employees were entitled to special consideration in this case is not contested. Likewise, the agency does not dispute the allegations that its handling of the selection roster was "procedurally in error" in that special consideration candidates and promotion candidates were provided to the selecting official at the same time. Thus, the agency's violation of the special consideration provisions of the FPM renders the entire action defective ab initio.

The question of the arbitrator's authority to order the selection of a special consideration candidate remains. FPM Chapter 335, Subchapter 2 (Requirement 6) sets forth the management right to select or nonselect. This management right can only be abridged if a direct causal connection between the agency's violation(s) and the failure to select a specific employee or from a specific group of employees is established. It must be determined by competent authority that but for the violation(s) that occurred, the employee in question

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*In Kirk Army Hospital, FLRC No. 72A-18, the Council had occasion to cite FPM subchapter 4-3(c)(2), and commented that "With respect to the repromotion rights of such employees, the FPM plainly states that, even though they are entitled to 'special consideration', they are 'not guaranteed promotion.' In other words, a selection decision remains to be made by the selecting official." [Footnote in original.]

would definitely (and in accordance with law, regulation, and/or negotiated agreement) have been selected. In such cases, the Comptroller General has ruled (in his decisions numbered B-180010 issued on and subsequent to October 31, 1974) that an arbitrator or other competent authority may direct retroactive promotion of the aggrieved employee, with backpay.

In this instance, however, there is no evidence that the required "but for" relationship exists. The arbitrator himself states:

> "Whether the grievant would have been selected to fill the GS-0343-11 position to which Mrs. Hunt was wrongfully assigned, is uncertain."

The agency gives no indication that it would have selected the grievant had the special consideration phase of the staffing process been properly conducted. Moreover, while the agency must accord a special consideration opportunity to those entitled to one before any other persons are considered, there is nothing in statute, Civil Service Regulation, or FPM which requires an agency to select a candidate entitled to such special consideration. Thus, while the arbitrator is empowered to find the agency's actions procedurally defective and could, for example, order a rerunning of the entire staffing process starting with a properly-conducted "special consideration" phase, his award of retroactive repromotion to the grievant, with backpay, is, under the circumstances of this case, violative of Commission directives and of controlling Comptroller General decisions.

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that the arbitrator's award of retroactive promotion to the grievant, with backpay, is, under the circumstances of this case, violative of Commission directives and of controlling Comptroller General decisions.

Conclusion

For the foregoing reasons, we find that, that portion of the arbitrator's award which orders the grievant be promoted retroactively with backpay violates appropriate regulation and may not be implemented. Pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award to the extent that it is inconsistent with the decision herein. As so modified, the award is sustained and the stay is vacated.

By the Council.

Henry B. Frazier III
Executive Director

Issued: July 7, 1976

Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case No. 63-4708(DR). The Assistant Secretary, in agreement with the Assistant Regional Director (ARD) and based on the ARD's reasoning, found that further proceedings with respect to the decertification petition filed in the instant case were unwarranted, and, therefore, denied the request of Mrs. Barbara Wood seeking reversal of the ARD's dismissal of the subject petition. Mrs. Wood appealed to the Council, contending, in effect, that the Assistant Secretary's decision appeared arbitrary and capricious or presented major policy issues.

Council action (July 7, 1976). The Council held that Mrs. Wood's appeal did not meet the requirements of section 2411.12 of the Council's rules; that is, it did not appear that the decision of the Assistant Secretary was arbitrary and capricious or that it presented a major policy issue. Accordingly, the Council denied review of the appeal.

CORRECTED COPY

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 7, 1976

Mrs. Barbara Wood
Route 5, Box 58V
Austin, Texas 78749

Re: Veterans Administration Data Processing Center, Austin, Texas, Assistant Secretary Case No. 63-4708 (DR), FLRC No. 76A-5

Dear Mrs. Wood:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the National Federation of Federal Employees (NFFE), in the above-entitled case.

In this case, a petition was filed by an employee seeking to decertify NFFE, Local 1745 as the exclusive representative of a unit of employees at the Veterans Administration Data Processing Center, Austin, Texas (the activity). While the petition was pending before the Assistant Regional Director (ARD), NFFE filed unfair labor practice complaints against the activity. As a result, further proceedings with respect to the decertification petition were suspended by the ARD pending disposition of the unfair labor practice complaints. In Veterans Administration, Veterans Administration Data Processing Center, Austin, Texas, A/SLMR No. 523 (June 24, 1975), the Assistant Secretary issued his decision on the consolidated complaints in which he found, in part, that an activity supervisor had participated in the solicitation of the showing of interest in the decertification petition. Thereafter, the ARD "caused an investigation of the adequacy and validity of that showing of interest to be conducted." The ARD dismissed the petition pursuant to Section 202.6 of the Assistant Secretary's regulations because:

> The investigation revealed that the extent of management involvement has sufficiently invalidated the showing of interest in the instant petition so that it has ceased to adequately support the petition.

The Assistant Secretary, in agreement with the ARD and based on his reasoning, found that further proceedings were unwarranted. Accordingly,

he denied your request for review seeking reversal of the ARD's dismissal of the decertification petition.

In your petition for review, you contend, in effect, that the Assistant Secretary's decision appears arbitrary and capricious or presents a major policy issue. In essence, your petition asserts that the Assistant Secretary improperly applied his regulations in the processing of the decertification petition and the related unfair labor practice proceedings. In addition, you contend that the Department of Labor failed to protect your rights under section 1(a) of the Order; violated section 6(a)(4) of the Order by failing to notify you of the hearings and decisions in the unfair labor practice proceedings; and failed to adequately disseminate information pursuant to section 25(b) of the Order.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, it does not appear that the decision of the Assistant Secretary was arbitrary and capricious or presents a major policy issue.

Specifically, no basis for Council review is presented with respect to your allegation that the Assistant Secretary improperly applied his regulations in the circumstances of this case. The Assistant Secretary has, pursuant to his authority under section 6(d) of the Order, prescribed regulations needed to administer his functions under the Order. The Assistant Secretary's decision in the instant case was based upon the application of his regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish such regulations, or that his regulations or his application thereof in the circumstances of this case was inconsistent with the purposes of the Order. Hence, the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue warranting Council review.

With respect to your assertions that the Department of Labor failed to protect your rights under the Order, your petition for review to the Council fails to set forth any circumstances to support such assertions and therefore does not provide a basis for Council review. Your further assertion that section 6(a)(4) of the Order was violated in that you received no notification of any hearings conducted or decisions issued in the related unfair labor practice proceeding likewise provides no basis for Council review, noting particularly that your petition neither alleges that you requested and were denied an opportunity to intervene in such proceeding, nor presents facts and circumstances to support a determination that prejudice may have thereby resulted in the processing of the instant decertification petition. Accordingly, it does not appear on the basis of the foregoing allegations that the Assistant Secretary's decision was arbitrary and capricious or presents a major policy issue.

Since it does not appear that the Assistant Secretary's decision is arbitrary and capricious or presents a major policy issue, your appeal fails

to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

N. E. Jacobs
VA

J. Cooper
NFFE

G. J. Peterson
AFGE

Naval Aerospace and Regional Medical Center, Pensacola, Florida, A/SLMR No. 603. The Assistant Secretary dismissed the separate representation petitions filed by three activities of the agency following a reorganization (which petitions sought to establish three separate smaller units), finding that the existing larger unit represented by American Federation of Government Employees, Local 1960 continued to remain appropriate. The agency appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented major policy issues.

Council action (July 7, 1976). The Council held that the agency's petition did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present major policy issues. Accordingly, the Council denied review of the agency's appeal.

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UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 7, 1976

Mr. John J. Connerton
Labor Relations Advisor
Labor Disputes and Appeals Section
Office of Civilian Manpower Management
Department of the Navy
Washington, D.C. 20390

Re: Naval Aerospace and Regional Medical Center, Pensacola, Florida, A/SLMR No. 603, FLRC No. 76A-18

Dear Mr. Connerton:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

As found by the Assistant Secretary, this case arose as a result of a reorganization instituted by the Chief of Naval Operations in the Bureau of Medicine and Surgery (BUMED), which included the Naval Aerospace and Regional Medical Center, Pensacola, Florida (the Center). American Federation of Government Employees, Local 1960, is the certified bargaining representative of essentially all nonprofessional employees of the Center. Prior to the reorganization, the Center included as component elements the Naval Aerospace Medical Institute (the Institute) and the Naval Aerospace Medical Research Laboratory (the Laboratory), and a hospital. The three elements were under the command of the Commanding Officer of the Center, who reported to BUMED. As a result of the reorganization, the Institute and the Laboratory were removed from the responsibility of the Center's Commanding Officer and established as separate and independent activities with different chains of command. The commander of each activity continued, however, to be responsible ultimately to BUMED.

Following the reorganization, the Center, the Laboratory, and the Institute each filed an agency representation petition (RA) with the Assistant Secretary contending that the reorganization so substantially changed the character and scope of the existing unit as to render it inappropriate.*/ In this regard, it was contended that as a result of the reorganization there now existed three separate units conforming to the new organizational alignment. The Assistant Secretary, after reviewing the circumstances of the reorganization and its impact on the unit, found "that the certified unit

*/ The activity-petitioners further indicated that should it be determined that petitions for clarification of unit (CU) should have been filed in this matter to achieve the desired result, the petitions be treated as such.

continues, after the reorganization, to remain appropriate for the purpose of exclusive recognition." The Assistant Secretary noted particularly in this regard "that the reorganization did not result in any change in the day-to-day terms and conditions of employment of the employees involved . . . ." Moreover, the Assistant Secretary stated that where, as in the instant case, "there is a history of collective bargaining in the unit involved and the exclusively recognized unit remains essentially intact following a reorganization, to alter the unit in the manner sought herein by the Activity-Petitioners clearly would not have the desired effect of promoting effective dealings and efficiency of agency operations." Rather, he found, the establishment of three separate units would "tend to promote fragmentation and inhibit effective dealings and efficiency of agency operations," noting in this regard that the three commands "continue to report to the same organizational command, BUMED, and are serviced by the same Consolidated Civilian Personnel Office." Accordingly, he dismissed the petitions. Further, in view of that disposition, the Assistant Secretary concluded that treating the instant petitions as CU petitions would not require a contrary result.

In your petition for review on behalf of the agency, you allege that the decision of the Assistant Secretary is arbitrary and capricious and presents major policy issues with respect to: (1) the Assistant Secretary's failure to make an affirmative finding with respect to "effective dealings and efficiency of agency operations" or to grant equal weight to each of the section 10(b) criteria as required by the Council's decision in Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364, FLRC No. 74A-28 (May 9, 1975), Report No. 69; (2) the Assistant Secretary's adoption of a co-employer doctrine, contrary to the Council's decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, FLRC No. 74A-22 (December 9, 1975), Report No. 88; and (3) in a reorganization, as occurred in this case, should there not be procedures available to conform the bargaining units to the changed conditions without an election?

In the Council's view, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present major policy issues.

With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in reaching his decision. Further, no major policy issue is presented, in the facts and circumstances of this case, by your allegation that the Assistant Secretary failed to make an affirmative finding with respect to effective dealings and efficiency of agency operations or to accord equal weight to each of the section 10(b) criteria as required by the Council's decision in Tulsa. In this regard, we note that while the Assistant Secretary's finding as to whether the unit found appropriate would promote effective dealings and

efficiency of agency operations was not couched in the precise language of the Order, the substance of his decision, that is, that to alter the unit in the manner sought clearly would not have the desired effect of promoting effective dealings and efficiency of agency operations, does not appear to be inconsistent with the Council's requirement for an affirmative determination in this regard and the required according of equal weight to these criteria. (See Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Central Region and Weather Service Offices (Bismarck, North Dakota; Fargo, North Dakota; St. Cloud, Minnesota; and International Falls, Minnesota), A/SLMR No. 331, FLRC No. 74A-16 (July 21, 1975), Report No. 77.) Moreover, no major policy issue is raised with respect to your contention that the Assistant Secretary adopted a co-employer doctrine, noting particularly the Assistant Secretary's finding that "the three commands . . . continue to report to the same organizational command, BUMED, and are serviced by the same Consolidated Civilian Personnel Office" and noting the total absence of any reliance upon or mention of such doctrine in his decision. Finally, with respect to a procedure to conform bargaining units to changed conditions without an election, in the Council's view, noting particularly that the Assistant Secretary concluded that treating the petitions as CU petitions would not require a contrary result, no major policy issue warranting review is raised by the Assistant Secretary's dismissal of the RA petitions in the instant case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and presents no major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. H. Smith
AFGE

U.S. Department of the Army, U.S. Army Materiel Command Headquarters, Assistant Secretary Case No. 22-6309(CA). The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), decided that further proceedings were unwarranted on the complaint filed by Local 1332, National Federation of Federal Employees (NFFE), which alleged violations of section 19(a)(1), (2), (4), (5) and (6) of the Order. The Assistant Secretary therefore denied NFFE's request for review seeking reversal of the ARD's dismissal of the complaint. NFFE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented a major policy issue.

Council action (July 7, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and did not present a major policy issue. Accordingly, the Council denied review of NFFE's appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 7, 1976

Ms. Lisa Renee Strax
Legal Department
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: U.S. Department of the Army, U.S. Army Materiel Command Headquarters, Assistant Secretary Case No. 22-6309 (CA), FLRC No. 76A-27

Dear Ms. Strax:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the agency's opposition thereto, in the above-entitled case.

In this case, Local 1332, National Federation of Federal Employees (the union), filed a complaint against the U.S. Department of the Army, U.S. Army Materiel Command Headquarters (the activity). The complaint alleged, in substance, that the activity violated section 19(a)(1), (2), (4), (5), and (6) of the Order by harassing, intimidating, and discriminating against a union vice president and a union steward because of their union activity, and by failing to consult, confer, or negotiate with the union as required by the Order.

The Assistant Secretary, in agreement with the Assistant Regional Director (ARD), decided that further proceedings were unwarranted. In reaching this determination, the Assistant Secretary stated:

> . . . I find that . . . the evidence presented does not establish a reasonable basis for your complaint concerning alleged improper conduct by the [activity] with respect to two employees based on union membership considerations. Moreover, noting the [union's] letter of April 10, 1975, to the [activity], it appears that the issues involved herein have been raised previously with respect to both employees under a grievance procedure. Therefore, Section 19(d) also would preclude further proceedings in this matter.

Accordingly, the Assistant Secretary denied the union's request for review seeking reversal of the ARD's dismissal of the complaint.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious and that the dismissal presents a major policy issue as to "whether S. [section] 19(d)

precludes the processing of an unfair labor practice complaint on behalf of one individual when an independent grievance had been previously filed by a second employee who was subject to identical forms of harassment due to union affiliation by the same supervisor as was directed to the former employee." In this connection you assert that the union steward had not processed this matter under any grievance procedure, and, as a result, her complaint was not barred by section 19(d) of the Order.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious and does not present a major policy issue.

As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in reaching his decision. In this regard, your contentions amount only to the claim that a reasonable basis has been established for the unfair labor practice as filed, and therefore constitute nothing more than a disagreement with the Assistant Secretary's contrary determination pursuant to his regulations.

With respect to your allegation that the Assistant Secretary's decision raises a major policy issue concerning the application of section 19(d) to the instant complaint, in the Council's view, noting particularly that the Assistant Secretary found that further proceedings were unwarranted inasmuch as the evidence presented did not establish a reasonable basis for the union's complaint and merely noted additionally that the issues involved therein appeared to have been raised previously under a grievance procedure which would also preclude further proceedings, no basis for Council review is thereby presented.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and presents no major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

D. A. Dresser
Army

AFGE Local 1738 and VA Hospital, Salisbury, North Carolina. The dispute involved the negotiability under the Order of union proposals concerning (1) parking facilities to be provided for and to be used by members of the public seeking the agency's services; and (2) conditions governing the assignment of duties not compatible with an employee's position description.

Council action (July 8, 1976). As to (1), the Council concluded that the union's proposal was outside the required scope of bargaining under section 11(a) of the Order. As to (2), the Council found that the union's proposal was excepted from the agency's obligation to bargain under section 11(b) of the Order. Accordingly, pursuant to section 2411.28 of its Rules and Regulations, the Council sustained the agency head's determination that the proposals were nonnegotiable.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

AFGE Local 1738

and

FLRC No. 75A-103

VA Hospital, Salisbury,
North Carolina

DECISION ON NEGOTIABILITY ISSUES

Background

AFGE Local 1738 (the union) represents a unit of all nonprofessional employees at Salisbury Veterans Administration Hospital. During the course of negotiations with the Hospital, a dispute arose as to the negotiability of two union proposals (set forth hereinafter).

Upon referral, the Veterans Administration determined that the proposals are nonnegotiable under section 12(b) of the Order. The union petitioned the Council under section 11(c)(4) of the Order for review of the agency determination and the agency filed a statement of position.

Opinion

The union proposals will be discussed separately below.

1. The first proposal reads as follows:

> For as long as they can be justified, management may reserve a total of 38 parking spaces for use of admitting and outpatient parking. Such parking spaces shall be equally distributed in the parking areas between Buildings two (2) and three (3) and the parking areas between Building two (2) and four (4). The use of all other parking spaces is negotiable and no other parking spaces will be reserved without prior negotiation with the union.

The agency contends that, while parking facilities for employees and the allocation of parking spaces would normally be negotiable, this proposal, by requiring the negotiation of facilities to be provided for veterans eligible for medical care, is integrally related to and impacts on the ability to maintain the efficiency of agency operations and therefore violates section 12(b)(4) of the Order. The union argues, in effect, that the proposal does not infringe on management's rights but rather concerns personnel policies and practices or matters affecting working conditions which are negotiable under section 11(a) of the Order.

Section 11(a) of the Order establishes an obligation to bargain concerning personnel policies and practices affecting the bargaining unit and matters affecting bargaining unit working conditions.[1] In our opinion, this proposal is outside the obligation to bargain because it does not relate to the personnel policies and practices and matters affecting working conditions of the bargaining unit within the meaning of section 11(a) of the Order. The proposal in dispute, by its express terms, clearly is concerned principally with agency facilities to be provided for and to be used by persons seeking the agency's services, specifically, eligible veterans being admitted to the Hospital or undergoing outpatient care, who are not members of the bargaining unit. The facilities which the agency provides for such members of the public seeking the agency's services, i.e., for the public in furtherance of the agency's mission, clearly do not, of themselves, involve personnel policies and practices or matters affecting working conditions of unit employees.[2]

As to the agency's contention regarding section 12(b)(4), in our view the agency has failed to demonstrate that the proposal necessarily would limit, as claimed, management's right to maintain the efficiency of its operations. As we stated in our Little Rock decision,[3] section 12(b)(4) may not be invoked to deny negotiations unless there is a substantial demonstration by the agency that increased costs or reduced effectiveness in operations are not offset by compensating benefits.

1/ Section 11(a) of the Order provides in relevant part, as follows:

> An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations . . . and this Order.

2/ Cf. Texas ANG Council of Locals, AFGE and State of Texas National Guard, FLRC No. 74A-71 (March 3, 1976), Report No. 100; National Treasury Employees Union, Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (February 24, 1976), Report No. 98; Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 416 [FLRC No. 72A-27 (May 25, 1973), Report No. 40]. In so ruling, we do not pass upon the extent to which employee access to those parking facilities which remain available after the agency has designated parking for persons seeking the agency's services is a matter which involves personnel policies and practices or matters affecting working conditions under section 11(a) of the Order.

3/ Local Union 2219, International Brotherhood of Electrical Workers, AFL-CIO and Department of the Army, Corps of Engineers, Little Rock, Ark., 1 FLRC 220 [FLRC No. 71A-46 (November 20, 1972), Report No. 30].

Accordingly, since the union's proposal does not involve personnel policies and practices or matters affecting working conditions and, hence, falls outside the required scope of bargaining under section 11(a) of the Order, we must hold that the agency may, at its option, bargain on the proposal but is under no obligation to do so under the Order.

2. The second proposal reads as follows:

> If an employee objects to an assignment not compatible with his position description and which is expected to or has extended for more than two days, the supervisor will select for the assignment an available qualified employee within the group (as defined by this agreement) who has the least seniority.

The agency contends, relying on prior Council decisions, that since this proposal is an attempt to require the assignment of work to employees based on their position descriptions it violates section 12(b)(1), (2), (4) and (5) of the Order and is, therefore, nonnegotiable.[4/] The union argues the proposal does not infringe on the agency's right to have the work performed but rather establishes a procedure to select employees to perform work that is unrelated to their position descriptions and is, therefore, negotiable.

It is evident from the express language here involved that this proposal would limit the assignment of duties, here duties not compatible with an employee's position description, to particular positions or employees unless conditions prescribed in the agreement existed. Namely, either the duties could last no more than 2 days or, if the duties were expected to last more than 2 days, the employee assigned those duties must be the least senior available qualified employee.

The Council has held in numerous decisions that the exception from the obligation to bargain over job content under section 11(b) of the Order applies not only to proposals which would totally proscribe the assignment of duties to particular types of employees,[5/] but also to proposals such as

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4/ In support of its contention, the agency relies upon American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, 1 FLRC 585 [FLRC No. 72A-41 (December 12, 1973), Report No. 46], Federal Employee Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 445 [FLRC No. 72A-33 (June 29, 1973), Report No. 41] and International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 323 [FLRC No. 71A-30 (April 19, 1973), Report No. 36]. In those decisions, the Council found that proposals concerning the assignment of duties to particular positions or employees were outside the agency's obligation to bargain under section 11(b). The Council did not rely upon section 12(b) in relevant portions of those decisions. Therefore, the cited decisions do not support the agency's position.

5/ International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 323 [FLRC No. 71A-30 (April 19, 1973), Report No. 36].

the one presently before us, which would prevent the agency from assigning such duties unless certain conditions exist.[6/] While the union claims that the conditions attached to the assignment of duties not compatible with the employee's position description in the present case are merely a "procedure" which is negotiable, the subject conditions (namely, as already mentioned, that either the duties last no more than 2 days or if the duties were expected to last more than 2 days the employee assigned those duties must be the least senior available qualified employee) plainly impose limitations on which employee will actually perform the duties involved. Such a limitation on the agency's reserved authority to assign duties falls outside the obligation to bargain under section 11(b) of the Order.

Accordingly, we must find that the union's proposal is excepted from the agency's obligation to bargain under section 11(b) of the Order.

Conclusion

For the reasons set forth above, and pursuant to section 2411.28 of the Council's Rules and Regulations, we find that the agency head's determination that the proposals here involved are nonnegotiable was proper and must be sustained.

By the Council.

Henry B. Frazier III
Executive Director

Issued: July 8, 1976

6/ NAGE Local R12-183 and McClellan Air Force Base, California, FLRC No. 75A-81 (June 23, 1976), Report No. 107; Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio, FLRC No. 74A-2 (December 5, 1974), Report No. 60; AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, FLRC No. 73A-25 (September 30, 1974), Report No. 57; Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 611 [FLRC No. 72A-46 (December 27, 1973), Report No. 47]; American Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, 1 FLRC 585 [FLRC No. 72A-41 (December 12, 1973), Report No. 46]; Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 445 [FLRC No. 72A-33 (June 29, 1973), Report No. 41].

U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, Assistant Secretary Case No. 30-6026(GA). The Assistant Secretary, upon an application for a decision on grievability filed by Local 1940, American Federation of Government Employees, AFL-CIO, found that the grievance concerning overtime pay was subject to the grievance and arbitration procedures in the parties' negotiated agreement. The agency appealed to the Council, contending that the Assistant Secretary's decision presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (July 8, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not present a major policy issue warranting Council review and the agency neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied review of the agency's petition. The Council likewise denied the agency's request for a stay.

UNITED STATES
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1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 8, 1976

Mr. S. B. Pranger
Director of Personnel
Office of the Secretary
U.S. Department of Agriculture
Washington, D.C. 20250

Re: U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center, Assistant Secretary Case No. 30-6026 (GA), FLRC No. 76A-23

Dear Mr. Pranger:

The Council has carefully considered the agency's petition for review and request for a stay of the Assistant Secretary's decision, and the union's opposition thereto, in the above-entitled case.

American Federation of Government Employees, AFL-CIO, Local 1940 (the union), is the exclusive representative for a unit of employees at the U.S. Department of Agriculture, Agricultural Research Service, Plum Island Animal Disease Center (the activity). On a number of occasions during one particular workweek, several wage grade vessel employees in the unit were required to report for duty less than an hour earlier than their originally scheduled starting times. Subsequently, the union filed a grievance pursuant to the negotiated agreement, claiming that the agreement requires that the affected employees be paid a minimum of two hours callback overtime pay for each occasion on which they were required to report for duty prior to their regularly scheduled starting times. The grievance was pursued through the third step of the negotiated grievance procedure, where the activity finally rejected the grievance on the basis that it was not on a matter involving the application or interpretation of the agreement.

The union then filed an application for a decision on grievability with the Assistant Secretary who found, in agreement with the Assistant Regional Director (ARD), that "the grievance herein is subject to the grievance and arbitration procedures in the parties' negotiated agreement." In so ruling, the Assistant Secretary noted and concluded that the agreement provides that premium pay shall be as prescribed for wage grade employees in a cited agency regulation and that "[w]hile neither party disputes the fact that the [agency regulation] is controlling in this situation, they are in dispute as to its interpretation and application;" and that as ". . . the negotiated grievance procedure provides that the grievance procedure is the exclusive procedure 'for the consideration of grievances over the interpretation or application of the agreement,' and [the regulation] is incorporated by

reference in the agreement, I find that the instant matter should be resolved through the negotiated grievance and arbitration procedures." In reaching this conclusion, the Assistant Secretary rejected the agency's contention that the matter at issue has been resolved in prior decisions of the Comptroller General, finding that the alleged applicability of such decisions "goes to the merits of the instant grievance and the relief sought as distinguished from the grievability and arbitrability of the grievance under the negotiated agreement."

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision presents a major policy issue as to "[w]hether the Assistant Secretary may legitimately avoid determining the applicability of Comptroller General decisions to grievability-arbitrability questions by ruling that they go to the merits of the case." In this regard, you assert that, in deciding that the applicability of such decisions goes to the merits, the Assistant Secretary subverted the meaning and intent of the Council's decision in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (February 7, 1975), Report No. 63. You further allege that the Assistant Secretary's decision presents a major policy issue as to "[w]hether the Assistant Secretary should promulgate criteria for determining the grievability or arbitrability of questions raised under a negotiated grievance procedure."

In the Council's view, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present a major policy issue, and you do not allege, nor does it appear, that his decision was arbitrary and capricious.

With respect to your contention, in effect, that the Assistant Secretary's failure to consider the applicability of Comptroller General decisions to grievability-arbitrability questions before him is contrary to the Council's decision in the Crane case and thus presents a major policy issue, in Crane the Council indicated that in resolving questions as to whether a grievance is subject to a negotiated grievance procedure, the Assistant Secretary must consider, among other things, "existing . . . laws and regulations of appropriate authorities." As the Assistant Secretary did consider the rulings of the Comptroller General, concluding that the alleged applicability of the decisions went to the merits of the grievance and the relief sought as distinguished from the grievability and arbitrability of the grievance under the negotiated agreement, your appeal fails to establish either that his decision in this regard is contrary to the Order or inconsistent with applicable Council precedent. Thus, since the applicability of the Comptroller General decisions goes to the merits of the grievance, they are appropriate matters for consideration in the resolution of the grievance. As the ARD noted herein, the Council has pointed out that "arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the

Order requires that the administration of each negotiated agreement be subject to such law and regulation." Bureau of Prisons and Federal Prison Industries, Inc., Washington, DC and Council of Prison Locals, AFGE, 73 FSIP 27, FLRC No. 74A-24 (June 10, 1975), Report No. 74. Accordingly, in the Council's view, no major policy issue is presented warranting Council review.

With respect to your contention that the Assistant Secretary's decision presents a major policy issue as to whether the Assistant Secretary should promulgate criteria for determining grievability or arbitrability issues, section 6(a)(5) of the Order assigns to the Assistant Secretary the authority to "decide questions as to whether a grievance is subject to a negotiated grievance procedure or subject to arbitration under an agreement" and pursuant to section 6(d), the Assistant Secretary has promulgated regulations prescribing the manner in which he will exercise this authority. His action on the application for a decision on grievability herein was taken pursuant to those regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to issue such regulations or that they are in any manner inconsistent with the Order. Consequently, your contention does not present a major policy issue warranting Council review.

Accordingly, since your petition fails to meet the requirements for review provided by section 2411.12 of the Council's rules of procedure, review of your petition is hereby denied. The request for a stay of the Assistant Secretary's decision is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. D. King
AFGE

FLRC No. 76A-89

National Association of Government Employees, Local R4-45 and Navy Commissary Store Region [Department of the Navy] (Kleeb, Arbitrator). The arbitrator's award was dated May 19, 1976, and, under sections 2411.33(b) and 2411.45(a) and (c) of the Council's rules of procedure, the union's appeal was due in the office of the Council no later than the close of business on June 23, 1976. However, the appeal was not filed with the Council until July 9, 1976, or more than two weeks late, and no extension of time for filing was either requested by or on behalf of the union or granted by the Council.

Council action (July 23, 1976). Because the union's appeal was untimely filed, and apart from other considerations, the Council denied the union's petition for review.

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UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 23, 1976

Robert M. White, Esq.
White and Selkin
1500 Virginia National
Bank Building
One Commercial Place
Norfolk, Virginia 23510

Re: National Association of Government Employees, Local R4-45 and Navy Commissary Store Region [Department of the Navy] (Kleeb, Arbitrator), FLRC No. 76A-89

Dear Mr. White:

This refers to your petition for review on behalf of National Association of Government Employees, Local R4-45 (NAGE) in the above-entitled case. For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

The subject arbitration award is dated May 19, 1976, and, under sections 2411.33(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council no later than the close of business on June 23, 1976. However, your appeal was not filed with the Council until July 9, 1976, or more than two weeks late, and no extension of time for filing was either requested by or on behalf of NAGE or granted by the Council.

Accordingly, as your appeal was untimely filed, and apart from other considerations, your petition for review is denied.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: J. L. Griggs
Navy

U.S. Army Dugway Proving Ground, Dugway, Utah and National Association of Government Employees, Local R14-9 (Rentfro, Arbitrator). The union appealed to the Council from the arbitrator's award in this case. Preliminary examination of the appeal disclosed deficiencies in meeting various requirements of the Council's rules of procedure. The union was notified of these deficiencies and was provided time to effect compliance with the rules. Further, the union was advised that failure to effect compliance would result in dismissal of the appeal. The union failed to complete the necessary actions within the prescribed time limit.

Council action (July 26, 1976). The Council dismissed the appeal for failure to comply with its rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
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July 26, 1976

Mr. Vincent E. Lucas
National Representative
National Association of
Government Employees
Tower Box 65
2101 Executive Drive
Hampton, Virginia 23666

Re: U.S. Army Dugway Proving Ground, Dugway, Utah and National Association of Government Employees, Local R14-9 (Rentfro, Arbitrator), FLRC No. 76A-78

Dear Mr. Lucas:

This refers to your petition for review in the above-entitled case, filed with the Council on June 7, 1976, and to the agency's opposition thereto, filed with the Council on July 16, 1976.

By Council letter of June 9, 1976, you were advised that preliminary examination of your appeal disclosed deficiencies in meeting various requirements of the Council's rules of procedure (a copy of which was sent to you for your information). The pertinent sections of the rules were indicated, namely, sections 2411.42 and 2411.44, and the deficiencies were explained, in the letter.

You were also advised in the Council's letter:

> Further processing of your appeal is contingent upon your compliance with the above-designated provision(s) of the Council's rules. Accordingly, you are hereby granted until the close of business on June 25, 1976, to take necessary action and file additional materials in compliance with the above provision(s). Moreover, you must serve a copy of the required additional submission on the other parties including all representatives of other parties who entered appearances in the subject proceeding before the Assistant Secretary, the agency head, or the arbitrator, as the case may be, in accordance with section 2411.46(a) of the rules; and you must include a statement of such service with your additional submission to the Council.

Failure to comply with the above requirements will result in dismissal of your appeal.

You have made no submission showing accomplishment of the required actions, and you have not filed the additional materials prescribed, within the time limit provided therefor.

Accordingly, your appeal is denied for failure to comply with the Council's rules of procedure.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: W. J. Schrader
Army

Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582. The Assistant Secretary, upon a complaint filed by Local 290, Boilermakers Union, adopted the findings and conclusions of the Administrative Law Judge (ALJ) that, in essence, the activity violated section 19(a)(1) of the Order by reason of the threat by the activity's Group Superintendent to consider disciplinary action against employees or union representatives who fail to follow the procedures specified in the parties' negotiated agreement in processing grievances under that agreement. In adopting the findings and conclusions of the ALJ, the Assistant Secretary noted in particular that no exceptions were filed with him on behalf of the activity from the ALJ's finding that the activity had committed an unfair labor practice, and the Assistant Secretary made no substantive changes in the ALJ's recommended decision and order. The agency appealed to the Council, contending that the Assistant Secretary's decision presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision and order.

Council action (July 27, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision did not raise a major policy issue, and the agency neither alleged, nor did it appear, that his decision was arbitrary and capricious. Furthermore, noting that the instant appeal was filed with the Council on behalf of the activity even though no exceptions were filed on behalf of the activity with the Assistant Secretary from the ALJ's unfair labor practice finding, and even though the Assistant Secretary made no substantive change in the ALJ's recommended decision and order, the Council determined that, while its rules of procedure do not explicitly preclude the filing of an appeal on behalf of the activity under these circumstances, such practice is not consistent with the orderly processing of adjudicatory matters under the Order. That is, the needs of the Council in rendering an informed judgement in a contested matter such as here involved would best be served by a party filing exceptions with the Assistant Secretary, and by the Assistant Secretary's opportunity thereby to consider and pass upon such exceptions, before an appeal is submitted to the Council. Without condoning the contrary action of the agency in the instant case, the Council, because of the present state of its rules, deemed it necessary to consider the acceptability of the agency's appeal as submitted. Also, because of the isolated circumstances of this appeal, the Council determined that an immediate revision of its rules was not indicated, but added that it would take under prompt advisement an appropriate amendment to its rules should an appeal be filed under such circumstances in the future. Accordingly, since the agency's appeal failed to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure, the Council denied the petition. The Council likewise denied the agency's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
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July 27, 1976

Mr. A. Di Pasquale, Director
Labor & Employee Relations Division
Office of Civilian Manpower Management
Department of the Navy
Washington, D.C. 20390

Re: Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582, FLRC No. 76A-13

Dear Mr. Di Pasquale:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the union's opposition thereto, in the above-entitled case.

In this case, according to the Assistant Secretary's decision, the Department of the Navy, Puget Sound Naval Shipyard (the activity) and Local 290, Boilermakers Union (the union) were parties to a collective bargaining agreement containing, in pertinent part, a grievance procedure. To process a grievance, the agreement provided that the "employee shall first take up his grievance informally with his immediate supervisor" in an attempt to resolve the grievance and that grievances not handled in this manner within 15 working days after the occurrence thereof "shall not be presented nor considered at a later date" (absent certain specified circumstances not pertinent herein). If the grievance was not resolved informally within 5 working days at this level, the agreement provided that a formal written grievance could be filed.

A dispute arose between an employee and his immediate supervisor concerning the employee's entitlement under the agreement to the payment of environmental differential pay. The employee and his union steward filed a written grievance at the first formal step in the grievance procedure, but failed to inform activity officials that they had first brought up the matter informally with the supervisor as required by the agreement. Consequently, when the written grievance ultimately advanced to the second formal step of the grievance procedure, the activity's Group Superintendent, while agreeing to sustain the grievance in part, orally admonished the employee and his representative for what he understood was the union's failure to abide by the grievance procedures specified in the agreement. In a subsequent written report to the employee concerning his grievance, the Group Superintendent again stated:

> . . . I found that the negotiated grievance procedure had not been followed by you or your [union] representative in processing this

> grievance . . . . I will consider this memorandum to you with a copy to your [union] representatives to serve as a letter of caution that should subsequent occasions arise where the fundamental guidelines for problem resolvement are not followed, formal discipline will be considered.

The union thereafter filed a complaint alleging that the activity violated the Order by virtue of the Group Superintendent's threat of disciplinary action against the grievant and his union representatives for allegedly failing to follow the grievance procedure.

The Assistant Secretary, "noting particularly that no exceptions were filed," adopted the findings and conclusions of the Administrative Law Judge (ALJ) that:

> The threat to consider discipline against employees or Union representatives who fail to properly invoke the grievance procedure . . . has the obvious consequence of chilling the assertion of contract rights by warning those who would pursue their claims that they do so at their peril. [The agreement] affords [the activity] a complete remedy for the kind of administrative burdens improperly processed grievances present to it . . . . Pursuant to its terms, employees who do not follow the prescription for processing a grievance do so at the peril of forfeiting their grievance. This clearly should be a sufficient deterrent to those tempted to skip the effort to resolve a grievance with their immediate supervisor. Absent such a readily available and completely satisfactory remedy for [the activity's] legitimate concerns, there would be considerably more force to the argument that [the activity] has the right to impose discipline in order to compel compliance with the contract. Here, resort to discipline is totally unnecessary for such purposes, leaving as the only foreseeable consequence of the threat to use discipline that of discouraging employees from using the grievance machinery. . . .

Accordingly, he concluded that the foregoing threats violated section 19(a)(1) of the Order "both by discouraging employees from filing grievances and discouraging Union representatives from becoming associated with such grievances," and issued a remedial order which made no substantive changes in the ALJ's recommended order.

In your petition for review, you allege that the Assistant Secretary's decision presents two major policy issues:

> (1) In light of the Order's policy which encourages agency management and labor organizations to regulate their dealings by means of formal contractual arrangements, and supports such agreements as the most appropriate method to advance the Order's purpose of promoting and maintaining "cooperative and constructive relationships" between the parties, under what circumstances is agency management entitled to utilize the disciplinary process, or warnings of future discipline,

to protect the mutually agreed to provisions of the collective bargaining contract, particularly the negotiated grievance system, from abuse or misuse by employees and/or their union representatives?

(2) Assuming arguendo, that in the circumstances of this case the warning issued by agency management to the employee and his union representative with regard to future failures to comply with the provisions of the negotiated grievance procedure contravened the proscriptions of Section 19(a)(1) of the Order, was the violation merely technical, isolated and de minimis, and should the complaint have been dismissed, in accordance with the views expressed by the Council in Vandenberg Air Force Base, 4392d Aerospace Support Group, Vandenberg Air Force Base, California [A/SLMR No. 435, FLRC No. 74A-77 (August 8, 1975), Report No. 79]?

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not raise a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

With respect to your contention concerning management's entitlement to protect the contractual negotiated grievance procedures, in the Council's view, noting particularly the Assistant Secretary's finding that the agreement herein afforded the activity "a complete remedy for the kind of administrative burdens improperly processed grievances present to it [since] employees . . . do so at the peril of forfeiting their grievance," no major policy issue is presented warranting Council review. Likewise, no major policy issue is presented by your allegation that the violation herein was de minimis and that the complaint therefore should have been dismissed in view of the Council's decision in Vandenberg Air Force Base, supra.*/ This

*/ As previously noted, the instant appeal was filed with the Council on behalf of the activity even though no exceptions were filed on behalf of the activity with the Assistant Secretary from the ALJ's finding that the activity had committed an unfair labor practice, and even though the Assistant Secretary made no substantive change in the ALJ's recommended decision and order. This is the first instance of such an appeal to the Council. While the Council's rules do not explicitly preclude the filing of an appeal on behalf of the activity under the foregoing circumstances, in our view, such practice is not consistent with the orderly processing of adjudicatory matters under the Order. That is, the needs of the Council in rendering an informed judgment in a contested matter would be best served by a party's filing exceptions with the Assistant Secretary, and by the Assistant Secretary's opportunity thereby to consider and pass upon such exceptions, before an appeal is submitted for consideration by the Council. We therefore do not condone the contrary action of the agency

(Continued)

allegation, in the circumstances of this case, amounts to nothing more than a disagreement with the Assistant Secretary's conclusion that the threat of disciplinary action was sufficiently substantial to constitute a violation of section 19(a)(1) of the Order, and therefore presents no basis for Council review.

Since the Assistant Secretary's decision does not present a major policy issue, and since you do not contend that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. Matisoff, Esq.
Boilermakers Union

(Continued)

in the instant case. However, because of the present state of the Council's rules, we have deemed it necessary to consider the acceptability of the agency's appeal as now submitted. Further, because of the isolated circumstances of this appeal, we do not believe that an immediate revision of the Council's rules is indicated. However, should it appear in the future that such action is repeated, the Council will take under prompt advisement an appropriate amendment of its rules.

U.S. Department of Transportation, Federal Highway Administration, Office of Federal Highway Projects, Vancouver, Washington, A/SLMR No. 612. The Assistant Secretary found, in pertinent part, that the agency had not violated section 19(a)(1) or (6) of the Order as alleged by National Federation of Federal Employees, Local 1348 (NFFE) in a complaint related to the transfer of certain employees from the agency's facility in Portland, Oregon to its facility in Vancouver, Washington, where NFFE Local 1348 was the exclusive representative. NFFE appealed to the Council, contending that the decision of the Assistant Secretary presented a major policy issue.

Council action (July 27, 1976). The Council held that NFFE's petition did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not present a major policy issue, and NFFE neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied review of NFFE's petition.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 27, 1976

Ms. Lisa Renee Strax
Legal Department
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: U.S. Department of Transportation, Federal Highway Administration, Office of Federal Highway Projects, Vancouver, Washington, A/SLMR No. 612, FLRC No. 76A-25

Dear Ms. Strax:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the agency, in the above-entitled case.

In this case, the National Federation of Federal Employees, Local 1348 (NFFE Local 1348 or the union) filed a complaint alleging that the U.S. Department of Transportation, Federal Highway Administration, Office of Federal Highway Projects, Vancouver, Washington (the agency) violated section 19(a)(1) and (6) of the Order. The complaint alleged that the agency had violated the Order by interfering with unit employees' exercise of their protected rights and failing to consult and confer with the union regarding the implementation and impact of a decision to transfer certain employees from the agency's facility in Portland to the agency's facility in Vancouver where NFFE Local 1348 was the exclusive representative. As found by the Assistant Secretary, the Portland office had issued a report recommending the transfer and sent a copy of the report to the exclusive representative of the Portland employees, NFFE Local 7, for comment. When no comments were received from NFFE Local 7, the report was transmitted to the agency's Regional Administrator, who decided to adopt the recommendation and transfer 15 employees to Vancouver, effective approximately 11 weeks thereafter. The following day, a meeting was held in Portland to announce the decision. Later the same day, a meeting was held in Vancouver to announce the transfer. This meeting was attended by the First

Vice President of NFFE Local 1348 along with the other employees in the Vancouver office. (The union's President was informed of the transfer upon his return from leave the next day.) At no time subsequent to this meeting did NFFE Local 1348 request discussions with the agency regarding the impact or implementation of the transfer upon the employees of the Vancouver office.

The Assistant Secretary, adopting the findings, conclusions, and recommendations of the Associate Chief Administrative Law Judge, found, in pertinent part, that there was no violation of section 19(a)(6) of the Order. He concluded that, although NFFE Local 1348 had the right to be consulted about the impact of the transfer upon its Vancouver constituency, ". . . there is no evidence that [the union or its President] demanded bargaining over the impact of the transfer, although there was ample time." He also found that the agency did not disparage the union and discourage membership in a manner violative of section 19(a)(1). In this regard, he pointed out that NFFE Local 1348 had ample opportunity for meaningful bargaining and there is no indication that the agency was not prepared to recognize the union's role in the event they indicated an interest in bargaining. It was noted in conclusion that the agency was not required to invite such discussion.

In your petition for review on behalf of the union, you allege that the decision of the Assistant Secretary presents a major policy issue as to "whether management's duty under S. [section] 11 of the Executive Order is restricted to those changes which are unilaterally determined to involve adverse impact." You further argue that the agency management was obligated to afford the bargaining representative notice and an opportunity to meet and confer as to the procedures and impact of matters affecting working conditions prior to the finalization of such decisions and that in the instant case the activity failed to conform to its obligation to meet and confer in a timely fashion.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious. With respect to your alleged major policy issue as to whether management's duty to bargain is restricted to changes having an adverse impact, without passing upon the extent of NFFE Local 1348's right to bargain about the implementation of the transfer as it affected the transferees at their new workplace, and as it might affect the other employees already in the Vancouver unit, noting the determination that NFFE Local 1348 had failed to demand such bargaining, no major policy issue warranting review is present. Similarly, no major policy issue is presented by your arguments concerning agency management's obligation to afford notice and an opportunity to bargain, again noting the determination that there was no demand for bargaining, even though there was ample time.

Because the Assistant Secretary's decision does not present a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. F. Zotter
FHA

Social Security Administration, Baltimore, Maryland, Assistant Secretary Case No. 22-6272(AP). The Assistant Secretary denied as untimely the request of the union (Local 1923, American Federation of Government Employees, AFL-CIO) for review of the Acting Assistant Regional Director's finding that a grievance was neither grievable nor arbitrable. The union appealed to the Council, contending, in effect, that the Assistant Secretary's decision appeared arbitrary and capricious or presented a major policy issue.

Council action (July 27, 1976). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious and did not present a major policy issue. Accordingly, the Council denied review of the union's appeal.

CORRECTED COPY

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 27, 1976

Mr. Joseph B. Rosenberg, President
American Federation of Government
Employees, AFL-CIO, Local 1923
6401 Security Boulevard
Baltimore, Maryland 21235

Re: Social Security Administration, Baltimore, Maryland, Assistant Secretary Case No. 22-6272 (AP), FLRC No. 76A-33

Dear Mr. Rosenberg:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, the Acting Assistant Regional Director (ARD), pursuant to an application filed by the American Federation of Government Employees, AFL-CIO, Local 1923 (the union), issued his Report and Findings on Grievability or Arbitrability dated October 9, 1975, in which he found that a grievance filed by the union against the Social Security Administration, Baltimore, Maryland (the activity) was neither grievable nor arbitrable. In his Report, the ARD notified the parties of their right to request review of his finding, and that "[s]uch request . . . must be received by the Assistant Secretary . . . not later than the close of business October 24, 1975." The union then sought and was granted an extension of time until November 10 within which to file a request for review of the ARD's dismissal with the Assistant Secretary. The Assistant Secretary thereafter denied the union's subsequently filed request for review as untimely, stating in pertinent part:

> I find that your request for review was not timely filed pursuant to Section 205.6(b) and 202.6(d) of the Assistant Secretary's Regulations. Thus, while you were granted an extension of time until November 10, 1975, in which a request for review could be received by the Assistant Secretary, your request for review, postmarked November 11, 1975, was not received timely.

In your petition for review on behalf of the union, you contend, in effect, that the Assistant Secretary's decision appears arbitrary and capricious or presents a major policy issue, because the union's request for review herein was timely filed. In this regard, you assert that the request for review was placed in a U.S. Government mailbox on Friday, November 7, 1975, and that the Council's own rules define the date of service as the day when the matter is deposited in the U.S. mail.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious and does not present a major policy issue.

The Assistant Secretary has, pursuant to his authority under section 6(d) of the Order, prescribed regulations needed to administer his functions under the Order. The Assistant Secretary's decision in the instant case was based upon the application of Section 205.6(b) and 202.6(d) of his regulations, and your petition presents no persuasive reasons to show either that the Assistant Secretary was without authority to establish such regulations, or that his application thereof in the circumstances of this case was inconsistent with the purposes of the Order, noting particularly the Assistant Secretary's finding that the union's request for review, which should have been received by him no later than November 10, 1975, was postmarked November 11, 1975.*/ Moreover, it does not appear that the decision of the Assistant Secretary was without reasonable justification in the facts and circumstances of this case.

Since it does not appear that the Assistant Secretary's decision is arbitrary and capricious or presents a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. B. Schwartz
SSA

*/ Petitions for review filed with the Assistant Secretary must of course be filed pursuant to and are governed by his regulations. The Council's rules govern only the filing of appeals with the Council and, therefore, were not applicable to the matter which was before the Assistant Secretary for resolution—namely, the timeliness of your request for review. Moreover, section 2411.46(e) of the Council's rules (which was cited in your appeal) defines the date of service solely for the purpose of computing the beginning date of a time limit within which a party may file a timely document with the Council. Section 2411.45(a) of the Council's rules provides that, for such filings to be timely, they must be received in the office of the Council on the last day of the time limit thus established.

246-469 O - 78 - 26

Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 623. The Assistant Secretary, adopting the Administrative Law Judge's findings, conclusions and recommendations, dismissed the 19(a)(1), (2), and (6) complaint filed by National Federation of Federal Employees, Local 1001 (NFFE), which alleged, essentially, that the activity had followed a course of conduct of bad faith bargaining. NFFE appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented major policy issues.

Council action (July 27, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious or present any major policy issues. Accordingly, the Council denied review of NFFE's appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 27, 1976

Ms. Lisa Renee Strax
Legal Department
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California, A/SLMR No. 623, FLRC No. 76A-46

Dear Ms. Strax:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, according to the Assistant Secretary's decision, National Federation of Federal Employees, Local 1001 (NFFE) filed an unfair labor practice complaint alleging that the Department of the Air Force, 4392d Aerospace Support Group, Vandenberg Air Force Base, California (the activity) had violated section 19(a)(1), (2), and (6) of the Order. The complaint alleged essentially that the activity had followed a course of conduct of bad faith bargaining in negotiations for a new agreement. Specifically, NFFE sought to establish that the activity had violated the Order by: proposing to establish a "Personnel Policy Review Committee" (PPRC) dealing with employee-management relations and establishing similar organizations for the purpose of bypassing NFFE in dealings with employees; bypassing NFFE's president by selecting other local officers to help develop the PPRC idea; canceling a formal negotiating session in order to hold a "consultation" meeting regarding the PPRC plan; offering proposals during negotiations it "knew" would be unacceptable to NFFE; and refusing to utilize negotiating time fully by failing to discuss negotiable matters which were not on the agenda for a particular negotiating session.

The Assistant Secretary, adopting the Administrative Law Judge's (ALJ) findings, conclusions, and recommendations, found that NFFE had failed to prove these allegations by a preponderance of the evidence. Accordingly, he ordered that the complaint be dismissed.

In your petition for review on behalf of NFFE, you allege that the Assistant Secretary's decision is arbitrary and capricious in that he erred in affirming the ALJ's recommendations inasmuch as the ALJ's

findings are not supported by the oral or written evidence. In this regard, you argue that the ALJ's failure to "consider evidence . . . materially prejudicial to the [activity] is a strong indication of bias on his part," and further that the Assistant Secretary disregarded these omissions as well as inferences improperly drawn by the ALJ. You further contend that the Assistant Secretary's decision presents major policy issues as to "[w]hether the case law developed under [section] 11(a) of the Order stands for the proposition that Management can rightfully establish Committees and other intricate programs IN WHICH EMPLOYEES PARTICIPATE DIRECTLY, to conduct various studies and formulate detailed proposals so long as management CONSULTS with the Union prior to the actual implementation of any changes recommended by the management-employees groups," and "whether the concept of finality will be applied so as to permit management to unilaterally formulate detailed policy changes where there is a history of mechanical implementation of such proposals, without any modification to reflect comments and suggestions offered by the exclusive representative pursuant to their rights under E.O. 11491." In support of the contention that major policy issues warranting review are present, you restate the alleged facts of the case and contend that these facts constitute a violation of the Order.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious or present any major policy issues.

As to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear in the circumstances of this case that the Assistant Secretary acted without any reasonable justification in reaching his decision. In this connection, your appeal does not disclose any probative evidence presented which the Assistant Secretary failed to consider, but instead amounts to nothing more than disagreement with the weight accorded the evidence by the Assistant Secretary. Further, the appeal contains no basis to support your imputation of bias in the circumstances of this case.

Nor, in the circumstances of this case, is a major policy issue presented by the Assistant Secretary's decision either with respect to whether "management" may properly establish committees in which employees directly participate so long as management consults with the union prior to actual implementation of changes recommended by such committees, or whether management may unilaterally formulate detailed policy changes without any subsequent modification to reflect comments and suggestions offered by the exclusive representative. In this regard, the Council notes particularly the Assistant Secretary's finding that the committees at issue in this case were either never established, did not include unit employees, or were established outside the period encompassed by the complaint; and, further, the absence of a finding that detailed policy changes were formulated and implemented unilaterally on otherwise negotiable matters in the circumstances of this case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

F. Sprague
Air Force

Community Services Administration, Washington, D.C., Assistant Secretary Case No. 22-6494(AP). The Assistant Secretary denied as untimely the agency's request for an extension of time in which to file a request for review of the Acting Regional Administrator's finding that a grievance filed by the National Council of CSA Locals, AFGE, AFL-CIO, was arbitrable. The agency appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious. The agency also requested a stay of the decision of the Assistant Secretary.

Council action (July 27, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious, and the agency neither alleged, nor did it appear, that his decision presented a major policy issue. Accordingly, the Council denied review of the agency's petition. The Council likewise denied the agency's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 27, 1976

Mr. Alphonse Rodriguez
Associate Director for Administration
Community Services Administration
1200 19th Street, NW.
Washington, D.C. 20506

Re: Community Services Administration, Washington, D.C., Assistant Secretary
Case No. 22-6494 (AP), FLRC No. 76A-48

Dear Mr. Rodriguez:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the opposition thereto filed by the union, in the above-entitled case.

In this case, the Acting Regional Administrator (ARA), pursuant to an application filed by the Community Services Administration (CSA), issued his Report and Findings on Arbitrability dated February 24, 1976, in which he found that a grievance filed by the National Council of CSA Locals, AFGE, AFL-CIO (the union) was arbitrable. In his Report, the ARA notified the parties of their right to request review of his finding, and that "[s]uch request . . . must be received by the Assistant Secretary . . . no later than close of business March 9, 1976." CSA thereafter, by letter dated March 5, 1976, and received by the Assistant Secretary on Monday, March 8, 1976, requested an extension of time in which to file a request for review in this case.

The Assistant Secretary denied CSA's request for an extension of time, finding that such request was "procedurally defective since it was filed untimely." In so ruling, he noted that:/

> According to the applicable Section of the Assistant Secretary's Regulations, Section 202.6(d), requests for an extension of time must be ". . . received by the Assistant Secretary not later than three (3) days before the date the request for review is due." [Emphasis in original.]

He further noted that:

> . . . the intent of the abovenoted portion of Section 202.6(d) is to provide the Assistant Secretary sufficient time, i.e., a minimum of 3 days prior to the request for review due date, in which to consider the request for an extension of time.

The Assistant Secretary found that since the instant request for an extension of time was received on March 8, 1976, the request was untimely because it was not filed a minimum of 3 days before the date the request for review was due.

In your petition for review on behalf of CSA, you allege that the Assistant Secretary's decision is arbitrary and capricious. In this regard you contend that the request for an extension was timely since March 6 or March 7 would have imposed a Saturday or Sunday submission date, and even if CSA attempted to serve notice on those dates no official business is conducted by the Assistant Secretary on those days. You argue that there is ample authority to support the contention that if the last day to perform an act falls on a "non work" day the submission date is advanced to the next workday, and that CSA's submission therefore "was timely and within a legally acceptable application of the three-day rule."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious, and you do not allege, nor does it appear, that his decision presents a major policy issue.

The Assistant Secretary has, pursuant to his authority under section 6(d) of the Order, prescribed regulations needed to administer his functions under the Order. The Assistant Secretary's decision in the instant case was based upon the application of Section 202.6(d) of his regulations, and your petition presents no persuasive reasons to show that the Assistant Secretary was without authority to establish such regulation, or that his application thereof in the circumstances of this case was inconsistent with the purposes of the Order or with his previous decisions. Moreover, it does not appear that the decision of the Assistant Secretary was without reasonable justification in the facts and circumstances of this case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that his decision presents a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied. The request for a stay of the Assistant Secretary's decision is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor
P. Kete
AFGE

United States Department of Labor (Decision of the Vice Chairman of the U.S. Civil Service Commission, V/C CSC No. 3). The Vice Chairman, upon an application for a decision on grievability or arbitrability filed by American Federation of Government Employees, Local 12 (AFGE), adopted the conclusion of the General Counsel of the Civil Service Commission that the grievance that gave rise to the instant application had not been timely filed by the grievant under the terms of the parties' negotiated agreement; and, further, concluded that AFGE's application, which was filed more than 2 years after final written rejection of the subject grievance by the agency, was not filed within a reasonable time after receipt of such rejection or within 60 days of the effective date of section 205.2 of the Assistant Secretary's regulations. The Vice Chairman therefore dismissed AFGE's application as untimely filed. AFGE appealed to the Council, contending, in essence, that the decision of the Vice Chairman was arbitrary and capricious and raised a major policy issue.

Council action*/ (July 27, 1976). Without passing upon the question of whether the grievance herein had been timely filed under the provisions of the parties' negotiated agreement, the Council held that the Vice Chairman's decision did not appear arbitrary and capricious or present a major policy issue. Accordingly, since AFGE's appeal failed to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, the Council denied review of the appeal.

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*/ The Secretary of Labor did not participate in this decision.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 27, 1976

Mr. Ronald D. King, Acting Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: United States Department of Labor
(Decision of the Vice Chairman of the U.S. Civil Service Commission, V/C CSC No. 3), FLRC No. 76A-52

Dear Mr. King:

The Council has carefully considered your petition for review of the Vice Chairman's decision in the above-entitled case.

The facts in this case, as found by the Vice Chairman of the Civil Service Commission (CSC),[1/] are as follows: On August 23, 1971, an employee of the Department of Labor (the agency), a member of a unit represented by the American Federation of Government Employees, Local 12 (the union), was notified of his selection for promotion to another position, and on or about the same date, he was notified that a job freeze would preclude his promotion. In December 1971, in response to an inquiry by the employee, the agency informed him that the particular position for which he was selected had been canceled. On February 25, 1972, the employee filed a grievance on his own behalf. Thereafter, on March 15, 1972, the agency advised him that his grievance had been rejected because it had not been timely filed under the terms of the negotiated agreement, and by letter to the grievant dated June 8, 1972, the activity issued its "final rejection" of the grievance.

On November 4, 1974, the union filed an application for a decision on grievability or arbitrability with the CSC. The Vice Chairman dismissed the application, adopting the General Counsel's conclusion that the grievance had not been timely filed under the terms of the negotiated

1/ Since the Department of Labor is a party in this case, the Civil Service Commission, pursuant to section 6(e) of the Order, is responsible for performing the duties of the Assistant Secretary specified in section 6(a) and (b) of the Order. The Chairman of the Commission has designated the Vice Chairman to perform such duties, and has designated the General Counsel of the Commission to assume the responsibilities of the Assistant Regional Director of LMSA in such cases.

agreement, i.e., "within 30 days of the event giving rise to the grievance, or knowledge thereof, whichever is later," and additionally finding that Section 205.2(b) of the Assistant Secretary's regulations "requires that an application for a decision on grievability or arbitrability be filed within 60 days after service on the applicant of a written rejection of the grievance on the grounds that the matter is not subject to the grievance procedure in the existing agreement, or is not subject to arbitration under that agreement," and that the union filed its application herein more than 2 years after final written rejection of the instant grievance. Accordingly, the Vice Chairman concluded:

> In view of the failure of the grievant to file the grievance with the [agency] within 30 days of the event giving rise to knowledge of the grievance, and further, the failure of the union to file its application for a decision on grievability or arbitrability within a reasonable time after receipt of the [agency's] final written rejection of the grievance or within 60 days of the effective date of § 205.2, the Application was not timely filed and, accordingly, its dismissal was proper.

In your petition for review on behalf of the union, you allege, in essence, that the decision of the Vice Chairman is arbitrary and capricious because the Vice Chairman failed to follow "procedures and practices of the Assistant Secretary." Specifically, you allege that the Vice Chairman, unlike the Assistant Secretary in similar situations, failed to hold a hearing before an administrative law judge or even to send interrogatories to the parties on the application for a decision on grievability or arbitrability; and that the Vice Chairman's review was based only on a "superficial, cursory review of documents" which "fell so short as to lend itself to no more than an arbitrary and capricious decision to the extent it was fatally faulty at law." Further, your petition alleges that the Vice Chairman's decision raises a major policy issue because it indicates that the agency's employees are not given the same access to "due process" as provided other Federal employees under the Order.

In the Council's opinion, your petition for review of the Vice Chairman's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, it does not appear arbitrary and capricious or present any major policy issues. With respect to your contention that the failure of the Vice Chairman to follow "practices and procedures of the Assistant Secretary" was arbitrary and capricious, in the Council's view, noting particularly the Vice Chairman's finding that the union failed to file its application "within a reasonable time after receipt of the [agency's] final written rejection of the grievance or within 60 days of the effective date of § 205.2" of the Assistant Secretary's regulations, the Vice Chairman's decision to dismiss the union's application as untimely filed was not without reasonable justification in the circumstances of this case. Nor is a major policy issue presented as to whether the agency's employees are denied the same access to due process which is accorded to other Federal employees under the Order, again noting the Vice Chairman's adoption of

and reliance upon the Assistant Secretary's regulations in dismissing the union's application herein, and noting further that your appeal fails to disclose, in the circumstances of this case, that the agency's employees were denied the due process accorded under the Assistant Secretary's regulations.

Accordingly, and without passing upon the question of whether the grievance herein had been timely filed under the provisions of the negotiated agreement, the Vice Chairman's decision does not appear arbitrary and capricious or present a major policy issue. Therefore, since your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, review of your appeal is hereby denied.

By the Council.[2/]

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: Vice Chairman
CSC

F. Clark
DOL

2/ The Secretary of Labor did not participate in this decision.

General Services Administration, Region 5, Public Buildings Service, Milwaukee Field Office, Milwaukee, Wisconsin, Assistant Secretary Case No. 50-13016(RO). The Assistant Secretary found, contrary to the Assistant Regional Director (ARD), that the first of three objections filed by GSA Region 5 Council of NFFE Locals, National Federation of Federal Employees (NFFE) to conduct by representatives of Local 1346, American Federation of Government Employees, AFL-CIO (AFGE), alleged by NFFE to have improperly affected the results of an election, did not warrant setting the election aside. Additionally, the Assistant Secretary found no merit to NFFE's second and third objections, upon which the ARD had not reached a conclusion. Accordingly, the Assistant Secretary granted AFGE's request for review of the ARD's Report and Findings and remanded the case to the ARD for appropriate action. AFGE was thereafter certified as the exclusive representative of the unit involved. NFFE appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious.

Council action (July 30, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and NFFE neither alleged, nor did it appear, that his decision presented a major policy issue. Accordingly, without passing upon or adopting the specific evidentiary conclusions of the Assistant Secretary in reaching his decision in the circumstances of this case, the Council denied review of NFFE's appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 30, 1976

Mr. Robert J. Gorman
Chief Union Negotiator
National Federation of Federal Employees
8 East Delaware Place, #3R
Chicago, Illinois 60611

Re: General Services Administration, Region 5, Public Buildings Service, Milwaukee Field Office, Milwaukee, Wisconsin, Assistant Secretary Case No. 50-13016 (RO), FLRC No. 76A-32

Dear Mr. Gorman:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, GSA Region 5 Council of NFFE Locals, National Federation of Federal Employees (NFFE) filed objections to conduct alleged to have improperly affected the results of an election. NFFE alleged, in pertinent part, that on the day before the election, representatives of Local 1346, American Federation of Government Employees, AFL-CIO (AFGE): (1) used the lunch and rest area exclusively provided for unit employees (the "swing room") to make a slide presentation and distribute literature during the noon lunch hour; (2) "accosted" unit employees at the activity during working hours and at duty stations for purposes of engaging in discussions in support of AFGE's campaign; and (3) distributed to unit employees a memorandum containing untrue and misleading statements about NFFE, thereby effectively prohibiting NFFE from responding to it. The Assistant Regional Director (ARD), in his Report and Findings on Objections, found merit in and sustained the first objection, concluding that "conduct occurred that tended to improperly affect the results of the election."*/

The Assistant Secretary, in considering AFGE's request for review seeking reversal of the ARD's decision found, contrary to the ARD, that NFFE's first objection did not warrant setting the election aside because, in his view, "the evidence herein does not establish that the AFGE's conduct in this regard constituted a violation of the Order or impaired the voters' freedom of choice in the election." The Assistant Secretary also found no merit to NFFE's second and third objections. As to the second objection,

*/ As to the second and third objections, the ARD found it "unnecessary to comment . . . or to reach a conclusion regarding their merit" in view of his finding with respect to the first objection.

the Assistant Secretary stated that "[w]hile a labor organization does not have a right under the Order to solicit support for organizational purposes in work areas during work time, I find, under the circumstances herein, that such conduct, standing alone, does not warrant setting the election aside." Finally, as to the third objection, the Assistant Secretary found that the AFGE leaflet "did not contain gross misrepresentations of material facts, but . . . campaign propaganda which the voters could evaluate for themselves." Accordingly, he granted AFGE's request for review of the ARD's Report and Findings and remanded the case to the ARD for appropriate action. (Thereafter, AFGE was certified as the exclusive representative of the unit.)

In your appeal to the Council on behalf of NFFE, you contend that the Assistant Secretary's decision is arbitrary and capricious because the Assistant Secretary condoned the "improper actions" of AFGE representatives and their distribution of literature containing false statements, when NFFE had no opportunity to respond before the election. In this connection, you allege that the literature distributed by AFGE contained gross misrepresentations of material facts and was not of a nature that voters could evaluate for themselves. You also assert that "[w]e [NFFE] do not understand how the Assistant Secretary can condone AFGE representatives' going into work areas . . . without first securing clearance from the General Services Administration."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you do not allege, nor does it appear, that his decision presents a major policy issue. With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in reaching his decision in the circumstances of this case. In this regard, your assertions concerning the AFGE distribution of literature constitute, in effect, nothing more than disagreement with the Assistant Secretary's specific factual determinations to the contrary, and therefore provide no basis for review. As to your assertion regarding AFGE representatives' going into work areas, in the Council's opinion, noting particularly the Assistant Secretary's determination that "[w]hile a labor organization does not have a right under the Order to solicit support for organizational purposes in work areas during work time, . . . under the circumstances herein . . . such conduct, standing alone, does not warrant setting the election aside," no basis for Council review is presented.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and you do not allege, nor does it appear, that his decision presents a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules. Accordingly, without passing upon or adopting the specific evidentiary conclusions

of the Assistant Secretary in reaching his decision in the circumstances of this case, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

A. H. Kaplan
AFGE

E. A. Clark
GSA

FLRC No. 76A-35

Naval Air Rework Facility, Naval Air Station, Jacksonville, Florida, A/SLMR No. 613. The Assistant Secretary overruled the objection to conduct alleged to have improperly affected the results of an election, filed by National Association of Government Employees, Local R5-82 (NAGE). NAGE appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (July 30, 1976). The Council held that NAGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied review of NAGE's appeal.

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UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

July 30, 1976

Mr. Robert J. Canavan, Counsel
National Association of Government Employees
285 Dorchester Avenue
Boston, Massachusetts 02127

Re: Naval Air Rework Facility, Naval Air Station, Jacksonville, Florida, A/SLMR No. 613, FLRC No. 76A-35

Dear Mr. Canavan:

The Council has carefully considered your request for review of the Assistant Secretary's decision in the above-entitled case.

In this case, the National Association of Government Employees, Local R5-82 (NAGE) filed objections to conduct alleged to have improperly affected the results of an election in a unit of employees at the Naval Air Rework Facility, Naval Air Station, Jacksonville, Florida (the activity). NAGE alleged specifically that a leaflet distributed by a rival union two days prior to the election misrepresented NAGE's participation, as exclusive representative of the unit, in the procedures for the establishment of blue collar wage rates for employees in the unit. The Assistant Secretary concluded "that the statements contained in the leaflet involved contained gross misrepresentations of a material fact which unit employees would be unable to evaluate and which could reasonably be expected to affect the outcome of the election." However, with respect to the question of whether NAGE had "a reasonable opportunity to make an effective reply," he concluded that under all of the circumstances, NAGE had ample time to prepare and distribute an effective reply to the statement contained in the leaflet prior to the election, but merely chose not to do so. Therefore, the Assistant Secretary ordered that NAGE's objection to the election be overruled.

In your petition for review on behalf of NAGE, you allege that the Assistant Secretary's decision was "arbitrary and capricious and contrary to the purposes of the Order" because his finding that NAGE had ample opportunity to respond to the rival union's misrepresentations but chose not to do so was not supported by and was contrary to the credible evidence in the record, and because the Assistant Secretary held NAGE to "an impossible and grossly unfair standard in faulting it for failing to reply" to the leaflet. You further allege that the decision of the Assistant Secretary raises a major policy issue because it demonstrates the need for the Council to review the area of "last minute" campaign tactics.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue. With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in concluding that NAGE's objection to the election should be overruled. Rather, your assertions that his decision was contrary to the evidence and that NAGE did not have sufficient time to prepare and distribute an effective reply prior to the election constitute nothing more than a disagreement with the Assistant Secretary's factual findings and therefore do not present a basis for Council review. Nor is a major policy issue presented with regard to your contention that the Assistant Secretary's decision indicates the need for the Council to review the area of "last minute" campaign tactics, noting particularly that the Assistant Secretary's decision is based on the circumstances of the case and that your appeal fails to establish that his decision herein was inconsistent either with the purposes of the Order or applicable precedent.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

L. P. Poulton
IAM

E. C. Newton
Navy

Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida. The dispute involved the negotiability under the Order of certain provisions in the local parties' agreement, which the agency head determined to be nonnegotiable and disapproved during review of that agreement pursuant to section 15 of the Order. The provisions in question related to (1) employees working in locations not within observing distance of others; (2) assignment of overtime; (3) dues withholding; (4) assignment of unit employees to supervisors; and (5) use of public address systems by the union to announce meetings.

Council action (August 2, 1976). As to (1), (2) and (4), the Council held, in essence, that the provisions were not violative of section 12(b) of the Order, as contended by the agency, and, further, with regard to (1) and (4), held that although the subject provisions were excepted from the agency's section 11(a) obligation to bargain by section 11(b) of the Order, as also argued by the agency, once agreed upon at the local level, they could not be disapproved by the agency head during review of the parties' agreement under section 15 of the Order. As to (3), which the agency head determined to be violative of an agency directive, the Council held that the directive (with the exception of a particular portion thereof), as interpreted and applied by the agency head, violated section 21 of the Order. Concerning the excepted portion of the agency directive, the Council found that it did reflect a prescription of the Civil Service Commission issued pursuant to the Commission's authority under section 21 of the Order, as claimed by the agency; but that the agency head misinterpreted the agreement provision in that regard, and therefore failed to establish that the directive or the Federal Personnel Manual were applicable so as to preclude negotiation of the provision under section 11(a) of the Order. Finally, as to (5), the Council held that the union's appeal for review of the agency head's determination of nonnegotiability concerning this provision failed to meet the conditions prescribed in section 11(c)(4) of the Order (as then in effect) and therefore denied the union's appeal in that respect.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Local 1485, National Federation
of Federal Employees

and

FLRC No. 75A-77

Coast Guard Base, Miami Beach,
Florida

DECISION ON NEGOTIABILITY ISSUES

Background

Local 1485, National Federation of Federal Employees (hereinafter referred to as the union) represents an activity-wide unit of wage-grade employees at the Coast Guard Base in Miami Beach, Florida. The parties negotiated an agreement, subject to approval of the parent organization, the Department of Transportation (hereinafter DOT), pursuant to section 15 of the Order.[1/]

DOT disapproved five provisions of the agreement, as detailed hereinafter, determining that such provisions are nonnegotiable under sections 11(b) and 12(b) of the Order and agency regulations.

The union appealed from this determination to the Council under section 11(c)(4) of the Order, and the agency filed a statement of position in support of its determination.

Opinion

The provisions in dispute are considered separately below.

1/ Section 15 of the Order provides, in relevant part:

> Approval of agreements. An agreement with a labor organization as the exclusive representative of employees in a unit is subject to the approval of the head of the agency or an official designated by him. An agreement shall be approved within forty-five days from the date of its execution if it conforms to applicable laws, the Order, existing published agency policies and regulations (unless the agency has granted an exception to a policy or regulation) and regulations of other appropriate authorities . . . .

1. Article VIII (Safety and Protective Clothing).

The provision in dispute is as follows:

. . . . . .

SECTION 3. The employee shall not be required to work in any location where other persons are not within observing distance unless he is assisted by other employees. Such persons may be military or civilian.

The agency contends that the quoted provision interferes with management's right under section 12(b)(5) of the Order "to determine the . . . personnel by which agency operations are to be conducted" and, therefore, is nonnegotiable. The agency contends also that the provision concerns "matters with respect to the numbers, types, and grades of employees assigned to an organizational unit, work project or tour of duty" and, therefore, is excepted from the obligation to bargain by section 11(b) of the Order. In support of its contentions, the agency argues that the provision "would require management, in assigning any employee to any 'one-man job' in a location not visually observable by other employees, to assign two or more employees so that one could observe the other."

The union, on the other hand, contends that the provision is negotiable under section 11(a) of the Order, arguing that it does not "forbid" assignments but rather "conditions" them; and that it sets forth merely a policy for the "implementation of employee assignments in a manner consistent with the health and safety of unit employees."

Section 12(b)(5) of the Order provides:

Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements—

. . . . . .

(b) management officials of the agency retain the right, in accordance with applicable laws and regulations—

. . . . . .

(5) to determine the methods, means, and personnel by which such operations are to be conducted.

In its Tidewater decision[2/], the Council said in regard to the above underscored language of section 12(b)(5) of the Order:

2/ Tidewater Virginia Federal Employees Metal Trades Council and Norfolk Naval Public Works Center, Norfolk, Virginia, 1 FLRC 432 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

> . . . [A]s used in the Order, personnel means the total body of persons engaged in the performance of agency operations (i.e., the composition of that body in terms of numbers, types of occupations and levels) and the particular groups of persons that make up the personnel conducting agency operations (e.g., military or civilian personnel; supervisory or nonsupervisory personnel; professional or nonprofessional personnel; Government personnel or contract personnel). In short, personnel means who will conduct agency operations. [Emphasis in original.]

Further, in finding the proposal concerning work assignment in that case to be violative of section 12(b)(5), the Council said:

> MTC's proposal concerning work assignment explicitly would deny management the authority to assign "bargaining unit work" to nonunit employees, particularly supervisors and military personnel, except in certain limited circumstances. Thus, management's right to determine the composition of the total body of persons engaged in certain operations at the Public Works Center would be limited. As a general rule, it could not include supervisors or military personnel among the particular groups of persons that make up the personnel conducting these particular agency operations and, thus, its options in exercising this reserved management right would be restricted. In other words, MTC's proposal relates to the exercise of the substantive right as reserved to management by section 12(b)(5) to determine the type of personnel, or which personnel, will conduct these particular agency operations. Therefore, the proposal clearly contravenes section 12(b)(5) since, as discussed above, management's reserved right—"to determine the . . . personnel by which such operations are to be conducted" is mandatory and may not be relinquished or diluted.

The provision at issue in the instant case clearly does not involve management's reserved right under section 12(b)(5) "to determine the type of personnel, or which personnel, will conduct agency operations." In our view, the provision places no restriction on management's authority to assign any particular type of personnel to any particular agency work, the provision requiring only that an employee "not be required to work in any location where other persons are not within observing distance unless he is assisted by other employees." The provision makes no mention of what type of work is involved and does not attempt to specify who may be assigned to perform the work nor to specify the type of personnel who must assist or observe the employee involved. Indeed, the language of the provision makes clear that those persons utilized to prevent the situation of "employees working in a location not within observing distance" [by others] "may be military or civilian." Accordingly, we find that the provision at issue does not violate section 12(b)(5) of the Order.

The agency further contends that the instant provision would require the agency to assign at least two employees to the performance of a "one-man job" if the work is located where other persons are not within observing distance and, therefore, the provision is excepted from the obligation to bargain by section 11(b) of the Order since it imposes a limitation on

management's discretion to determine the number of employees assigned to a work project or tour of duty. We find merit in the agency's contention. Although it does not require assignment of a specific number of employees, plainly, the provision contemplates a limitation on management's authority to determine the number of employees assigned to a work project or tour of duty.[3/] As to the union's contention that the provision is "concerned only with the safety and health of unit members" and is therefore negotiable, we find such claim to be unpersuasive, since the disputed provision clearly does not prescribe a general standard of safety or of health.[4/] Thus, we must find that the provision presently before us is excepted from the obligation to bargain by section 11(b) of the Order.[5/]

However, as noted at the outset, the local parties reached agreement on the provision in dispute, and the agency disapproved the provision only subsequently during review of the agreement under section 15 of the Order. As previously set forth more fully, section 15 provides, in part, "[a]n agreement shall be approved . . . if it conforms to applicable laws, the Order, existing published agency policies and regulations . . . and regulations of other appropriate authorities."

3/ In this regard, the provision here is similar to one found by the Council to be excepted by section 11(b) of the Order from the agency's obligation to bargain in Immigration and Naturalization Service and American Federation of Government Employees, FLRC No. 74A-13 (June 26, 1975), Report No. 75. Specifically, the union's proposal was:

> Article 18, Section M. An appropriate Number of Border Patrol Agents and Patrol vehicles equipped with flashing emergency lights will be assigned to traffic checkpoints. The number of employees and vehicles will be sufficient to provide adequate safety protection. [Only the underscored portions were in dispute.]

4/ Cf. AFGE Local 2595 and Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector (Yuma, Arizona), 1 FLRC 72 [FLRC No. 70A-10 (April 15, 1971), Report No. 6].

5/ AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, FLRC No. 73A-25 (September 30, 1974), Report No. 57; see, International Association of Fire Fighters, Local F-111, and Griffiss Air Force Base, Rome, New York, 1 FLRC 323 [FLRC No. 71A-30 (April 19, 1973), Report No. 36]; cf. American Federation of Government Employees, Local 997 and Veterans Administration Hospital, Montgomery, Alabama, FLRC No. 73A-22 (January 31, 1974), Report No. 48, Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 451 [FLRC No. 72A-35 (June 29, 1973), Report No. 41], Federal Employees Metal Trades Council of Charleston and U.S. Naval Supply Center, Charleston, South Carolina, 1 FLRC 236 [FLRC No. 71A-52 (November 24, 1972), Report No. 31].

With regard to an agency head's reliance on section 11(b) as the basis for disapproving a provision of a local agreement during the section 15 review process, the Council has stated that:[6/]

> . . . [M]atters which are within the ambit of section 11(b), although excepted from the obligation to negotiate, may be negotiated if management chooses to negotiate over them. In other words, while there is no requirement that matters within the ambit of section 11(b) be negotiated, the Order does permit their negotiation so that an agreement which results from the negotiation of such matters does not, thereby, fail to conform to the Order. Therefore, since the agency in the instant case, through its local bargaining representative, negotiated and reached agreement on the proposal in dispute as permitted by the Order, the agency cannot, after that fact, change its position during the section 15 review process. Such an agreement conforms to the Order, and under section 15 it must be approved. [Footnotes omitted.]

Accordingly, we find that the agency head's determination — that Article VIII (Safety and Protective Clothing), Section 3, which was agreed upon at the local level, is nonnegotiable — was improper and must be set aside.

2. Article X (Overtime).

The provision in dispute is as follows:

> SECTION 6. The Employer shall not assign normal scheduled overtime to the employees who do not perform this job description during the week except in emergency situations.

The agency contends that this provision is violative of management's right under section 12(b)(5) of the Order to determine "who" will conduct agency operations. In support of this contention, the agency argues that the provision would prohibit management from assigning overtime work to military personnel, supervisors, or to other unit or nonunit personnel not engaged in the particular type of work on a regular basis and therefore is analogous to the work assignment proposal which the Council held to be nonnegotiable under section 12(b)(5) in Tidewater.[7/] In substance, the union contends that the provision does not violate section 12(b)(5) and that it is a negotiable "procedure for the assignment of overtime."

As already noted in part 1 of this decision, section 12(b)(5) of the Order reserves to management officials the right to determine the methods, means, and personnel by which agency operations are to be conducted.

6/ AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26, 1975), Report No. 75.

7/ Tidewater Virginia Federal Employees Metal Trades Council and Norfolk Naval Public Works Center, Norfolk, Virginia, 1 FLRC 432 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

In Tidewater, previously discussed in part 1 of this opinion, the union's proposal[8/] sought to establish a principle of bargaining unit work preservation and, hence, as the Council there found, "would generally ban the assignment of certain work to military personnel, supervisory personnel and nonunit personnel." (The Council's findings in this regard are quoted more fully, herein, in part 1.)

The instant provision clearly is distinguished from the work assignment proposal found to conflict with section 12(b)(5) in Tidewater. In contrast to Tidewater, the provision herein concerns solely a procedure for the assignment of overtime. That is, under the disputed provision in the present case, if management determines that "normal scheduled overtime" work is necessary to accomplish certain tasks, which are assigned to and performed "during the week" by particular employees at the base, then management shall not assign the same tasks to other employees to perform on overtime, "except in emergency situations." Thus, it is clear that the instant provision, unlike the proposal in Tidewater: (1) is concerned only with the type of work which management has previously assigned to unit employees to perform on a regular-time basis, i.e., "during the week"; (2) relates to such work only when the agency has specifically designated it to be performed as scheduled overtime; and (3) would not restrict management in any way in otherwise assigning to unit or nonunit employees work to be performed during periods which have not been designated as scheduled overtime.

Hence, we find the instant provision is analogous to the proposal at issue in the Philadelphia Naval Shipyard case[9/] which the Council expressly

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8/ The union's proposal provided in pertinent part,

Article IX - Work Assignment

Section 1. The employer agrees that work regularly and historically assigned to and performed by bargaining unit employees covered by this Agreement will not be assigned to military personnel or to Public Works Center employees excluded from the bargaining unit.

9/ Philadelphia Metal Trades Council, AFL-CIO and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, 1 FLRC 457 [FLRC No. 72A-40 (June 29, 1973), Report No. 41]. Here, the proposal found by the Council to be negotiable under section 11(a) of the Order provided,

Article X, Section 11

Section 11. Supervisors, Shop Planners, Planners and Estimators or Employees not covered by this Agreement shall not be assigned to perform the duties of employees in the unit on overtime assignments for the sole purpose of eliminating the need for such employees on overtime.

distinguished from Tidewater. There, relying upon its Little Rock decision[10/], the Council said:

> This proposal is clearly distinguishable from the work assignment proposal (Article IX, Section 4) in the Tidewater case. The union's proposal in this case is significantly different in scope and effect from that proposal. Here, unlike in that case, the union proposal would only affect assignment of overtime. The proposal, if agreed to, would not restrict management in any way in otherwise assigning to nonunit employees work usually performed by unit employees, during nonovertime periods. . . .
>
> Thus, while the agency contends that the proposal violates management's reserved right under section 12(b)(5) of the Order to determine the type of personnel by whom certain work of the Philadelphia Naval Shipyard would be accomplished, such contention is without merit because, as we noted above, the proposal, in effect, is solely concerned with the assignment of overtime.

Accordingly, we must conclude that the provision does not violate section 12(b)(5) of the Order and that the agency determination to the contrary was improper and must be set aside.[11/]

10/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Arkansas, 1 FLRC 220 [FLRC No. 71A-46 (November 20, 1972), Report No. 30]. Here, with specific regard to the negotiation of provisions concerned with the assignment of overtime, the Council stated that:

> Section 11(a) of the Order, which relates to the negotiation of agreements, provides that the parties shall meet and confer in good faith regarding "personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations, including . . . this Order."
>
> Plainly management policies and procedures concerning the assignment of employees to particular shifts or the assignment of overtime or holiday work directly affect the jobs of employees and are "matters affecting working conditions." They have traditionally been so recognized. . . . [Emphasis supplied.]

11/ Although without controlling significance in this case because the agency determination was made pursuant to section 15 review of a local agreement, to avoid any possible misunderstanding, we expressly distinguish our holding herein from prior Council decisions which held to be excepted from the bargaining obligation, under section 11(b), proposals which would "totally proscribe" the assignment of specific duties to particular types of employees (See, e.g., International Association of Firefighters, Local F-111, and Griffiss Air Force Base, Rome, New York, 1 FLRC 323 [FLRC No. 71A-30

(Continued)

3. Article XII (Voluntary Allotment of Union Dues).

The agency determined that Article XII, which sets forth the locally agreed upon dues withholding arrangement between the parties,[12] is nonnegotiable because it violates a controlling agency directive (Chapter 24 of DOT 3710.2, Labor-Management Relations Program) in that the article does not contain five "items of information" as the directive requires.[13] Further, the agency argues that its directive, upon which it relies, conforms to and carries out the intent and the requirements of the Federal Personnel Manual.[14]

(Continued)
(April 19, 1973), Report No. 36].), or would prevent an agency from assigning such duties "unless certain conditions exist" (See, e.g., AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, FLRC No. 73A-25 (September 30, 1974), Report No. 57.).

12/ The full text of Article XII appears in an Appendix to the instant opinion.

13/ The agency describes the information required by the agency directive which it claims is not addressed in Article XII, as follows:

> (1) That the filing of the SF-1187 (Request and Authorization for Voluntary Allotment of Compensation for Payment of Employee Organization Dues) shall be a voluntary action by the employee;
>
> (2) that the amount of the allotment for dues shall be the same for each deduction, (e.g., if the dues are $5 every 4 weeks, they will be withheld at the rate of $2.50 every biweekly pay period, not $3 one pay period and $2 the next);
>
> (3) a requirement for prompt notification of the employer by the labor organization of an employee's notification of revocation of the allotment;
>
> (4) the frequency with which the labor organization may change the amount of dues to be deducted for each allottor; and
>
> (5) the procedures for adjustment of errors in the amount of the remittance.

14/ The agency cites generally, in this regard, FPM chapter 550, subchapter 3-5(c) which provides:

> (c) Arrangements for allotments. The agency and pertinent labor organizations shall enter into a written agreement concerning the procedures and arrangements considered essential for the smooth functioning of the allotment program before any employee may make an allotment of dues to the labor organization.

(Continued)

The union contends, in effect, that the agency directive involved here, as interpreted by the agency head to bar negotiation of Article XII, violates section 21 of the Order under the principles enunciated in the Council's Fort Monmouth decision.[15/]

In Fort Monmouth, the Council said in regard to section 21 of the Order:[16/]

> . . . [I]t was the clear intent of section 21 that both the substance and the form of dues withholding arrangements were to be left to determination by the parties at the bargaining table. . . . In summary, it was intended by section 21 and by the Council in recommending the subsequent amendment to section 21, that the form and substance of dues withholding arrangements were to be negotiated by the parties subject only to the explicit limitations prescribed by the Order itself and by regulations of the Civil Service Commission issued pursuant to its authority under section 21 of the Order.

Here, the DOT directive, as interpreted and applied by the agency head, mandates the inclusion of certain "items of information" in any dues withholding arrangement between the parties; in other words, such directive purports to dictate, in part, the substance of the dues withholding arrangement. It is clear, however, that the agency directive does not reflect in this regard any "explicit limitations prescribed by the Order itself" nor, with the one exception addressed below, "by regulations of the Civil Service Commission issued pursuant to its authority under section 21 of the Order." Therefore, apart from the "frequency" provision (item (4) in the agency directive) discussed below, we must find Chapter 24 of DOT 3710.2, Labor-Management Relations Program, as interpreted and applied by the agency

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(Continued)
More specifically, the agency cites FPM chapter 550, subchapter 3-5(f) which provides, in pertinent part:

> The agreement between the agency and the labor organization shall specify how often a change may be made in the amount of the allotment for the payment of dues to the labor organization.

15/ National Federation of Federal Employees, Local 476 and Joint Tactical Communications Office, Fort Monmouth, New Jersey, 1 FLRC 500 [FLRC No. 72A-42 (August 8, 1973), Report No. 43].

16/ Section 21 of the Order provides in pertinent part:

> Sec. 21. Allotment of dues. (a) When a labor organization holds exclusive recognition, and the agency and the organization agree in writing to this course of action, an agency may deduct the regular and periodic dues of the organization from the pay of members of the organization in the unit of recognition who make a voluntary allotment for that purpose. Such an allotment is subject to the regulations of the Civil Service Commission, which shall include provision for the employee to revoke his authorization at stated six-month intervals.

head with respect to the instant provision, to be in violation of section 21 of the Order in that it purports to mandate the substance of a dues withholding agreement contrary to the intent of that section of the Order.

We now turn to the "frequency" provision of the DOT directive adverted to above[17]. As the agency claims, this provision reflects a prescription of the Civil Service Commission issued pursuant to the Commission's authority under section 21 of the Order. In the Council's opinion the agency head's characterization of Article XII of the local agreement, here in dispute, as failing to denote the "frequency with which the labor organization may change the amount of dues to be deducted for each allottor," misinterprets Article XII, in particular, section (k).[18] In fact, section (k) places no limitation on how often a change in the amount of the allotment for the payment of dues to the labor organization may be made. Thus, it indicates that such changes may be made with whatever frequency the union finds necessary. Accordingly, in view of the agency head's erroneous interpretation of section (k) of Article XII, the agency has failed to establish that its regulations or the FPM are applicable so as to preclude negotiation of section (k) under section 11(a) of the Order.[19]

Accordingly, the Council holds that in the circumstances of the present case, the agency head's determination, that Article XII of the proposed agreement is nonnegotiable, was improper and must be set aside. Our decision herein should not be construed to mean that the substance of the DOT directive is, itself, inconsistent with the Order. It is only the attempt unilaterally to impose such provisions by means of agency regulations which conflicts with section 21. Such provisions in a dues withholding arrangement would be clearly consistent with the Order if established through the process of negotiations.[20]

17/ See note 13, supra.

18/ Article XII, Section (k) of the proposed agreement provides:

> The Local will notify the payroll liaison clerk of any change in the amount of membership dues.

19/ See Patent Office Professional Association and U.S. Patent Office, Washington, D.C., 74 FSIP 20, FLRC No. 75A-13 (October 3, 1975), Report No. 85; American Federation of Government Employees Local 997 and Veterans Administration Hospital, Montgomery, Alabama, FLRC No. 73A-22 (January 31, 1974), Report No. 48; Veterans Administration Independent Service Employees Union and Veterans Administration Research Hospital, Chicago, Illinois, 1 FLRC 228, [FLRC No. 71A-31 (November 22, 1972), Report No. 31].

20/ Of course, agencies can regulate, without being subject to an obligation to bargain, matters concerning withholding which are not "personnel policies and practices and matters affecting working conditions" within the meaning of section 11(a), such as, e.g., an agency's computerized payroll system.

4. Article XVI (Job Descriptions).

The union's proposal is as follows:

> SECTION 1. It is understood that the employer has the right to assign to any employee, in any trade or craft, work which is not normally performed by employees in such trade or craft, whenever it is deemed reasonable and practical to do so in order to promote efficient operations or necessary to eliminate standby time. Such work shall be done under proper supervision. [Only the underlined portion is in dispute.]

The agency contends that this proposal would violate management's section 12(b)(2), (4), and (5) rights to hire, fire, demote, and otherwise discipline supervisors. In support, the agency argues that the proposal would subject its exercise of such reserved rights to the negotiated grievance and arbitration procedures under which the union could "allege that a particular supervisor was not performing properly, thus requiring that management assign another supervisor or perhaps discipline the one alleged not to be performing properly."

We think the agency's position is without merit. In support of its broad assertion that the proposal contravenes several parts of section 12(b) of the Order, the agency alleges unpersuasively that the provision infringes upon its right to evaluate supervisory work performance and to discipline supervisors. However, neither the provision of Article XVI here in question nor any claim or explanation of the union as to the meaning thereof in the record before us is in any manner concerned with the evaluation of supervisory work performance or disciplining supervisors. To the contrary, the article as a whole, as well as the particular disputed provision thereof, focuses on unit employees — the assignment of work to unit employees and, as herein disputed, the assurance that unit employees will work under "proper supervision," that is the assignment of unit employees to supervisors. Thus, in the circumstances of this case, the agency's reliance on section 12(b) is misplaced, and therefore, we must find that section 12(b) is inapplicable.

However, section 11(b) as previously set forth excepts from the section 11(a) obligation to bargain matters with respect to, among other things, the agency's "organization." In this regard, the Council has previously stated in its Charleston decision, with respect to a proposal concerning "assignment of each unit employee to one appropriate civilian supervisor," as follows:[21/]

> In our opinion, the union proposal must be regarded as a subject within the above quoted provisions of section 11(b) of the Order, i.e., one about which the agency may, but is not required to negotiate. The supervisory structure of an agency and the designation of the supervisory positions to which nonsupervisory positions are assigned are essential parts of the overall organization of an agency, i.e., the administrative and functional structure of an agency.

21/ Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 445 [FLRC No. 72A-33 (June 29, 1973), Report No. 41].

In our view, as already indicated, the instant disputed provision also relates principally to the assignment of unit (nonsupervisory) employees to supervisors. Hence, in accordance with the Council's aforementioned Charleston decision, we must find that such provision in the present case deals with a matter with respect to the "organization" of the agency and is excepted from the obligation to bargain under section 11(b) of the Order. However, as previously discussed in part 1 of this opinion with respect to Article VIII, matters excepted from the obligation to negotiate by section 11(b) may not be disapproved by the agency head during review of local agreements pursuant to section 15 of the Order.

Therefore, the agency head's determination that this provision is nonnegotiable was improper and must be set aside.

5. Article XVII (Use of Official Facilities and Services).

The provision in dispute is as follows:

. . . . . .

> SECTION 4. Public address systems will be available to the Union upon verbal request to the Base Duty officer by a Local Union Official for the purpose of announcing their meetings.

This provision was disapproved in the agency's section 15 review of the local agreement and, on April 25, 1975, the union requested an agency head negotiability determination. On June 16, the agency determined that negotiation of the disputed provision is barred by published agency regulations (DOT 3710-2, para. 29(d)), which prohibit the use by labor organizations of agency public address systems; and, on July 7, the union filed its petition for Council review of such determination contending that no "compelling need" exists for the agency regulations relied on in the agency determination.

It is clear, however, as the union in effect acknowledges, that at the time the union filed its petition for review in this case, the provisions of the Order for an appeal to the Council grounded on a challenge to the "compelling need" for internal agency regulations asserted to bar negotiations had not taken effect.[22/] Such provisions did not become effective until ninety days after issuance by the Council, in its rules, of criteria for determining "compelling need."[23/]

22/ Exec. Order No. 11838, §§11(a), 11(c), 40 Fed. Reg. 5743, 7391 (1975), amending Exec. Order No. 11491, 3 C.F.R., 1966-1970 Comp., 861, as amended by Exec. Order No. 11616, 3 C.F.R., 1971 Comp., 202, and Exec. Order No. 11636, 3 C.F.R. 1971 Comp., 232.

23/ In this regard, the Council published for comment on May 16, 1975, proposed rules for determining "compelling need." (40 Fed. Reg. 21488 (1975).) Subsequently, on September 24, 1975, the Council issued its rules concerning "compelling need" in final form. Ninety days thereafter, the rules and relevant provisions of the Order became effective. (40 Fed. Reg. 43880, §§ 2411.22(a)(2), 2411.22(b), 2411.23(b), 2411.24, 2411.25(b), 2411.25(c)(2), 2413 (1975).)

Moreover, while section 11(c)(4) of the Order, incorporated in section 2411.22 of the Council's rules at the time the agency head rendered his determination and the union petitioned the Council for review thereof, provided for a labor organization's appeal to the Council on grounds that an agency's regulations, as interpreted by the agency head, violate applicable law, regulation of appropriate authority outside the agency, or the Order, such grounds, as already indicated, are not asserted by the union, nor can such grounds be inferred from the appeal.

Accordingly, without prejudice to the right of the union under the Order and Council's rules, as currently effective, to secure a determination by the agency in any further negotiations that may be held, we find that since the union's appeal with respect to Article XVII, Section 4 fails to meet the conditions for review prescribed at the time of the agency determination and union petition for Council review, the appeal is hereby denied.

Conclusions

For the reasons discussed above, and pursuant to sections 2411.22 (as in effect at the time of the agency head's determination and the union's petition for review) and 2411.28 of the Council's rules and regulations, we find that:

1. The union's appeal for review of the agency head's determination as to the nonnegotiability of Article XVII, Section 4, fails to meet the conditions prescribed in section 11(c)(4) of the Order (as then in effect) and must be denied; and

2. The agency head's determination as to the nonnegotiability of Article VIII, Section 3; Article X, Section 6; Article XII; and Article XVI, Section 1, of the agreement negotiated at the local level, was improper and must be set aside. This decision should not be construed as expressing or implying any opinion of the Council as to the merits of the provisions here involved. We decide only that, as submitted by the union and based on the record before the Council, the provisions were properly subject to negotiation by the parties concerned under section 11(a) of the Order and, once agreed upon, could not be disapproved under section 15.

By the Council.

for Harold D. Kessler
Henry B. Frazier III
Executive Director

Issued: August 2, 1976

Attachment:

APPENDIX

246-469 O - 78 - 28

APPENDIX

Text of Dues Withhlding Arrangement between NFFE, Local 1485 and Coast Guard Base, Miami Beach, Florida

ARTICLE XII

VOLUNTARY ALLOTMENT OF UNION DUES

SECTION 1

This agreement concerning the Voluntary Allotment of Compensation for Payment of Employment Organization Dues is entered into and between the agency and the National Federation of Federal Employees, hereinafter referred to as the Local. We, the undersigned, agree to the following:

(a) The Local agrees to purchase SF-1187, Request and Authorization for Voluntary Allotment of Compensation for Payment of Employee Organization Dues, and furnish them to eligible members desiring to authorize an allotment for withholding of dues from their pay.
(b) The Local accepts responsibility of informing and educating its members concerning the program for the voluntary allotment of dues and the uses and availability of SF-1187 and SF-1188.
(c) The President or other authorized officer of the Local hereby agrees to certify each SF-1187 that the employee is a member in good standing in the Local and will insert the amount to be withheld.
(d) The Financial Secretary of the Local is responsible for submitting the completed SF-1187s to the civilian personnel officer of the agency.
(e) Allotments will be effective at the beginning of the first full pay period after receipt of SF-1187s by the payroll liaison clerk, if possible. This clause is submitted for informational purposes.
(f) The President of the Local hereby agrees to immediately notify, in writing, the appropriate payroll liaison clerk of any change in the name and/ or address of the Financial Secretary of the Local.
(g) The Local will promptly notify the payroll liaison clerk, in writing, when a member of the Local is expelled or ceases to be a member.
(h) The agency hereby agrees to request the payroll servicing officer to prepare monthly remittance check for the deductions made, and forward the check to the Secretary-Treasurer of the Local, whose name has previously been furnished the agency. The check will be for the total amount of dues withheld for that month, less .02¢ for each allotment actually made.
(i) The agency further agrees to submit with the remittance check a positive listing of the members and amounts withheld. The list will also include the names of those employees for whom allotments have been permanently or temporarily stopped and the reason therefore; e. g. moved out of the unit, separation, LWOP, insufficient income during pay period.

(j) A member may voluntarily revoke his allotment for the payment of dues at any time by filling out an SF-1188, "Revocation of Voluntary Authorization for Allotment of Compensation for Payment of Employee Organization Dues," and submitting it directly to the payroll liaison clerk. After receipt of such notice by the payroll liaison clerk, revocation in any case will not become effective until the first full pay period following either March 1, or September 1, whichever is earlier. The payroll liaison clerk will provide the Local appropriate notification of the revocation. The duplicate copy of SF-1188 when completed by the member can be used for this purpose.

(k) The Local will notify the payroll liaison clerk of any change in the amount of membership dues.

(l) The Local will notify the payroll liaison clerk the title and address of the allottee to whom remittances should be sent, including how the check should be made out.

(m) The Employer will notify the employee and the Union when an employee is not eligible for an allotment because he is not included in the Unit to which this Agreement is applicable. The Chief, Civilian Personnel Branch will be responsible for this notification.

AFGE Local 1592, Hill Air Force Base and Ogden Air Logistics Center, Hill Air Force Base, Ogden, Utah (Rockwell, Arbitrator). The arbitrator found, in part, that the activity violated the parties' agreement by not issuing special clothing to certain employees to protect them from extreme cold weather conditions, and directed that such special clothing be issued. The agency filed exceptions to the arbitrator's award with the Council, alleging that the arbitrator exceeded his authority. The agency also requested a stay of the award.

Council action (August 2, 1976). The Council held that the agency's petition did not furnish sufficient facts and circumstances to support its exceptions, and, therefore, the exceptions provided no basis for acceptance of the petition under section 2411.32 of the Council's rules. Accordingly, the Council denied review of the agency's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the Council denied the agency's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

August 2, 1976

Mr. Robert T. McLean, Chief
Labor & Employee Relations Division
Directorate of Civilian Personnel
Headquarters U.S. Air Force
Department of the Air Force
Washington, D.C. 20314

Re: AFGE Local 1592, Hill Air Force Base and Ogden Air Logistics Center, Hill Air Force Base, Ogden, Utah (Rockwell, Arbitrator), FLRC No. 76A-12

Dear Mr. McLean:

The Council has carefully considered your petition for review of an arbitrator's award filed in the above-entitled case.

According to the award, the union's grievance in the matter concerned the refusal of the activity to issue protective clothing to certain personnel employed at the Air Freight Terminal at Hill Air Force Base, Ogden, Utah. The grievance was ultimately submitted to arbitration. The parties, in a prearbitration agreement, stipulated the issues and also agreed that "no other issues shall be raised by either party." The issues were stipulated as follows:

1. Was special clothing authorized by TA016[1/] for local use by airfreight handlers under terms of Union Management Agreement, Art 18, Sec H.?

2. Is the employer required to provide special clothing by virtue of the Union Management Agreement, Article 20, Sec B1, specifically:

   a. Does a hazard in fact exist? and

   b. Is there an appropriate directive or regulation which requires special clothing?

1/ TA016 is not specifically identified in the arbitrator's award; however, it apparently is an Air Force Table of Allowance which governs the issuance of certain types of clothing.

3. Is the interpretation of AFR 127-101[2/] by the Office of Primary Responsibility binding on all parties under the terms of Union Management Agreement, Art 35 Sec C?[3/] [Footnotes added.]

2/ Air Force Regulation 127-101 is also not specifically identified in the arbitrator's award; however, excerpts from the regulation cited in the award deal with the health and safety of Air Force personnel.

3/ The cited provisions of the collective bargaining agreement are as follows:

Section H of Article 18 (Health and Safety):

Protective devices and/or special clothing will be furnished, when authorized for local use, by the Employer. Employees will be required to utilize protective devices and/or special clothing at all times in designated work areas.

Section B1 of Article 20 (Working Conditions):

B. Protective Clothing

1. Employees required to work in areas where hazardous conditions exist or the work environment is detrimental to health will not be expected to perform such work without proper personal protective equipment, clothing or safety devices as provided by appropriate directives and regulations. Personal protective apparel or equipment as determined necessary and appropriate will be provided by the Employer.

Section C of Article 35 (Grievance Procedure):

C. Interpretation of Policy, Regulations

1. When any grievance filed under the negotiated grievance procedure involving the interpretation or application of the Agreement also questions the interpretation of published higher headquarters' or agency policy, regulation or provision of law or regulation outside the agency and such policy, law or regulation has been made a part of the Agreement the following procedure will apply:

a. Processing of the grievance beyond step 2 of the negotiated procedure will be delayed until the questioned policy, law or regulation has been interpreted. In securing this interpretation, the Union will forward via the Ogden ALC Commander's Representative, its request to the cognizant office for decision, e.g., in the case of Hq AFLC policy or regulation to the office of primary responsibility within that headquarters, and likewise at Hq USAF. Requests for interpretation of matters external to the Air Force will be forwarded by the Union via the Commander's Representative to Hq USAF/DPC who will refer the matter for review and interpretation by the office of primary responsibility. No hearing will be held in either review process.

(Continued)

In his discussion of the issues the arbitrator acknowledged that "[w]hen full consideration is given to the guidelines applying to arbitration in the Federal Sector, the provisions contained in the labor management agreement currently in force, and the contents of the stipulation agreed to by both parties, the Arbitrator is definitely limited in the scope of authority and in the composition of the actual awards."

In discussing the first issue as to whether special clothing was authorized by TA016 for local use by air freight handlers, the arbitrator noted that Article 35, Section C of the collective bargaining agreement "clearly identifies the interpretation by the office of primary responsibility as binding on all parties." He stated that he had no choice other than to completely support the ruling made by the office of primary responsibility which provided that static free clothing was not authorized.

As to the second issue, the arbitrator noted that the stipulation of issues by the parties used the term "special clothing" and did not narrow the clothing in question to static free only. Further, he pointed out that when the office of primary responsibility denied the use of static free clothing, no mention was made of other types of special clothing. Therefore, he determined that the stipulation did not eliminate the issuance of other types of special clothing such as special clothing for protection from the extreme cold and the resulting chill factor. In discussing this issue the arbitrator stated as follows:

> Attention is directed to Air Force Regulations 127-101, Chapter 5, Section 5-12, which states in part:
>
> > ". . . The importance of protective clothing and equipment to safeguard the health of personnel engaged in hazardous activities cannot be over emphasized."

(Continued)

b. If the interpretation received does not resolve the question raised by the grievance, the grievant may elect to continue on to the next available step of the grievance procedure, if any, as to any matter in the grievance concerning the interpretation or application of the Agreement. The grievant may continue the grievance by delivering written notice of such intent to the Employee Relations Section (DPCR) within 15 days of receipt of the interpretation requested. In any event all parties including the arbitrator will be bound by the interpretation received.

2. At anytime during arbitration, if a question arises involving the interpretation or application of any such policy, law or regulation, and the resolution of the question is material to the grievance, the arbitrator shall follow the same procedure and channels as above, and the parties, including the arbitrator shall be bound by the interpretation received.

> The above portion of the Air Force Regulation definitely applies to the extreme cold and chill factors encountered by the air freight loaders. The same conditions apply when considering the provisions of the current labor management contract, Article 20, Section B . . . .

With respect to the third issue, the arbitrator stated that "[n]o testimony was submitted that would limit the authority of the Office of Primary Responsibility . . . ."

Therefore, the arbitrator made the following award:

> (1) Management did not violate Article 18, Section H of the current agreement by not issuing protective clothing, specifically, static free coveralls and static free parkas to Air Freight Terminal personnel. Air Force regulations and the Office of Primary Responsibility clearly eliminate issuance of the static free clothing.
>
> (2) Management did violate Article 20, Section B-1 of the current agreement by not issuing protective clothing, specifically clothing to protect employees at the Air Freight Terminal from the excessive cold and chill factor at the work location. Special clothing shall be issued for protection from the extreme weather conditions. Static free parkas are not to be considered. The special clothing is to be only for protection from the extreme cold weather conditions.
>
> (3) The interpretation of Air Force Regulation 127-101 by the office [sic] of Primary Responsibility is binding on all parties, including the Arbitrator, under the terms of Article 35, Section C of the current agreement.

The agency requests that the Council grant a stay of the arbitrator's award and accept its petition for review on the basis of three exceptions discussed below.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

The agency's first exception contends that the arbitrator exceeded his authority by rendering an award on a matter which was not properly submitted to him for consideration. The agency asserts that at all stages of the grievance procedure management addressed only the question of the issuance of static free clothing and that no mention was made of any hazard other than that of static electricity until the arbitration hearing was in

process. It argues that the term "protective clothing"[4/] in the second stipulated issue was selected as a mere recitation of the contract language and was not intended to refer to anything other than static free clothing nor was it intended to broaden the issue beyond that stated in the formal grievance. The agency states that the use of the wording "protective clothing," while admittedly broad, was not of great concern during the formulation of the stipulated issues since it was understood that Article 35, Section G.5. of the parties' collective bargaining agreement[5/] restricted the arbitrator's consideration to the issue contained in the formal grievance. On the other hand, the union, in its opposition to the petition for review, asserts that neither the formal grievance nor the joint stipulation of issues contain any reference to static electricity.

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator determined issues not included in the question submitted to arbitration, thereby exceeding his authority. Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60. The Council pointed out in American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), 1 FLRC 479 [FLRC No. 72A-3 (July 31, 1973), Report No. 42], that a determination as to what was submitted to the arbitrator for decision is made by looking to both the submission agreement and the collective bargaining agreement. Further, in Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (March 18, 1976), Report No. 101, the Council noted that when the parties to a dispute reach agreement as to the issue to be presented to an arbitrator, and thereafter undertake to formulate that issue in a submission agreement, it is important that the agreement define precisely the issues involved and that, even when

4/ It is noted that the joint "Stipulation of Issues" submitted to the Council as part of the agency's petition and set forth on pp. 1-2, supra, uses the term "special clothing" rather than "protective clothing." Use of this latter term by the agency is consistent with language used by the arbitrator in summarizing the issues in his award. The difference in the terms has not been questioned by either party and is therefore not material to Council resolution of this matter.

5/ Article 35, Section G.5. provides as follows:

> Submission of Question. As soon as an arbitrator has been selected, management and the Union will meet and attempt to stipulate as to the question to be submitted to the arbitrator. The question may be no broader in scope than the issues presented at the grievance stage. If the parties cannot mutually agree, they will each submit to the arbitrator the question they feel should be decided.

the parties have entered into a submission agreement, the Council will construe an agreement broadly with all doubts resolved in favor of the arbitrator when a question is presented to the Council as to whether an arbitrator exceeded his authority in a particular matter.6/

In the present case, while the agency's first exception states a ground upon which the Council will grant review of an arbitration award, the Council is of the opinion that the agency's contentions do not provide facts and circumstances to support the exception that the arbitrator exceeded his authority by rendering an award on a matter which was not properly submitted to him for consideration. As the arbitrator pointed out, the parties were not precise in their joint stipulation with respect to the particular type of clothing in issue before him, instead seeking resolution as to the issuance of "special clothing." Thus, the arbitrator concluded that he was not confined to a determination regarding static free clothing only. Nor is this conclusion altered by the provisions of Article 35, Section G.5. of the parties' agreement, which provide that a question submitted to arbitration shall be no broader in scope than the issues presented at the grievance stage. As the union contends, the formal grievance, which was part of the agency's petition for review and which was before the arbitrator, contains no specific reference to static free clothing.7/ Therefore, the agency's petition for review does not furnish sufficient facts and circumstances to support the assertion in its first exception that the arbitrator exceeded his authority by rendering an award on a matter not submitted to him and no basis is thus provided for the acceptance of the agency's petition under section 2411.32 of the Council's rules.

In its second exception the agency contends that the arbitrator exceeded his authority by making an interpretation and an application of Air Force regulations in violation of express constraints contained in the collective bargaining agreement. In support of their exception alleging that the arbitrator exceeded his authority, the agency asserts that under Article 35, Section C.2. of the agreement (set forth in n. 3, supra), if, during arbitration, a question arises involving the interpretation of a higher headquarters or agency policy or regulation, such interpretation

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6/ FLRC No. 75A-4, Report No. 101 at 8 of the Decision.

7/ In this regard it should be noted that even if the formal grievance did contain such reference, it would not operate to limit the scope of arbitration because the agency failed to express this limitation in the submission agreement. A provision in a collective bargaining agreement intended to limit the scope of arbitration would not, in itself, prevent arbitral resolution of disputes broader in scope when the parties to that collective bargaining agreement subsequently consent to do so through a submission agreement. Cf. Anaconda Co. v. Great Falls Mill & Smeltermen's Union No. 16, 402 F.2d 749 (9th Cir. 1968).

must be obtained by the arbitrator from the office of primary responsibility within that higher headquarters. The agency argues that the arbitrator applied, as the basis for the award, his own interpretation of extremely broad regulatory language in Air Force Regulation 127-101. As stated previously, the Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the arbitrator exceeded his authority. But, assuming, as the agency argues, that the basis for the arbitrator's award of cold weather clothing is the arbitrator's interpretation of Air Force Regulation 127-101, the agency's contentions do not provide facts and circumstances to support its exception in light of the activity's wording with the union of the second stipulated issue for the arbitrator. It is noted that the second issue in the "Stipulation of Issues" asks:

a. Does a hazard in fact exist? and

b. Is there an appropriate directive or regulation which requires special clothing?

Thus, the arbitrator was asked by the parties to determine whether or not a regulation required special clothing and he clearly answered that question. Therefore, the agency's petition for review does not furnish sufficient facts and circumstances to support its second exception that the arbitrator exceeded his authority and no basis is thus provided for acceptance of the agency's petition under section 2411.32 of the Council's rules.

In its third exception the agency contends that the award is null and unenforceable since by not obtaining an interpretation of the regulation the arbitrator failed to fulfill an express condition of the collective bargaining agreement which is precedent to the issuance of a valid award. As a remedy, the agency requests that the Council remand the award to the arbitrator with instructions to seek an interpretation of regulations prior to the issuance of a new award.

Without passing upon the propriety of the remedy requested by the agency, the substance of this exception is the same as the agency's second exception. Therefore, this exception likewise provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

Accordingly, the agency's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the request for a stay is denied.

By the Council.

Sincerely,

Harold D. Kessler
for
Henry B. Frazier III
Executive Director

cc: James R. Rosa
AFGE

Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator). The arbitrator denied the grievance related to the grievants' claim for environmental differential pay. The union filed an exception to the arbitrator's award with the Council, principally contending, in effect, that the award violated appropriate regulations, i.e., the Federal Personnel Manual.

Council action (August 31, 1976). The Council held that the union failed to provide facts and circumstances to support its exception. Accordingly, the Council denied the union's petition since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

August 31, 1976

Mr. Raymond Hall, President
Federal Employees Metal Trades
Council
P. O. Box 2052
Portsmouth Naval Shipyard
Portsmouth, New Hampshire 03801

Re: Federal Employees Metal Trades Council and Portsmouth Naval Shipyard (Heller, Arbitrator), FLRC No. 76A-36

Dear Mr. Hall:

The Council has carefully considered your petition for review of the arbitrator's award, and the agency's opposition thereto, filed in the above-entitled case.

According to the arbitrator's award, the instant grievance concerned the claim by shipyard employees involved in working with fibrous glass materials that the shipyard violated Article 20, Section 1[1/] of the parties' collective bargaining agreement by not paying the 6 percent environmental pay differential authorized by FPM Letter 532-78[2/] which became part of

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1/ According to the award, Article 20, Section 1 of the collective bargaining agreement provides as follows:

> Article 20, Section 1. The employer shall assign Enviornmental [sic] Pay to unit employees engaged in hazardous work or work involving difficult working conditions to the extent permitted and prescribed by applicable regulations.

2/ FPM Letter No. 532-78 and its attachment provide in relevant part as follows:

> Upon recommendation of the Federal Prevailing Rate Advisory Committee, and in accordance with the guidelines of subchapter S8 of Federal Personnel Manual Supplements 532-1 and 532-2, the Civil Service Commission has approved two new categories of environmental differentials for addition to appendix J of FPM Supplements 532-1 and 532-2. Under Part I (Payment for Actual Exposure) of appendix J, the category Fibrous Glass Work, with a differential rate of 6% has been added. The effective date for Fibrous Glass Work is the beginning of the first pay period on or after February 28, 1975. . . .

(Continued)

appendix J (described in the award as "a Schedule of enviornmental [sic] differentials paid for exposure to various degrees of hazards, physical hardships, and working conditions of unusual nature") of FPM Supplements 532-1 and 532-2. [Emphasis in original.] The grievants claimed that they were due "a 6% Enviornmental [sic] Differential pay because the exposure despite all the safety devices, salves, coveralls and other safety equipment issued to and used by the grievants has not practically eliminated the exposure to these glass fibers."

In his award the arbitrator stated the issue submitted to arbitration as follows:

> Did the Portsmouth Naval Shipyard violate Article 20, Section 1, of the agreement between the Portsmouth Naval Shipyard and the Federal Employees Metal Trades Council by denying the grievants . . . Enviornmental [sic] Pay for such time they were working with fibrous glass material on March 3, 1975, and thereafter?

Determining that there was no violation of the agreement, the arbitrator denied the grievance. He found that, in the instant case, "while fibrous glass material is a nuisance particulate and an irritant . . . no significant exposure of an unusually severe nature occurs." He concluded that the words "practically eliminated" in appendix J do "not mean total elimination and in effect, there is an economic consideration which must have been part of the consideration on a practical level for the verbiage used in the regulation concerning Enviornmental [sic] Pay Differentials."

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below. The agency filed an opposition.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to

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(Continued)

> The following is a new category to be added to appendix J of Federal Personnel Manual Supplements 532-1 and 532-2, Schedule of Environmental Differentials, Part I, Payment for Actual Exposure.
>
> | Differential rate | Category for Which Payable | Effective date [Footnote omitted.] |
> |---|---|---|
> | 6% | 16. Fibrous Glass Work. Working with or in close proximity to fibrous glass material which results in exposure of the skin, eyes or respiratory system to irritating fibrous glass particles or slivers where exposure is not practically eliminated by the mechanical equipment or protective devices being used. | February 28, 1975 |

the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its exception, the union contends that "[t]he Arbitrator appears to have misconstrued the FPM letter 532-78 concerning payment of enviromental [sic] pay for fibrous glass work in this case . . . which states in part, 'where exposure is not practically eliminated.'" The union asserts that "[the arbitrator] is apparently more concerned with the economic factor then [sic] with the merits of the case" and "[h]is jurisdiction does not [include] assuming the economic factor that may have been a consideration in the verbiage of the FPM letter 532-78." The union further contends that the arbitrator is "inconsistant [sic] [in] his decision to deny the grievance and to continue the physical hardship of these people without some form of monetary compensation since the exposure to the irritating fibrous glass has not been practically eliminated."

The union, in contending that the arbitrator has misconstrued FPM Letter 532-78 (as incorporated by reference into the collective bargaining agreement), appears to be asserting that the arbitrator's award violates the Federal Personnel Manual. The Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that an exception presents grounds that the award violates appropriate regulations. In this case, however, the union's contentions do not provide facts and circumstances to support its exception that the arbitrator's award is contrary to the Federal Personnel Manual. The union, in contending that the arbitrator was "apparently more concerned with the economic factor . . ." and "inconsistant [sic] [in] his decision to deny the grievance . . ." is, in essence, disagreeing with the arbitrator's reasoning and conclusion in arriving at his award. The Council has consistently held that the conclusion or specific reasoning employed by an arbitrator is not subject to challenge. E.g., Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96; Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (Nov. 14, 1975), Report No. 89. Therefore, the union's exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the Council has denied review of the union's petition because it fails to meet the requirements for review as set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A. G. Niro
Navy

U.S. Department of Commerce, U.S. Merchant Marine Academy, Kings Point, New York, A/SLMR No. 620. The Assistant Secretary, adopting the Administrative Law Judge's findings, conclusions and recommendations, dismissed the 19(a)(1) and (6) complaint filed by the United Federation of College Teachers, U.S. Merchant Marine Academy Chapter (union), which alleged, in substance, that the agency engaged in dilatory actions and refused to negotiate in good faith with the union regarding specific salary items previously found by the Council to be negotiable in United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, FLRC No. 71A-15; and also dismissed the union's related 19(a)(1), (5) and (6) complaint, which alleged that the activity failed to negotiate in good faith by unilaterally interpreting a provision in the parties' agreement and unilaterally terminating that agreement. The union appealed to the Council, contending, in summary, that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (August 31, 1976). The Council held that the union's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the union's petition for review.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 F STREET, N.W. • WASHINGTON, D.C. 20415

August 31, 1976

Mr. Donald R. Paquette
Vice-Chairman, USMMA Chapter
United Federation of College Teachers
U.S. Merchant Marine Academy
Kings Point, New York 11024

Re: U.S. Department of Commerce, U.S. Merchant Marine Academy, Kings Point, New York, A/SLMR No. 620, FLRC No. 76A-42

Dear Mr. Paquette:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the agency's opposition thereto, in the above-entitled case.

In this case, according to the findings of the Assistant Secretary, United Federation of College Teachers, U.S. Merchant Marine Academy Chapter (the union), as the exclusive representative of faculty members at the U.S. Merchant Marine Academy (the activity), filed a complaint alleging in substance that the U.S. Department of Commerce (the agency) violated section 19(a)(1) and (6) of the Order by engaging in dilatory actions and refusing to negotiate in good faith with the union regarding specific salary items previously found by the Council to be negotiable in United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 210 [FLRC No. 71A-15 (November 20, 1972), Report No. 30]. Another complaint (the two were subsequently consolidated) alleged that the activity failed to negotiate in good faith in violation of section 19(a)(1), (5), and (6) of the Order by engaging in a unilateral interpretation of a contract provision in order to terminate the agreement and, further, by unilaterally terminating the agreement in an effort "to effect the agency's purpose in a salary dispute."

The Assistant Secretary, adopting the findings, conclusions, and recommendations of the Administrative Law Judge (ALJ), ordered the union's complaints dismissed. With respect to the union's allegations of bad faith bargaining arising from the agency's conduct during negotiations, the Assistant Secretary adopted the ALJ's conclusion that, "[c]onsidering all the circumstances, it can not be said that the [activity and the agency] were refusing to bargain in good faith with the . . . Union. To the contrary, the record indicates that while the [activity and the agency] were engaged in hard bargaining with the Union, they were making a good faith effort to resolve their differences." More specifically, the Assistant Secretary adopted the ALJ's finding with respect to the

246-469 O - 78 - 29

parties' attempts to agree upon ground rules for the negotiations that, in pertinent part, "[t]he [agency's] proposal to alternate the situs of the meetings, even though a departure from past practice, does not, without more, constitute a refusal to bargain," in view of the "creditable explanation" offered for such proposal. As to the union's allegations with respect to the activity's termination of the agreement, the Assistant Secretary adopted the ALJ's conclusion that the agreement was clearly terminable at will by either party after the expiration of the anniversary date, and, therefore, that the agency and activity in the instant case merely undertook to do that which they were entitled to do, and in the manner set forth in the agreement, when confronted with the union's continued insistence that negotiations be limited to salary items. He further concluded that no intent to avoid bargaining was exhibited but, rather, that the agency and activity "were employing a legitimate maneuver to ensure that the parties would have to bargain for an agreement which would conform in all respects with the Executive Order."

In your petition for review on behalf of the union, you allege, in summary, that the Assistant Secretary's decision is arbitrary and capricious in that the Assistant Secretary ignored or misinterpreted certain evidence and committed "numerous procedural errors" in reaching his decision. You further allege that the Assistant Secretary's decision presents a major policy issue as to whether all negotiating sessions should be held at the location of the activity employing the unit members, when all unit members are located at the activity. In this regard, you contend that such a requirement would result in a minimal burden on all parties, and would be consistent with the general principles of the Merchant Marine case, supra.

In the Council's opinion, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious or present a major policy issue.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear in the circumstances of this case that the Assistant Secretary acted without reasonable justification in concluding that the union's complaint should be dismissed. In this connection, your appeal does not disclose any probative evidence presented which the Assistant Secretary failed to consider, but instead amounts to nothing more than disagreement with the weight accorded the evidence by the Assistant Secretary. Moreover, as to your allegation that the Assistant Secretary committed "numerous procedural errors" in reaching his decision, your appeal fails to disclose that the Assistant Secretary applied his regulations in a manner inconsistent either with his previous decisions or with the purposes of the Order. Nor is a major policy issue presented concerning the appropriate location of negotiating sessions, as alleged. In this regard, the Council notes particularly the absence of any findings by the Assistant Secretary as to the appropriate location for negotiations; instead he merely found, in the circumstances

of this case, that the agency's proposal to alternate the situs of the meetings did not constitute a refusal to bargain in good faith. The Council notes further that your appeal fails to establish that such decision is inconsistent with relevant Council precedent.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

M. J. McMorrow
Commerce

Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, District Office, Minneapolis, Minnesota, A/SLMR No. 621. The Assistant Secretary, upon a clarification of unit petition filed by the activity, seeking to exclude the newly created position of "Operations Analyst" from the exclusively recognized local bargaining unit represented by Local 3129, American Federation of Government Employees, AFL-CIO, found, among other things, that the Operations Analysts were not management officials within the meaning of the Order. Accordingly, the Assistant Secretary clarified the unit involved by including the Operations Analysts therein. The agency appealed to the Council, contending that the Assistant Secretary's decision presented major policy issues. The agency also requested a stay of the decision.

Council action (August 31, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not raise a major policy issue, and the agency neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. WASHINGTON, D.C. 20415

August 31, 1976

Mr. Irving L. Becker
Labor Relations Officer
Social Security Administration
Room G-2608, West High Rise Building
6401 Security Boulevard
Baltimore, Maryland 21235

Re: Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, District Office, Minneapolis, Minnesota, A/SLMR No. 621, FLRC No. 76A-50

Dear Mr. Becker:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the union's opposition thereto, in the above-entitled case.

This case arose when the Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, District Office, Minneapolis, Minnesota (the activity) filed a petition for clarification of unit. The petition sought to exclude the newly created position of "Operations Analyst" (which had been established nationwide by the Social Security Administration) from the exclusively recognized local bargaining unit represented by the American Federation of Government Employees, AFL-CIO, Local 3129 (AFGE). The activity contended, in pertinent part, that its two Operations Analysts were management officials and should, therefore, be excluded from the certified unit. In his decision, the Assistant Secretary reviewed the record evidence as to the duties and responsibilities of the Operations Analyst, and concluded, in pertinent part, that they were not management officials within the meaning of the Order. Citing his previous decision wherein he promulgated the definition of "management official" which he would use to decide questions regarding the appropriate unit pursuant to section 6(a)(1) of the Order, the Assistant Secretary concluded:

> . . . I find that the Operations Analysts at issue are not management officials within the meaning of the Executive Order. Thus, in my view, the evidence establishes that such employees do not have the authority to make, or influence effectively, Activity policies with respect to personnel, procedures or programs. Rather, I find that in their narrow job functions they serve as experts or resource persons rendering resource information or recommendations with respect to the implementation of existing policies. [Citations omitted.]

Accordingly, he clarified the unit for which the union was certified by including in the unit Operations Analysts of the activity.

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision presents major policy issues as to whether: (1) "[t]he Assistant Secretary's definition of the term management official should be broadened in line with that applied in the private sector to assure the avoidance of any real or apparent conflict of interest between agency management and bargaining unit employees"; and (2) "[t]he Assistant Secretary's policy of adjudicating employee eligibility for inclusion in bargaining units solely on the basis of job duties currently performed should be broadened to admit, for appropriate consideration, evidence on prospective job duties for newly created positions."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not raise a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

With respect to your first alleged major policy issue, in its 1975 Report and Recommendations on the Amendment of the Order, the Council considered definitions pertaining to inclusions and exclusions, including the section 10(b)(1) exclusion of management official from units of exclusive recognition. The Council noted that the Order contained no definition of the term and, as a consequence, it became necessary for the Assistant Secretary to define the term in connection with carrying out his responsibilities to decide questions regarding the appropriateness of units pursuant to section 6(a)(1) of the Order. In this regard, the Council observed that there was little comment in the oral and written submissions to the Council concerning the definitions at issue and concluded that, "[w]hile they appear to be working satisfactorily, we believe that more experience should be acquired with them before giving further consideration to including them in the Order." [Labor-Management Relations in the Federal Service (1975), at 29-30.] In the Council's opinion, your appeal fails to demonstrate that the Assistant Secretary's definition is no longer working satisfactorily or that experience under such definition now requires the Council to consider the adoption of an alternative definition.

Accordingly, while the Council may deem it necessary to reconsider the matter if it should appear in the future that the definition of management official as formulated by the Assistant Secretary is not working satisfactorily, no major policy issue warranting review is raised by the instant decision. Nor is a major policy issue presented as to your contention concerning the Assistant Secretary's obligation to consider future job duties for newly created positions in adjudicating employee eligibility for inclusion in bargaining units, noting in this regard that the Assistant Secretary's determination that the Operations Analysts herein are not management officials was based on their present duties and responsibilities

and such determination does not foreclose a reexamination of the position should those duties and responsibilities change.

Since the Assistant Secretary's decision does not present a major policy issue, and since you neither contend, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

J. R. Rosa
AFGE

Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 617. The Assistant Secretary dismissed the representation petition filed by the U.S. Army Electronics Command (ECOM), which alleged that due to a reorganization resulting in the closing of ECOM's Philadelphia office (where Local 1498, American Federation of Government Employees, AFL-CIO was the exclusive representative of a unit of employees), and in the physical transfer of a number of employees from that office to Fort Monmouth, a good faith doubt existed as to whether Local 1498 continued to represent a majority of employees in the unit. In dismissing the petition, the Assistant Secretary found, among other things, that the Philadelphia unit had ceased to exist as a distinct, separate and identifiable unit after the reorganization and related transfer. Thereafter, according to documents submitted to the Council, the American Federation of Government Employees (AFGE) put its Local 1498 into trusteeship, notifying ECOM (and members of Local 1498) that the trustee designated by AFGE was the only authorized representative of the Local with whom ECOM should deal. Mr. William L. Washington appealed to the Council, contending, among other things, that the decision of the Assistant Secretary was arbitrary and capricious. Mr. Washington also requested a stay of the Assistant Secretary's decision.

Council action (August 31, 1976). Without passing on the agency's contention in its opposition to Council acceptance of the instant petition that Mr. Washington had no standing to function as a petitioner, the Council held that Mr. Washington's petition did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and Mr. Washington neither alleged, nor did it appear, that the subject decision presented any major policy issues. Accordingly, the Council denied review of Mr. Washington's petition. The Council likewise denied his request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

August 31, 1976

Mr. William L. Washington
2525 West Huntington Street
Philadelphia, Pennsylvania 19132

Re: Department of the Army, U.S. Army Electronics Command, Fort Monmouth, New Jersey, A/SLMR No. 617, FLRC No. 76A-55

Dear Mr. Washington:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the opposition thereto filed by the agency, in the above-entitled case.

In this case, according to the findings of the Assistant Secretary as relevant to the instant appeal, the American Federation of Government Employees, Local 1498, AFL-CIO (Local 1498) was granted exclusive representative status for a unit of all nonprofessional, nonsupervisory employees in the Philadelphia office of the U.S. Army Electronics Command (ECOM) in 1967. In 1974, pursuant to a reorganization directed by Headquarters, U.S. Army Materiel Command (AMC), the Philadelphia office was closed and its mission transferred to Fort Monmouth, approximately 50 miles away. Approximately 545 employees of the Philadelphia office were also physically transferred to Fort Monmouth and consolidated with their counterparts there. ECOM then filed a representation (RA) petition alleging that, due to the reorganization involving the Philadelphia office, there existed a good faith doubt as to whether Local 1498 continued to represent a majority of employees in the unit. Two labor organizations which, prior to the transfer, had been granted exclusive recognition for units of employees at Fort Monmouth (National Federation of Federal Employees, Local 476 and American Federation of Government Employees, Local 1904, AFL-CIO) intervened.[1/] Local 1498 did not timely intervene but, because it was the currently recognized collective bargaining representative,

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1/ Consolidated with this representation proceeding was an unfair labor practice case involving an allegation by NFFE that ECOM had violated section 19(a)(3) of the Order by "providing payroll withholding services for Union dues of AFGE [Local 1498] members who are not in exclusive bargaining units, while denying the same services to NFFE members." NFFE's complaint was dismissed by the Assistant Secretary, and has not been appealed to the Council. Moreover, your appeal, in effect, disclaims any intent to appeal such dismissal to the Council.

it was deemed "an interested party" by the Administrative Law Judge (ALJ) and was designated a "Party-in-Interest" by the Assistant Secretary on NFFE's request for review of the ALJ's Recommended Decision and Order. All parties were represented at the hearing and ". . . were afforded full opportunity to be heard, to adduce evidence, and to examine, cross examine witnesses."

The Assistant Secretary, adopting the findings, conclusions, and recommendations of the ALJ, found that the record established that the Philadelphia unit ceased to exist as a distinct, separate, and identifiable unit of employees when ECOM's Philadelphia operation was moved to and merged with the Fort Monmouth operation, and that the former Philadelphia unit employees were indistinguishable from the other ECOM employees at Fort Monmouth. In this regard, the Assistant Secretary noted that any other unit located at Fort Monmouth, that may include all or some of ECOM's former Philadelphia employees, would be of such a substantially different nature that it in effect bears no real relationship to the former Philadelphia unit and that an election in any such unit would be unwarranted unless a valid and appropriate petition were filed for such a unit. Accordingly, the representation petition was dismissed.

Thereafter, according to the documents submitted by you as attachments to your appeal, on March 3, 1976, the American Federation of Government Employees (AFGE) put its Local 1498 into trusteeship, notifying ECOM (and members of Local 1498) that the trustee designated by AFGE was the only authorized representative of the Local with whom ECOM should deal.

In your petition for review to the Council dated April 19, 1976, you contend that the decision of the Assistant Secretary is arbitrary and capricious since the evidence fails to establish that the Philadelphia unit ceased to exist as a distinct, separate, and identifiable unit of employees when ECOM's Philadelphia operation was moved to and merged with the Fort Monmouth operation.2/ In this regard, you assert that "the Philadelphia office moved in tact [sic] to Fort Monmouth, with no change whatsoever in the operation or mission." You further contend that Local 1498 "was not afforded a full opportunity to be heard. No representative of Local 1498 AFGE was called to testify."

In its opposition to your petition for review herein, the agency contends, among other things, that you have "no standing under the Council's rules to function as a petitioner," noting that AFGE has placed Local 1498 in

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2/ In your appeal, you also contend that the filing of the representation petition in the instant case was motivated by racial discrimination on the part of agency management and the national office of the AFGE. However, such issues were not involved in the case before the Assistant Secretary or considered by him in reaching his decision on ECOM's RA petition from which you appeal, and apart from other considerations, such contentions provide no basis for review of the dismissal of the RA petition.

trusteeship and that you have failed to submit any document pursuant to the Council's rules to show that AFGE's national president has authorized you to file the instant petition.

In the Council's opinion, without passing upon the agency's contention that you have no standing to function as a petitioner, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision presents any major policy issues.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in finding that the Philadelphia unit ceased to exist as a distinct, separate, and identifiable unit of employees, and that ECOM's RA petition therefore should be dismissed. Rather, your contention constitutes, in effect, nothing more than disagreement with the Assistant Secretary's factual findings and therefore does not present a basis for Council review. Likewise, no basis for Council review is presented by your contention that Local 1498 was not afforded a full opportunity to be heard through the testimony of its representatives at the hearing, noting particularly that Local 1498 was deemed a Party-in-Interest despite its failure to timely intervene, and at the consolidated hearing in this case, was afforded full opportunity to participate as a party.

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that any major policy issues are presented, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure, and review of your appeal is hereby denied. Your request for a stay of the Assistant Secretary's decision is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

W. J. Schrader
Army

D. Garrison
AFGE

I. L. Geller
NFFE

U.S. Army Missile Command, Redstone Arsenal, Alabama, Assistant Secretary Case No. 40-6698(CA). The Assistant Secretary, in agreement with the Assistant Regional Director (ARD) and based upon the ARD's reasoning, decided that further proceedings were unwarranted with respect to the 19(a)(6) complaint filed by Mr. Raymond L. Reynolds, which alleged, in substance, that the activity failed to consult or negotiate in good faith with Local 1858, American Federation of Government Employees, AFL-CIO, the exclusive representative of a unit of employees at the activity, and that, as a result of such failure, he was not promoted to a particular position. The Assistant Secretary therefore denied Mr. Reynolds' request for review seeking reversal of the ARD's dismissal of the complaint. Mr. Reynolds appealed to the Council, alleging that the Assistant Secretary's decision was arbitrary and capricious.

Council action (August 31, 1976). The Council held that Mr. Reynolds' petition did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and Mr. Reynolds neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied review of Mr. Reynolds' petition.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

August 31, 1976

Mr. Raymond L. Reynolds
704 Randolph Avenue, SE.
Huntsville, Alabama 35801

Re: U.S. Army Missile Command, Redstone Arsenal, Alabama, Assistant Secretary Case No. 40-6698(CA), FLRC No. 76A-61

Dear Mr. Reynolds:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, you filed a complaint against the U.S. Army Missile Command, Redstone Arsenal, Alabama (the activity). The complaint alleged, in substance, that the activity violated section 19(a)(6) of the Order by failing to consult or negotiate in good faith with Local 1858, American Federation of Government Employees, AFL-CIO (the union), the exclusive bargaining representative of a unit at the activity, and that, as a result of such failure, you were not promoted to the position of Housing Project Manager.

The Assistant Secretary, in agreement with the Assistant Regional Director (ARD) and based on his reasoning, decided that further proceedings were unwarranted. In reaching this determination, the Assistant Secretary stated:

> Thus, in my view, the obligation to meet and confer is owed by an agency or activity to the labor organization which is the exclusive representative of employees in the unit and the right to challenge the agency's or activity's obligation in this regard runs solely to that labor organization and not to an individual unit employee.

Accordingly, the Assistant Secretary denied your request for review seeking reversal of the ARD's dismissal of the complaint.

In your petition for review, you allege that the decision of the Assistant Secretary is arbitrary and capricious in that he erroneously found that the right to challenge the activity's obligation to meet and confer runs solely to the labor organization which is the exclusive representative of employees in the unit and not to an individual unit employee. In this connection, you contend that Section 203.1 of the Assistant Secretary's regulations stipulates that an employee may file a complaint against an agency, activity or labor organization alleging a violation of section 19 of the Order. You further assert that the Assistant Secretary's failure to take action on your charges demonstrates bias on his part, and is supportive of the activity's denial of your "civil rights."

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you do not allege, nor does it appear, that this decision presents a major policy issue.

With respect to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in dismissing your complaint herein. Nor is any basis for Council review presented by your contention that the Assistant Secretary in effect misapplied Section 203.1 of his regulations in the circumstances of this case, noting particularly that you, as an employee, did file a complaint against the activity which complaint was considered by the Assistant Secretary, that the Assistant Secretary neither cited nor relied upon such regulation in reaching his decision, and noting further that in any event your appeal fails to allege that his dismissal of your complaint herein was inconsistent with the purposes of the Order. Cf. Department of the Air Force, Headquarters, Tactical Air Command, Langley Air Force Base, Virginia, Assistant Secretary Case Nos. 22-6261 (CA) and 22-6263 (CA), FLRC No. 75A-123 (April 12, 1976), Report No. 102. Finally, the appeal contains no basis to support your imputation of bias or other impropriety in the circumstances of this case.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that it presents a major policy issue, your petition fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your petition is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Commanding General
Redstone Arsenal

U.S. Civil Service Commission, Atlanta Region, Atlanta, Georgia, Assistant Secretary Case No. 40-6699(CA). The Assistant Secretary, in agreement with the Assistant Regional Director (ARD) and based on the ARD's reasoning, found that further proceedings were unwarranted with respect to the unfair labor practice complaint filed by Mr. Raymond L. Reynolds, which alleged, in substance, that the Civil Service Commission violated the Order by not requiring the U.S. Army Missile Command, Redstone Arsenal, Alabama (the activity) to adhere to existing laws and regulations, and that the Commission specifically violated sections 19(a)(6) and 19(b)(6) of the Order by encouraging the activity and Local 1858, American Federation of Government Employees, AFL-CIO, the exclusive representative of a unit of employees at the activity, not to consult in good faith. The Assistant Secretary further found that the Area Director's investigation of the matter was sufficient, and, accordingly, denied Mr. Reynolds' request for review seeking reversal of the ARD's dismissal of the complaint. Mr. Reynolds appealed to the Council, alleging that the decision of the Assistant Secretary was arbitrary and capricious.

Council action*/ (August 31, 1976). The Council held that Mr. Reynolds' petition did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and Mr. Reynolds neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied review of Mr. Reynolds' petition.

*/ The Chairman of the Civil Service Commission did not participate in this decision.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

August 31, 1976

Mr. Raymond L. Reynolds
704 Randolph Avenue, SE.
Huntsville, Alabama 35801

Re: U.S. Civil Service Commission, Atlanta Region, Atlanta, Georgia, Assistant Secretary Case No. 40-6699(CA), FLRC No. 76A-62

Dear Mr. Reynolds:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, as found by the Assistant Secretary, you applied for the position of Housing Project Manager, GS-11; you were rated highly qualified, but you were not selected for the position. You filed a complaint against the U.S. Civil Service Commission (CSC) which alleged, in substance, that the CSC violated the Order by not carrying out its "sworn duties" of requiring the U.S. Army Missile Command, Redstone Arsenal, Alabama (the activity) to adhere to existing laws and regulations and specifically violated section 19(a)(6) and 19(b)(6) of the Order by encouraging the activity and Local 1858, American Federation of Government Employees, AFL-CIO (the union), the exclusive bargaining representative of a unit at the activity, not to consult in good faith.

The Assistant Secretary, in agreement with the Assistant Regional Director (ARD) and based on his reasoning, found that further proceedings were unwarranted since "the evidence . . . does not establish a reasonable basis for your allegation that the [CSC] has violated your rights assured by the Order." The Assistant Secretary further found that the Area Director's "investigation of this matter was sufficient," and accordingly denied your request for review seeking reversal of the ARD's dismissal of the complaint herein.

In your petition for review, you allege that the decision of the Assistant Secretary was arbitrary and capricious "in that a preponderance of evidence was furnished and an investigation, if properly made would have further supported [your] allegation." In this regard, you assert that none of the evidence which you furnished was considered and that no investigation was made, citing Section 203.6 of the Assistant Secretary's regulations.

In the Council's view, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision presents a major policy issue.

With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in reaching his decision. In this connection, your appeal does not disclose any probative evidence presented which the Assistant Secretary failed to consider, but instead amounts to nothing more than disagreement with the Assistant Secretary's conclusion that the evidence presented did not establish a reasonable basis for your complaint.

As to your further allegation that no investigation was made, citing Section 203.6 of the Assistant Secretary's regulations, the Council has previously stated that section 6(d) of the Order empowers the Assistant Secretary to prescribe regulations needed to administer his functions under the Order, and that, as the issuer of those regulations, the Assistant Secretary is responsible for their interpretation and implementation.1/ In the instant case, the Assistant Secretary found that "investigation of this matter was sufficient," and your appeal fails to establish that the Assistant Secretary's application of his regulations in the circumstances of this case was arbitrary and capricious or inconsistent with the purposes of the Order.

Accordingly, since the Assistant Secretary's decision does not appear arbitrary and capricious and you do not allege, nor does it appear, that it presents a major policy issue, your petition fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Therefore, your petition for review is denied.

By the Council.2/

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

A. F. Ingrassia
CSC

Commanding General
Redstone Arsenal

R. B. Swain
AFGE

1/ Department of the Air Force, Ellsworth Air Force Base, South Dakota, Assistant Secretary Case No. 60-3412(RO), FLRC No. 73A-60 (October 30, 1974), Report No. 59.

2/ The Chairman of the Civil Service Commission did not participate in this decision.

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Local 1858, American Federation of Government Employees, AFL-CIO, Assistant Secretary Case No. 40-6700(CO). The Assistant Secretary, in agreement with the Assistant Regional Director (ARD) and based on the ARD's reasoning, found that further proceedings were unwarranted with respect to the 19(b)(6) complaint filed by Mr. Raymond L. Reynolds, which alleged that the union failed to consult, confer, or negotiate in good faith with the U.S. Army Missile Command, Redstone Arsenal, Alabama (the activity), and that such failure by the union, as the exclusive representative of a unit of employees at the activity, was the cause of Mr. Reynolds not being promoted by the activity to a particular position. The Assistant Secretary therefore denied Mr. Reynolds' request for review seeking reversal of the ARD's dismissal of his complaint. Mr. Reynolds appealed to the Council, alleging, in essence, that the decision of the Assistant Secretary was arbitrary and capricious.

Council action (August 31, 1976). The Council held that Mr. Reynolds' petition did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and Mr. Reynolds neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied review of Mr. Reynolds' petition.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

August 31, 1976

Mr. Raymond L. Reynolds
704 Randolph Avenue, SE.
Huntsville, Alabama 35801

Re: Local 1858, American Federation of Government Employees, AFL-CIO, Assistant Secretary Case No. 40-6700(CO), FLRC No. 76A-63

Dear Mr. Reynolds:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, you filed a complaint alleging that Local 1858, American Federation of Government Employees, AFL-CIO (the union) violated section 19(b)(6) of the Order by failing to consult, confer, or negotiate in good faith with the U.S. Army Missile Command, Redstone Arsenal, Alabama (the activity). You alleged that such failure to negotiate by the union, as the exclusive bargaining representative of a unit at the activity was the cause of your not being promoted by the activity to the position of Housing Project Manager.

The Assistant Secretary, in agreement with the Assistant Regional Director (ARD) and based on his reasoning, found that further proceedings were unwarranted since:

> . . . there was no evidence to show that you were involved in any proceeding in which there was an obligation on the part of the [union] to meet and confer with the [activity] concerning the position of Housing Project Manager. Moreover, the right to challenge the obligation of a labor organization to meet and confer with an agency or activity does not extend to an individual unit employee.

Accordingly, the Assistant Secretary denied your request for review seeking reversal of the ARD's dismissal of the complaint.

In your petition for review, you allege, in essence, that the decision of the Assistant Secretary is arbitrary and capricious because he erroneously found that the right to challenge the obligation of a labor organization to meet and confer with an agency or activity does not extend to an individual unit employee. You also allege that the Assistant Secretary erred in finding no evidence of your involvement in any proceedings in which the union was obligated to meet and confer with the activity. In this regard you contend, in essence, that the Assistant Secretary failed to consider any of the documentation which you submitted as evidence in this case.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, and you do not allege, nor does it appear, that it presents a major policy issue.

With respect to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in reaching his decision, nor does your appeal allege that his dismissal of your complaint herein was inconsistent with the purposes of the Order. Cf. Department of the Air Force, Headquarters, Tactical Air Command, Langley Air Force Base, Virginia, Assistant Secretary Case Nos. 22-6261 (CA) and 22-6263 (CA), FLRC No. 75A-123 (April 12, 1976), Report No. 102.

As to your allegation that the Assistant Secretary failed to consider any of the documentation submitted by you in finding no evidence that you were involved in any proceeding in which the union had an obligation to meet and confer with the activity, your appeal does not disclose any probative evidence presented which the Assistant Secretary failed to consider, and therefore presents no basis for Council review. Further, your allegation that the Assistant Secretary erred in finding no evidence of your involvement in any proceedings in which the union was obligated to meet and confer with the activity amounts to nothing more than disagreement with the Assistant Secretary's conclusion that the evidence did not establish a reasonable basis for your complaint.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and you do not allege, nor does it appear, that it presents any major policy issues, your petition fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your petition is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. B. Swain
AFGE

American Federation of Government Employees, Local 3239, AFL-CIO and Social Security Administration, Cleveland Region, Area One Office, Southfield, Michigan (Ott, Arbitrator). The arbitrator denied the grievance related to the issuance of a memorandum by the activity providing for mandatory overtime. The union filed exceptions to the arbitrator's award with the Council, contending (1) specifically, that the award lacks entirety, and (2) that the award violates the Order. The union also requested a stay of the award.

Council action (August 31, 1976). As to (1), the Council held that the exception provided no basis for acceptance of the union's petition under section 2411.32 of the Council's rules. As to (2), the Council held, in effect, that the union failed to provide any support for this exception in its petition. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the union's request for a stay.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

August 31, 1976

Mr. Allen H. Kaplan
National Vice-President
American Federation of Government
Employees, AFL-CIO
446 North Central
Northfield, Illinois 60093

Re: American Federation of Government Employees, Local 3239, AFL-CIO and Social Security Administration, Cleveland Region, Area One Office, Southfield, Michigan (Ott, Arbitrator), FLRC No. 76A-67

Dear Mr. Kaplan:

The Council has carefully considered your petition for review of an arbitrator's award in the above-entitled case.

According to the arbitrator's award, this case arose upon the filing of a grievance alleging that the issuance of an activity memo which provided for mandatory overtime violated the parties' labor agreement.*/ The union contended before the arbitrator that the activity, by issuing the memo, had, in effect, modified the agreement between the parties since the memo was a unilateral change in Article V, section 2 of the agreement and that under Article II, section 5 neither party "will make any unilateral changes in the terms of the agreement pending settlement of outstanding differences . . . ."

*/ The arbitrator cites and quotes the provisions of the collective bargaining agreement pertinent to the matter before him as follows:

ARTICLE II. DURATION OF THE AGREEMENT

Section 5. Changes. Neither the Region nor the Union will make any unilateral changes in the terms of the agreement pending settlement of outstanding differences through mutually agreeable procedures.

ARTICLE III. CONSULTATIONS

Section 1. The region agrees to consult with the Union during the formulation of personnel policies and practices and matters affecting working conditions; and on the impact of staffing patterns, promotion policies, creation or abolition of positions on employees. . . .

(Continued)

In the opinion accompanying his award, the arbitrator discussed each of the cited contract provisions and found that the Area Director had consulted with the union on his intention to schedule overtime, that the decision to work overtime is a judgment for management to make and is not a unilateral change under Article II, section 5 of the labor agreement, that there is no prohibition against scheduling overtime in the parties' labor agreement, and that the activity had not violated the provisions of Article V, section 2 of the agreement. Accordingly, the arbitrator held that "[t]he Union has failed to meet the burden of proving a contractual violation occurred," and therefore denied and dismissed the grievance.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of its two exceptions discussed below and requests a stay of the award. The agency filed an opposition.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception the union contends that the award lacks entirety. In support of this exception the union asserts that the arbitrator's interpretation of Article II, section 5 "flies in the face of clear

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(Continued)

Section 2. Consultation Subject Areas.

A total of ten different areas of consultation are listed therein.

ARTICLE V. OVERTIME

Section 2. Procedure. The Region and the Union agree that at times overtime will be necessary to carry on the work of the Region in an efficient manner.

(a) Distribution: Overtime will be distributed equitably among all employees who have the capability of performing the work required.

(b) The Region agrees to assign overtime work to qualified volunteers to the extent that this volunteer policy for overtime assignments can be carried out successfully.

An employee may be excused by his supervisor from overtime on the basis of reasonable justification and/or personal hardship. No employee shall be discriminated against in any manner because he or she is excused from overtime.

contract language and because of it fails to resolve the dispute submitted to the Arbitrator." The union further asserts that "[t]he Arbitrator clearly failed to understand the connection between Article V and Article II" and "[t]he Arbitrator has failed to address the violation of Article II, section 5 . . . . The Arbitrator's view that the unilateral method of overtime distribution is not a change in working conditions is clearly wrong and fails to address precisely the issue presented to him."

The union's specific exception that the award lacks entirety does not assert a ground upon which the Council has previously granted review of an arbitration award nor does it appear to assert a ground similar to that upon which a challenge to a labor arbitration award is sustained by courts in private sector cases. The union cites no private sector cases in which courts have held this specific exception to be a ground for review of arbitration awards nor has our research disclosed any such cases. Moreover, the Council is of the opinion that the union, in substance, is merely contending that the arbitrator reached an incorrect result and is disagreeing with the arbitrator's interpretation of the labor agreement. The Council has consistently held that the interpretation of the agreement is a matter to be left to the arbitrator's judgment and does not state a ground for review under section 2411.32 of the Council's rules. Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96; Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (Aug. 15, 1975), Report No. 82; American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), 1 FLRC 544 [FLRC No. 72A-55 (Sept. 17, 1973), Report No. 44]. Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception the union contends that the award violates the Order. While this exception cites a general ground upon which the Council will grant review of an arbitration award, the union does not specify in its petition which sections of the Order it believes the award to violate, nor does it provide any explanation as to why the award is considered violative of the Order except to state that "[a]n award that lacks entirety is fundamentally contrary to the overall purposes of E.O. 11491." Furthermore, the petition does not contain a description of facts and circumstances to support this exception. A petition for review of an arbitrator's award will not be accepted where there appears in the petition no support for the stated exception to the award. Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96; Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (Aug. 15, 1975), Report No. 82. Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the union's request for a stay of the award is denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: P. Arca
SSA

Wing Commander, 29th Flying Training Wing, Craig Air Force Base, Alabama and American Federation of Government Employees, AFL-CIO, Local Union No. 2574 (Williams, Arbitrator). The arbitrator found that the activity had violated the parties' agreement by failing to compensate the grievant for 6 hours spent outside regular working hours in travel from Dobbins Air Force Base, Georgia, to Craig Air Force Base, Alabama. (The grievant spent approximately 4 1/2 hours of this time as the driver of the Government vehicle in which he was traveling and 1 1/2 hours as a passenger.) The arbitrator directed that the grievant be paid 6 hours pay at the appropriate overtime rate. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award granting overtime pay to the grievant violated applicable law and controlling regulation. The Council also granted the agency's request for a stay (Report No. 98).

Council action (September 14, 1976). Based upon an interpretation by the Civil Service Commission rendered in response to the Council's request, the Council held that the arbitrator's award of overtime compensation was consistent with applicable law and appropriate regulation to the extent that the award compensated the grievant for the 4 1/2 hours of the subject trip during which he drove the Government vehicle in which he was traveling. The Council further held that the award, insofar as it directed overtime pay for the portion of the grievant's trip in which he was a passenger in the vehicle, was violative of applicable law and CSC regulations and may not be implemented. Accordingly, the Council, pursuant to section 2411.37(b) of its rules of procedure, modified the arbitrator's award to provide for 4 1/2 hours pay for the grievant at the appropriate overtime rate. As so modified, the Council sustained the arbitrator's award and vacated the stay which it had previously granted.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Wing Commander, 29th Flying
Training Wing, Craig Air Force
Base, Alabama

and

FLRC No. 75A-121

American Federation of Government
Employees, AFL-CIO, Local
Union No. 2574

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the award issued by the arbitrator, wherein he granted the grievant 6 hours' overtime pay for time spent in travel outside of regular working hours.

Based on the findings of the arbitrator and the entire record, it appears that the grievant, an aircraft mechanic at Craig Air Force Base, Alabama, was assigned to temporary duty at Dobbins Air Force Base, Georgia, to repair an aircraft there. On January 30, 1975, grievant worked at Dobbins on the aircraft for 9 hours, completed his assigned repair work, and telephoned his supervisor at Craig and asked whether he should return to Craig. The supervisor instructed grievant to return that evening. The trip from Dobbins AFB to Craig AFB took 6 hours, approximately 4 1/2 of which the grievant drove the Government truck in which he was traveling and 1 1/2 hours of which he spent as a passenger in the truck. The grievant arrived at Craig at 9:30 p.m., spent 45 minutes unloading the truck, and went off duty at 10:15 p.m. For that day, the grievant was paid 8 hours' pay at straight time and 1 hour, 45 minutes overtime pay, representing the 9 hours he worked at Dobbins AFB and the 45 minutes he worked at Craig AFB upon his return. The grievant was paid nothing for the 6 hours spent traveling from Dobbins AFB to Craig AFB. Subsequently, the union filed a grievance contending that the activity violated the parties' collective bargaining agreement by not paying the grievant for this 6-hour period at the appropriate overtime rate and the matter was ultimately submitted to arbitration.

Simultaneously, the activity disbursing officer referred the question of the grievant's entitlement to overtime compensation to the Comptroller General because of uncertainty as to whether such payment was authorized by regulations. The Comptroller General had not rendered his decision as of the date of the arbitration hearing. At the hearing, the activity contended that the question of whether the grievant was entitled to overtime

compensation required the interpretation of certain laws and regulations and was therefore not arbitrable.

The Arbitrator's Award

The arbitrator, after determining that the issue presented by the grievance required only the interpretation and application of the agreement for its resolution and was therefore arbitrable, concluded that the activity had violated the provisions of Article IX, Section 1[1/] of the agreement by failing to compensate the grievant for the period during which he made the return trip. As his award, the arbitrator directed that the grievant "be paid 6 hours pay at the appropriate overtime rate of pay for time spent making the trip from Dobbins Air Force Base to Craig Air Force Base on January 30, 1975."

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged that the award granting overtime pay to the grievant violates applicable law and controlling regulation.[2/]

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review insofar as it related to its exception which alleged that the award granting overtime pay to the grievant violates applicable law and controlling regulation. Since the Civil Service Commission is authorized to prescribe directives to implement certain statutory provisions dealing with overtime compensation in the Federal service, the Council requested an interpretation from the Commission of the relevant statutes and implementing Commission

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1/ According to the arbitrator, Article IX, Section 1 provides:

> Employees required to perform authorized overtime services shall be compensated in accordance with applicable rules and regulations.

2/ The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending the determination of the appeal.

regulations as they pertain to the arbitrator's award in this case. The Commission replied in relevant part as follows:

> In this case, the grievant charged that the agency refused to compensate him for six hours travel time in violation of the negotiated agreement. The grievant's trip was made at his supervisor's request and occurred after his regular daily tour of duty had been completed. The applicable section of the agreement--Article IX, Section 1--provided that employees required to perform "authorized overtime services" must be paid overtime pay in accordance with applicable rules and regulations. The arbitrator determined the agency violated the agreement by refusing to compensate the employee and ordered the agency to pay the grievant six hours pay at the appropriate overtime rate.
>
> The Comptroller General has already ruled in this case (B-183577 dated November 6, 1975).3/ His decision (issued after the arbitrator's

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3/ The Comptroller General, in his decision, stated in pertinent part as follows:

> On May 1, 1974, Public Law 93-259, 88 Stat. 56, the Fair Labor Standards Amendments of 1974, became effective and amended the Fair Labor Standards Act (FLSA) of 1938 to include all Federal employees, with certain exceptions not material here. All nonsupervisory employees in WG positions, as is the claimant, are covered under the new law. For overtime purposes, covered or "nonexempt" employees under FLSA are now covered by two laws, title 5 of the United States Code and the FLSA, and may receive the greater benefit where the FLSA and the other statute are inconsistent. The FLSA requires payment to nonexempt employees of overtime (for hours in excess of 40 a week) for all work which the employer "suffers or permits" to be performed. The FLSA statute also empowers the United States Civil Service Commission to administer the FLSA with respect to most Federal employees.
>
> The Commission has compiled tentative regulations for travel time as hours of work under the FLSA. The tentative regulations provide that an employee who for whatever purposes, drives an automobile or truck to a given destination at the request of or on behalf of the employing activity is performing work while traveling and shall have such time spent traveling counted as hours of work. However, travel performed as a passenger outside of the employee's regular working hours is not included in hours worked.
>
> Therefore, under the FLSA the 4-1/2 hours [the grievant] drove the military truck outside of his regular working hours in returning to his permanent duty station is compensable as overtime work. The 1-1/2 hours that [the grievant] was a passenger in the military truck in returning to his permanent duty station outside of his regular working hours is not hours of work and is not compensable as overtime.

award was made) drew heavily from draft Civil Service Commission instructions that have since been issued as Federal Personnel Manual Letter No. 551-10, dated April 30, 1976. The following discussion of the issues in this case is extracted in part from the CG's decision. [Footnote added.]

The grievant, an aircraft mechanic, WG-10, is a nonexempt employee under the Fair Labor Standards Act (FLSA), and as such, is entitled to overtime pay under that Act or under title 5, United States Code, whichever law provides the greater overtime pay benefit. Under title 5, for the employee to be entitled to 6 hours' overtime pay for the time spent in travel status away from his official duty station on January 30, 1975, the purpose of the travel must have met one of the following conditions provided in 5 U.S.C. 5544(a):

> ". . . Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the traveling (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling, (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively."

The case file does not establish that any of the above criteria in 5 U.S.C. 5544(a) apply to the grievant's trip from Dobbins AFB to Craig AFB.

Time spent traveling is considered to be hours worked on a different basis under FLSA. Specifically, under FLSA, when an employee is required to drive a vehicle to a given destination at the request and on behalf of his agency, the employee is considered to be working while traveling and is entitled to overtime pay for that period if it is in excess of his 40 hour work week. However, anytime an employee spends traveling as a passenger outside regular working hours when the travel period in question has kept the employee away from his official duty station overnight, as in the instant case, is not considered to be hours worked.

The record discloses that the employee drove a truck for approximately 4 1/2 hours of the 6 hour return trip from Dobbins AFB and was a passenger in the truck for the other 1 1/2 hours. Hence, the Comptroller General properly determined that under the FLSA the 4 1/2 hours [the grievant] drove the military truck outside of his regular working hours in returning to his permanent duty station is compensable as overtime work and the 1 1/2 hours that [the grievant] was a passenger in the military truck in returning to his permanent duty station outside of his regular working hours is not hours of work under FLSA and is not compensable as overtime.

While there is now a statutory appeal procedure available to adjudicate claims of overtime entitlement under FLSA, our formal procedures were

not in place when the events in this case occurred. (The procedures are now described in detail in Federal Personnel Manual Letter No. 551-9, Civil Service Commission System for Administering the Fair Labor Standards Act (FLSA) Compliance and Complaint System, dated March 30, 1976.) For this reason, we are not objecting, after the fact, to the arbitrator's assumption of jurisdiction. Since there do not appear to be any matters in dispute other than those submitted to the CG and since we concur wholly in his interpretation of our instructions, and in his decision, we advise you that while the grievant is entitled to 4 1/2 hours overtime pay for the period that he was driving the truck, the part of the arbitrator's award that orders payment of overtime pay for the 1 1/2 hours that the grievant was a passenger in the truck is contrary to applicable law, regulations and instructions and cannot be legally implemented.

Based upon the foregoing interpretation of the Civil Service Commission, it is clear that the arbitrator's award of overtime compensation is consistent with applicable law and appropriate regulation to the extent that the award compensates the grievant for the 4 1/2 hours of his return trip during which he drove the government vehicle in which he was traveling. It is equally clear, however, that the award, insofar as it provides for overtime compensation for the grievant for the portion of the return trip during which he was a passenger in that vehicle, violates applicable law and Civil Service Commission regulations and may not be implemented.4/

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award so that the last sentence thereof reads as follows:

> Grievant will be paid 4 1/2 hours pay at the appropriate overtime rate of pay for time spent making the trip from Dobbins Air Force Base to Craig Air Force Base on January 30, 1975.

As so modified, the award is sustained and the stay of the award is vacated.

By the Council.

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

Issued: September 14, 1976

4/ In a supplement to its petition for review, filed following issuance of the Comptroller General's decision relevant to this matter, the agency requested that the award be amended to provide that the grievant be paid overtime for such time as authorized by the Comptroller General.

U.S. Department of Agriculture, National Forests of Mississippi, Jackson, Mississippi, Assistant Secretary Case No. 41-4524(CA). The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA) and based on the ARA's reasoning, found that further proceedings were unwarranted with respect to the 19(a) complaint filed by Local 2543, American Federation of Government Employees, AFL-CIO (AFGE), which alleged, in pertinent part, that the activity had improperly allowed a rival labor organization to solicit members in a unit exclusively represented by AFGE. AFGE appealed to the Council, alleging in substance, that the Assistant Secretary's decision was arbitrary and capricious.

Council action (September 14, 1976). The Council held that AFGE's petition did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, and AFGE neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied review of AFGE's appeal.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

September 14, 1976

Mr. James L. Neustadt
Assistant General Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: U.S. Department of Agriculture, National Forests of Mississippi, Jackson, Mississippi, Assistant Secretary Case No. 41-4524(CA), FLRC No. 76A-73

Dear Mr. Neustadt:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, as found by the Assistant Secretary, the American Federation of Government Employees, AFL-CIO Local 2543 (AFGE) filed an unfair labor practice complaint against the U.S. Department of Agriculture, National Forests of Mississippi, Jackson, Mississippi (the activity). The complaint alleged, in pertinent part, that the activity had violated section 19(a) of the Order by improperly allowing Local 1894, National Federation of Federal Employees (NFFE) to solicit members in a unit exclusively represented by AFGE. The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA) and based on his reasoning, found that further proceedings were unwarranted inasmuch as a reasonable basis for the complaint had not been established. The ARA found that NFFE filed a representation (RO) petition for essentially the same unit exclusively represented by AFGE, and that the activity thereafter granted a NFFE representative's request to talk with unit employees during their lunch period or during nonduty hours. In reaching his decision, the ARA noted that the filing of a petition which raises a question concerning representation places the petitioner, NFFE, in "equivalent status" with AFGE as a participant in the representation proceedings and that, when NFFE was given permission to solicit employees, NFFE was already in equivalent status by having filed the RO petition.

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In your petition for review on behalf of AFGE, you allege, in substance, that the Assistant Secretary's decision is arbitrary and capricious because he dismissed AFGE's complaint in the instant case prior to holding a hearing in the "companion" representation proceeding. Specifically, you contend that if the Assistant Secretary concludes in the pending representation case that NFFE's election petition was untimely filed under his regulations by virtue of an agreement bar, the result would be that NFFE never had "equivalent status" with AFGE. As a consequence, the Assistant Secretary's prior dismissal of the instant complaint would deprive AFGE of an effective vehicle for remedying the activity's section 19(a)(3) violation in granting NFFE's request to solicit unit employees at a time when NFFE lacked "equivalent status" with AFGE.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision presents a major policy issue. With respect to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear in the circumstances of this case that the Assistant Secretary acted without reasonable justification in finding that no reasonable basis for the instant complaint had been established. In this regard, the Council notes particularly that the Assistant Secretary adopted the reasoning of the ARA, who relied upon prior published decisions of the Assistant Secretary in reaching his decision,*/ and that your appeal herein fails to establish that the instant decision is inconsistent with such previous decisions or with other applicable precedent.

Since the Assistant Secretary's decision does not appear arbitrary and capricious, and you neither allege, nor does it appear, that his decision

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*/ Included among those prior decisions was Defense Supply Agency, Defense Contract Administration Services Region, SF, Burlingame, California, A/SLMR No. 247 (Feb. 13, 1972), wherein the Assistant Secretary stated with respect to the granting of "equivalent status":

> . . . In this connection, the test as to whether the [activity] violated the Order by assisting . . . a labor organization not having equivalent status in the pending representation matter, is dependent upon whether there existed a question concerning representation in all or part of the unit in which the membership solicitation campaign was permitted, at the time when such permission was granted and not upon subsequent events. Thus, the fact that the Complainant's petition was dismissed subsequently is not considered to be determinative, where, as here, equivalent status was granted to a non-intervening labor organization during the pendency of a question concerning representation raised by the filing of a representation petition.

presents a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

cc: A/SLMR
Labor

R. F. Stalnaker
U.S. Forest Service

Department of the Interior, Bureau of Reclamation, Yuma Projects Office, Yuma, Arizona, A/SLMR No. 401. This appeal arose from a decision and order of the Assistant Secretary, who, acting upon a complaint filed by Local 1487, National Federation of Federal Employees (NFFE), found that the activity improperly interfered with its employees' rights assured by the Order in violation of section 19(a)(1) of the Order by establishing new competitive areas (for reduction-in-force (RIF) purposes following a reorganization) during the pendency of its representation (RA) petition. In his decision, the Assistant Secretary, addressing the application of section 19(d) of the Order, found that it was not dispositive of the unfair labor practice issue and that the matter was therefore properly before him. In reaching his finding that the activity violated section 19(a)(1) of the Order, the Assistant Secretary concluded, in substance, that absent evidence, not present in the instant case, of an overriding exigency which would require immediate changes, during the pendency of an RA petition, the petitioning agency has an obligation to remain neutral and maintain the status quo with respect to the personnel policies and practices and matters affecting working conditions of employees who are covered by the petition. The Assistant Secretary thereupon issued a remedial order, directing the activity, among other things, to reestablish the competitive areas which existed prior to the reorganization; reevaluate layoffs made subsequent to the changes; and reinstate with backpay any employee found to have been incorrectly laid off following such reevaluation. The Council accepted the agency's petition for review on the ground that the Assistant Secretary's decision raised major policy issues concerning: (1) the conclusion of the Assistant Secretary with respect to the applicability of section 19(d) of the Order in the circumstances of this case; and (2) the obligations, in the circumstances of this case, of an agency under the Order during the pendency of a representation petition with respect to the personnel policies and practices and matters affecting the working conditions of employees who are covered by the petition. The Council also granted the agency's request for a stay.

Council action (September 17, 1976). As to (1), the Council held that the Assistant Secretary properly determined that disposition of NFFE's complaint concerning the agency's unilateral change of competitive areas during the pendency of a representation proceeding was not precluded by section 19(d) of the Order. The Council further held, however, that even assuming the agency were properly found to have committed an unfair labor practice in this regard (under the standard set forth below), the Assistant Secretary would have been prohibited by section 19(d) from imposing remedies which were attendant upon the established RIF appeals procedure. The Council therefore ruled that the Assistant Secretary's order imposing such remedies must be set aside. As to (2), the Council found, that in the reorganization circumstances here involved, the obligation of the agency, contrary to the conclusion of the Assistant

Secretary, was not maintain the status quo absent evidence of an overriding exigency, but to continue recognitions and adhere to the terms of existing agreements to the maximum extent possible until the representation matter is resolved. That is, consistent with the circumstances of the reorganization and with the necessary functioning of the agency, an agency must continue to recognize the status of an incumbent labor organization as the exclusive representative of the employees; adhere to the terms of existing agreements; and otherwise maintain existing personnel policies and practices and matters affecting working conditions to the extent consistent with the bargaining obligation under section 11(a) of the Order. The Council therefore set aside the Assistant Secretary's finding that the agency, in the absence of an overriding exigency, violated the Order by its failure to maintain the status quo. The Council further held, however, that the Assistant Secretary's findings failed to address certain critical and dispositive factors necessary to determine whether the agency met or violated its obligation as described by the Council. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decision and order and remanded the case to him for appropriate action consistent with the Council's decision.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Department of the Interior,
Bureau of Reclamation,
Yuma Projects Office,
Yuma, Arizona

and

A/SLMR No. 401
FLRC No. 74A-52

Local 1487, National Federation
of Federal Employees, Blythe,
California

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary who, acting upon a complaint filed by Local 1487, National Federation of Federal Employees (hereinafter referred to as "NFFE"), determined that the establishment by the Bureau of Reclamation, Yuma Projects Office (hereinafter referred to as "YPO" or "the activity") of new competitive areas during the pendency of an RA petition improperly interfered with its employees' rights assured by the Order in violation of section 19(a)(1).1/

The pertinent factual background of this case, as found by the Assistant Secretary, is as follows: Before a reorganization, the Lower Colorado River Projects Office (LCRPO) and the YPO were two separate field components within Region 3 of the Bureau of Reclamation of the Department of the Interior (hereinafter referred to as "the agency"). Nonsupervisory, nonprofessional employees of the LCRPO were represented by NFFE. The exclusive representative of the nonsupervisory employees (minus those in the engineering function) within the YPO was Local 640, International Brotherhood of Electrical Workers (IBEW). For reduction-in-force (RIF) purposes, the designated competitive areas for the two offices were (1) the LCRPO plus field offices involved in dredging activity, and (2) the YPO.

1/ Section 19(a)(1) of the Order provides as follows:

(a) Agency management shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order . . . .

Pursuant to a reorganization involving the merger of the LCRPO and the YPO, the functions of the LCRPO and the employees working therein were officially transferred to the YPO. The employees performing certain operations at the LCRPO were assimilated into similar operations of the YPO. Unlike the rest of the employees involved, the employees engaged in the operation of dredges for the Colorado Project (comprising "field offices") were transferred as an organizational entity to the YPO, but their work functions and work locations remained unchanged. Thus, this latter group associated with the dredging operations was not intermingled with any existing YPO personnel and their supervisor-employee relationships remained unchanged except that managerial direction came from the head of the YPO.

Subsequent to the reorganization, the activity held a meeting with representatives of NFFE and IBEW to determine the effects of the merger of the two offices into the YPO on employee representation. Neither union accepted an activity proposal that dredging employees continue to be represented by NFFE and the balance of former LCRPO employees be represented by IBEW, and the activity itself filed an agency representation (RA) petition seeking an election in an overall unit consisting of all eligible General Schedule and Wage Board employees at YPO and certain other employees at a facility not involved herein.[2/] During the same period of time, the activity unilaterally determined that separate competitive areas should be maintained for (1) dredging operations employees assigned to the YPO and (2) the balance of the YPO. A formal request to this effect was made by the activity to the Commissioner, Bureau of Reclamation. This request was approved, and an agency supplement to the Federal Personnel Manual (FPM) was issued establishing the new competitive areas. The activity thereafter determined that a RIF was necessary in the dredging program and notified NFFE and IBEW of the changes in the competitive areas and discussed the impending RIF in separate meetings with those unions. The activity then proceeded to conduct the RIF.

NFFE filed an unfair labor practice complaint, which was subsequently amended to allege section 19(a)(1), (3) and (6) violations of the Order, arising out of the activity's unilateral changing of the established competitive areas governing reduction-in-force and, thereafter, refusing to confer with NFFE for purposes of discussing the latter's pending complaint without the presence of rival union representatives. Concurrently, a group of employees who had been affected by the RIF filed appeals with the Civil

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2/ This petition was dismissed after the filing of the instant NFFE complaint by the Assistant Secretary on the grounds that it did not raise a question concerning representation because "the reorganization . . . did not substantially or materially change the scope or character of the units involved and that, therefore, such units remain viable and identifiable . . . ." (United States Department of Interior, Bureau of Reclamation, Lower Colorado Region, A/SLMR No. 318.) No appeal was taken to the Council from this decision.

Service Commission (CSC) Regional Office alleging violations of their reduction-in-force rights and challenging the establishment of the new competitive areas. On appeal, the CSC's Board of Appeals and Review (BAR), affirming the Regional Office's determination, found that the establishment of the new competitive areas had been accomplished pursuant to CSC regulation (FPM chapter 351, section 4-2b(2)).

The Assistant Secretary, in his decision, first addressed the application of section 19(d) and found that it would not be dispositive of this matter.[3/] He stated, in this regard:

> . . . In its decision, the BAR acceded to the [agency's] exception to review by the BAR of an appeal of the "labor-management issue" raised in the subject case. The BAR noted, in this regard, that "the testimony developed in connection with the Unfair Labor Practice Complaint pertaining to the reasons for separate competitive areas is not relevant in the adjudication of the propriety of the competitive areas as established." In view of the foregoing, I find that Section 19(d) of the Order would not be dispositive of this matter. . . .

Finding the unfair labor practice issue properly before him, the Assistant Secretary held, in pertinent part, that the activity's action in changing competitive areas was violative of section 19(a)(1) of the Order. In reaching this conclusion, the Assistant Secretary noted particularly that his decision and the Council's decision in AVSCOM[4/] stood for the proposition that when an RA petition is filed in good faith, the petitioning agency should be permitted to remain neutral and await the decision of the Assistant Secretary with respect to that petition and be given a reasonable opportunity to comply with the consequences which flow from the representation decision before incurring the risk of an unfair labor practice finding. The Assistant Secretary thereafter concluded:

3/ Section 19(d) provides:

> (d) Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. Appeals or grievance decisions shall not be construed as unfair labor practice decisions under this Order nor as precedent for such decisions. All complaints under this section that cannot be resolved by the parties shall be filed with the Assistant Secretary.

4/ Headquarters, United States Army Aviation Systems Command, A/SLMR No. 168, 1 FLRC 473 [FLRC No. 72A-30 (July 25, 1973), Report No. 42].

> In this regard, I agree with the Administrative Law Judge's conclusion that the [activity] did not act in accordance with the foregoing rationale. Thus, the evidence establishes that it did not remain neutral and await the decision of the Assistant Secretary after the filing of its RA petition but, rather, during this period it chose to establish new competitive areas. In my view, absent evidence (not present in the instant case) of an overriding exigency, which would require immediate changes in personnel policies and practices and matters affecting its employees' working conditions, during the pendency of an RA petition, the petitioning agency has an obligation to remain neutral and maintain the status quo with respect to the personnel policies and practices and matters affecting the working condition of employees who are covered by its RA petition. To allow otherwise would permit a petitioning agency to interfere with its employees' right to a free and untrammeled election which is being sought by the RA petition. Moreover, I concur with the view of the Administrative Law Judge that an agency should not be permitted to engage in conduct during the pendency of its RA petition which could cast suspicion on the appropriateness of the existing bargaining unit or units involved or a union's representative status, and which, in and of itself, possibly could establish a basis for the RA petition. Based on these considerations and as the evidence does not establish that the [activity's] conduct herein was based on an overriding exigency which required immediate action, I find that the [activity's] establishing of new competitive areas during the pendency of its RA petition improperly interfered with its employees' rights assured by the Order in violation of Section 19(a)(1).

As to the obligation owed by the activity to NFFE during the pendency of the RA petition, the Assistant Secretary rejected the finding of the Administrative Law Judge that the activity's conduct violated section 19(a)(6),[5/] stating:

> Thus, as noted above, the [activity] had an obligation during the pendency of its RA petition to remain neutral and to maintain the status quo with respect to personnel policies and practices and matters affecting the conditions of employment of employees covered by the RA petition. However, in view of the basis for the RA petition--i.e., that the existing units were inappropriate as a result of a reorganization--and the fact that the evidence establishes that such petition was filed in good faith, I find that during its pendency the [activity] was under no obligation to meet and confer with [NFFE] which may or may not have continued to represent an appropriate unit based on the outcome of the RA petition. [Footnotes omitted.]

5/ The Assistant Secretary likewise dismissed the section 19(a)(3) complaint.

Accordingly, the Assistant Secretary ordered that the YPO cease and desist from changing the competitive areas for purposes of a RIF during the pendency of its RA petition or in any like manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Order. Further, the Assistant Secretary ordered the activity to reestablish the competitive areas which existed prior to the reorganization and reevaluate layoffs made subsequent to the changes; reinstate with backpay any employees found to be incorrectly laid off following the aforementioned evaluation; and post notices to this effect at the YPO.

The agency appealed the Assistant Secretary's decision to the Council, alleging that the decision presented major policy issues, and NFFE filed an opposition to the appeal. The Council accepted the agency's petition for review, concluding that under section 2411.12 of its rules of procedure (5 CFR 2411.12), major policy issues are raised by the decision of the Assistant Secretary concerning: (1) the conclusion of the Assistant Secretary with respect to the applicability of section 19(d) of the Order in the circumstances of this case; and (2) the obligations, in the circumstances of this case, of an agency under the Order during the pendency of a representation petition with respect to the personnel policies and practices and matters affecting the working conditions of employees who are covered by the petition. The Council also determined that the agency's request for a stay met the criteria for granting a stay as set forth in section 2411.47 (c)(2) of its then current rules (now 5 CFR 2411.47(e)(2)), and granted the request.

The agency and the union filed briefs on the merits with the Council as provided for in section 2411.16 of the Council's rules (5 CFR 2411.16). Amicus curiae briefs were filed by the Department of the Treasury, the Department of Health, Education and Welfare, and the National Treasury Employees Union, as provided for in section 2411.49 of the Council's rules (5 CFR 2411.49).6/

Opinion

As already mentioned, there are two major policy issues raised by the Assistant Secretary's decision in the present case concerning respectively (1) the conclusion of the Assistant Secretary with respect to the applicability of section 19(d) of the Order in the circumstances of this case; and (2) the obligation, in the circumstances of this case, of an agency under the Order during the pendency of a representation petition with respect to the personnel policies and practices and matters affecting the

6/ In its appeal, the agency requested permission to present oral argument before the Council. Pursuant to section 2411.48 of the Council's rules (5 CFR 2411.48), this request is denied because the positions of the participants in this case are adequately reflected in the entire record now before the Council.

working conditions of employees who are covered by the petition. These issues are discussed below.

1. Applicability of Section 19(d).

At issue here is the application of section 19(d) of the Order in the circumstances of this case, specifically the application of the first sentence of that section: "Issues which can properly be raised under an appeals procedure may not be raised under this section." Stated otherwise, the issue is the correctness of the Assistant Secretary's conclusion that section 19(d) of the Order would not be dispositive in the present case.

The first sentence of section 19(d) by its terms precludes the Assistant Secretary from considering, as an unfair labor practice, an issue which can properly be raised under an appeals procedure. As to this provision of the Order, the Council, in its 1971 Report and Recommendations which recommended other changes in section 19(d), stated:7/

> The existing requirement that when an issue can be raised under an established appeals procedure, that procedure is the exclusive procedure for resolving the issue is not affected by this recommendation. [Emphasis added.]

Thus, the policy reflected in the Order is that an issue which can properly be raised under established appeals procedures may not be raised under the unfair labor practice complaint procedures established by the Order. Further, such an established appeals procedure is the exclusive procedure for the total resolution of the issue, including the disposition of the issue on the merits as well as the fashioning of any remedies which may be appropriate. The question then becomes whether, in the circumstances of a given case, the issue sought to be resolved in an unfair labor practice, including its attendant remedies, could have properly been invoked under an appeals procedure. If so, section 19(d) precludes the Assistant Secretary from permitting the disposition of such issue or the fashioning of such attendant remedies under section 19 in an unfair labor practice proceeding.

In the instant case it is clear that the affected employees could, as they did, properly raise under an established appeals procedure (in this instance, the RIF appeals procedure) the issue as to whether the competitive areas established by the agency and the subsequent reduction-in-force actions were accomplished in compliance with applicable CSC regulations. The established appeals procedure was therefore the exclusive procedure available to the employees to raise that issue and to seek appropriate remedies including a determination that the actions taken should be cancelled because the competitive areas were improper, which cancellation would result in the restoration of the employees to their previous positions with backpay.

7/ Labor-Management Relations in the Federal Service (1975), at 57.

Since the issue of whether the establishment of the competitive areas and the running of the reduction-in-force were in accord with CSC regulations was an issue exclusively reserved for the appeals procedure under section 19(d) of the Order, such issue could not be raised before the Assistant Secretary. With respect to the unfair labor practice proceeding, the issue before the Assistant Secretary herein was brought by the union, not the employees, and the issue before him only pertained to rights directly or indirectly accorded the union under the Order. That issue, as addressed by the Assistant Secretary, concerned the obligation owed by the activity to the unions involved herein during the pendency of the representation proceeding: specifically whether the activity was obligated to remain neutral and maintain the status quo with respect to personnel policies and practices and matters affecting working conditions during this period. While the Civil Service Commission had jurisdiction over the employees' appeals, it was without jurisdiction under an appeals procedure to decide the union's unfair labor practice complaint that its rights (as contrasted to employees' rights) under the Order had been violated—a matter within the exclusive jurisdiction of the Assistant Secretary.[8/] Accordingly, the Assistant Secretary's determination that section 19(d) was not dispositive of the merits of the alleged unfair labor practice complaint filed by NFFE was proper and must be affirmed.

8/ This is not to say that the Civil Service Commission, in resolving issues properly raised under an appeals procedure, may not consider the relevance of provisions of the Order to the resolution of issues before it. This is implicitly recognized in that portion of section 19(d) which provides that decisions under appeals procedures should not be construed as unfair labor practice decisions under the Order nor as precedents for such decisions. Thus, the CSC has indicated in its prior issuances that "[a] claim of unfair labor practice made as part or all of an appeal or grievance will be considered and acted upon as part of the merits of the case being decided, as heretofore. . . . However, there would be no decision as to whether an unfair labor practice had been committed, nor would any precedent be established in the area of unfair labor practices." (Attachment 1 to FPM Letter 711-36, "Technical Advice and Information on Amendments to Executive Order 11491" (November 8, 1971), at 9.) Where the Commission considers the relevance of provisions of the Order to the resolution of issues before it and further, determines that an authoritative interpretation of E.O. 11491, as amended, is required before the Commission can reach a decision in the matter before it, the Commission should seek such interpretation from the Council. Neither such consideration of the relevance of the Order nor the determination as to whether an authoritative interpretation of the Order is required precludes the Assistant Secretary from resolving related questions concerning obligations under the Order as they pertain to the union's rights (as contrasted to employees' rights), not otherwise cognizable under an appeals procedure, when raised by the union in an unfair labor practice proceeding arising out of the same circumstances.

However, while the Assistant Secretary could properly consider as unfair labor practices the issues relating to the obligation owed by the agency to the unions involved in a representation case, as stated above, the remedies attendant on the appeals procedures, apart from the disposition of the issue on the merits, are also subject to the proscription of section 19(d). More particularly, in the instant case, the issue of whether the competitive areas and the running of the reduction-in-force were consistent with CSC regulations was for exclusive disposition through the appeals procedure. Likewise, any attendant remedy, viz., that the affected employees should be restored to their previous positions with backpay, is exclusively for determination through the appeals procedure. Thus, where an appeals procedure is available, pursuant to section 19(d), an unfair labor practice complaint may not be used as an alternate method for obtaining redress for the employees who properly have access to the appeals procedure. Otherwise, the very conflict in proceedings sought to be averted by section 19 would potentially obtain. Therefore, if, in the resolution of unfair labor practices, the Assistant Secretary were to decide that violations of section 19 had occurred, then pursuant to section 19(d), his remedies may extend only to remedies which could not have been invoked in an appeals procedure. In other words, if an unfair labor practice were found by the Assistant Secretary, the Assistant Secretary could not, consistent with the requirements of section 19(d), direct, as he did in this case, the reestablishment of the competitive areas, the reevaluation of layoffs made, and the reinstatement with backpay of any employee incorrectly laid off.9/ Thus, these remedies imposed by the Assistant Secretary in the instant case, even assuming a proper finding of an unfair labor practice, were inconsistent with section 19(d) and must be set aside.

2. Obligation of an agency.

As stated above, the Assistant Secretary, relying principally upon his decision and the Council's in AVSCOM, concluded in substance that:

> . . . absent evidence . . . of an overriding exigency, which would require immediate changes in personnel policies and practices and matters affecting its employees' working conditions, during the pendency of an RA petition, the petitioning agency has an obligation to remain neutral and maintain the status quo with respect to the personnel policies and practices and matters affecting the working conditions of employees who are covered by its RA petition.

9/ While without authority to direct such remedies, the Assistant Secretary has authority, pursuant to section 6(b), to utilize other remedies for unfair labor practices; that is, he may require a party to cease and desist from the violations of the Order and require it to take affirmative action insofar as such affirmative action deemed appropriate with respect to the union does not conflict with remedies which derive from the appeals procedure.

We are of the opinion that the Assistant Secretary improperly applied the AVSCOM decision of the Council in the present case.

In the AVSCOM case, as the Council recently explained at length in the DSA case,[10] the situation was essentially as follows:

> On July 1, 1971, a reorganization was effected within the Army Aviation Systems Command (AVSCOM), whereby 49 of 53 Headquarters employees represented in a separate unit by AFGE were combined with 35 employees from a nearby inactivated Depot unit represented by the Operating Engineers, into a newly formed subordinate element of AVSCOM Headquarters. This reorganization occurred while negotiations between AVSCOM and AFGE were in progress; and its anticipation prompted Army to file a petition with the Assistant Secretary in which Army contended that a single overall unit was now appropriate and requested an election to determine which of the two unions represented that unit. [Footnote omitted.] During the pendency of that petition, AFGE and AVSCOM continued to negotiate and in October 1971 reached full accord. However, AVSCOM refused to sign the agreement until the Assistant Secretary resolved the representation issue. AFGE thereupon filed a 19(a)(6) complaint by reason of AVSCOM's refusal to sign the agreement.
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> In May 1972, the Assistant Secretary issued his decision in the representation case, dismissing the petition on the ground that there was insufficient basis for the activity's claim that separate units were no longer appropriate. (No appeal was taken to the Council from that decision.) Thereafter, in June 1972, the Assistant Secretary issued his decision in the unfair labor practice case, finding that, because the existing units remained viable, Army's refusal to sign the October 1971 agreement violated 19(a)(6). As a remedy, the Assistant Secretary ordered Army to sign the agreement upon request and to post the customary notice. Army appealed to the Council, objecting not to the 19(a)(6) finding or the required signing of the agreement, but to the posting requirement.
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> In its AVSCOM decision, issued in July 1973, the Council upheld the posting requirement in the circumstances of that appeal. However, the Council also addressed the underlying dilemma faced by agency management in the course of such a reorganization, and the derivative responsibilities of the Assistant Secretary under the Order. In more detail, the Council stated at pp. 5-6 of its decision:
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> > . . . [W]e recognize the serious dilemma which agency management is in when faced with circumstances such as those present in this case. That is, as a result of the reorganization of AVSCOM, the

10/ Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, FLRC No. 74A-22 (December 9, 1975), Report No. 88, at 5-6 of Council decision.

Army had a doubt as to the continued appropriateness of the existing units, and sought to resolve that doubt by the filing of a petition with the Assistant Secretary. As stated above, if the existing units had been found to be inappropriate due to the reorganization of AVSCOM, the Army would not have been obligated to sign the contract. In fact, to have signed it could, at least potentially, have subjected it to a charge that it had violated section 19(a)(3) of the Order. Yet, because the existing units were subsequently found to be appropriate, the Assistant Secretary held that the Army was obligated to sign the negotiated agreement. Since there were no other allegations of misconduct involved in this case, the disposition of the representation issue was determinative of the disposition of the 19(a)(6) complaint.

In our view, this type of a dilemma or risk places an undue burden on an agency. That is, where an agency has acted in apparent good faith and availed itself of the representation proceedings offered in order to resolve legitimate questions as to the correct bargaining unit, and where no other evidence of misconduct is involved, an agency should not be forced to assume the risk of violating either section 19(a)(3) or section 19(a)(6) during the period in which the underlying representation issue is still pending before the Assistant Secretary.

Rather, we believe that procedures can and must be devised which will permit an agency to file a representation petition in good faith, to await the decision of the Assistant Secretary with respect to that petition, and to be given a reasonable opportunity to comply with the consequences which flow from the representation decision, before that agency incurs the risk of an unfair labor practice finding. Since it does not violate the Order to raise a question concerning representation in good faith, the procedures employed to effectuate the purposes of the Order must permit an agency to do so without risking an unfair labor practice finding.

. . . . . .

Accordingly, while we leave to the discretion and judgment of the Assistant Secretary the determination as to the precise procedures which will best accomplish this result, we direct that his procedures be reviewed and revised so that, in the future, agencies will be permitted to await his decision on a representation petition without incurring the risk of an unfair labor practice finding. [Underscoring in part supplied.]

Thus, the Council's decision in AVSCOM stands for the proposition that, to avert the risk of an unfair labor practice finding, an agency must be permitted to file a representation petition, in good faith; to await the decision of the Assistant Secretary with respect to that petition; and to

be given a reasonable opportunity to comply with the consequences which flow from the representation decision. However, nothing in AVSCOM supports the Assistant Secretary's conclusion in the instant case that "absent evidence . . . of an overriding exigency," the petitioning agency has an obligation to maintain the status quo during the pendency of the RA proceeding. Indeed, the status of existing personnel policies and practices and matters affecting working conditions is not even addressed in the Council's AVSCOM decision.

Rather, the controlling principle as pertains to the status of personnel policies and matters affecting working conditions, following an agency reorganization, was subsequently explained by the Council in the report accompanying E.O. 11838. In that report, the Council discussed the agency's obligation while awaiting resolution of representation issues which arose because of an agency reorganization, stating:[11/]

> . . . [E]xisting recognitions, agreements, and dues withholding arrangements should be honored to the maximum extent possible consistent with the rights of the parties involved pending final decisions on issues raised by reorganizations. [Emphasis supplied.]

Applying this principle in the DSA case, the Council noted:[12/]

> [U]ntil any . . . issues raised by the reorganization are decided (e.g., questions concerning representation, unit questions, or the like), the . . . employer is . . . enjoined, in order to assure stability of labor relations and the well-being of its employees, to maintain recognition and to adhere to the terms of the prior agreement, including dues withholding, to the maximum extent possible. [Footnote omitted.]

Therefore, following a reorganization and during the pendency of a representation petition, the obligation of an agency under the Order, with respect to personnel policies and practices and matters affecting the working conditions of employees who are covered by the petition, is not to maintain the status quo absent evidence of an overriding exigency, as held in the present case by the Assistant Secretary, but instead to maintain recognition and to adhere to terms of the prior agreement to the maximum extent possible until the representation matter is resolved.

With respect to the precise nature of the obligation to maintain recognition and to adhere to the terms of the prior agreement to the maximum

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11/ Labor-Management Relations in the Federal Service (1975), at 51.

12/ Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, note 10, supra, at 15 of Council decision.

extent possible until the representation issues raised by the reorganization are resolved, this means that consistent with the circumstances of the reorganization and with the necessary functioning of the agency, an agency must continue to recognize the status of an incumbent labor organization as the exclusive representative of the employees; adhere to the terms of existing agreements; and otherwise maintain existing personnel policies and practices and matters affecting working conditions to the extent consistent with the bargaining obligation under section 11(a) of the Order. Where the agency, as a direct result of the reorganization and consistent with the necessary functioning of the agency, must make changes in otherwise negotiable personnel policies and practices and matters affecting working conditions, then the agency must notify the incumbent union or unions of those proposed changes and, upon request, negotiate on those matters covered by section 11(a) of the Order. Similarly, if work forces must be realigned as a result of a reorganization, the incumbent labor organization or organizations must be so advised and negotiations must be conducted, upon request, as to appropriate arrangements for employees adversely affected by the impact of such realignment, as expressly sanctioned in section 11(b) of the Order.

These requirements under the Order are intended carefully to balance the interests of the employees in continued representation during the critical period after a reorganization, when their conditions of employment will most likely be facing serious change, and the needs of the agency in fully adapting to the changed circumstances which ordinarily derive from an agency reorganization. Such bargaining obligation manifestly does not prevent changes by the agency in personnel policies and practices and matters affecting working conditions brought about by and flowing out of the reorganization, and necessary to the functioning of the agency, but merely requires negotiation by the parties before those changes are undertaken in conformity with the provisions of section 11(a). Moreover, such obligation will not impede, but rather will implement, the efforts of the agency in carrying out its mission, by reason of the substantial impact on the well-being of the employees which the Order recognizes as vital to the efficient administration of the Government. Thus, this requirement best serves the interests of the employees, the union, and the agency, and most importantly, protects the paramount interest of the public.

We recognize that in AVSCOM the Council stated, and we affirm herein, that an agency should not be forced to violate its neutrality during the period in which the underlying representation question is pending; that is, risk committing an unfair labor practice, or, for that matter, risk improperly affecting the results of a representation election, because of its response to negotiating demands made by a labor organization whose continuing representational status has been called into question by the reorganization. Certainly, as the Council indicated in AVSCOM, an agency could decline to negotiate and execute a comprehensive new agreement with such a labor organization until the representational questions are resolved through the Assistant Secretary's procedures. However, balanced against this principle is the need, in circumstances where, during the pendency

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of the representational procedures, management concludes that it is not possible to maintain the personnel policies and practices and matters affecting working conditions, for the previously existing representative to speak for the employees with respect to the intended change and the impact of such change on the employees. Otherwise, during this critical period either no changes would be possible in personnel policies and practices and matters affecting working conditions thereby perhaps interfering with the necessary functioning of the agency, or changes could be made and the employees would lack a spokesperson when, as mentioned, their conditions of employment will most likely be facing serious change. Accordingly, an agency must meet the above-described negotiation obligation and, absent other circumstances such as bad faith, the meeting of such obligation shall not be a basis for a finding of an unfair labor practice or grounds for setting aside the election.

Applying these considerations in the instant case, it is clear that, if NFFE was not informed of the agency's proposed change in competitive areas, or if NFFE was so informed but the agency, upon request, refused to bargain thereon with NFFE, the agency must be deemed to have violated its obligation to negotiate under the Order.

However, the findings of the Assistant Secretary, which were based on principles held inapplicable to the present case, failed to address these critical and dispositive factors. Accordingly, we must remand the case to the Assistant Secretary for reconsideration and determination as to whether the agency violated its bargaining obligation as set forth herein.

Conclusion

In summary, as to the Assistant Secretary's holding with respect to the applicability of section 19(d) in this case, the Assistant Secretary properly determined that disposition of NFFE's complaint concerning the agency's unilateral change of competitive areas during the pendency of a representation proceeding was not precluded by section 19(d) of the Order. However, even assuming the agency were properly found to have committed an unfair labor practice in this regard (under the standard set forth below), the Assistant Secretary was prohibited by section 19(d) from imposing remedies which were attendant upon the appeals procedure before the CSC, such as the restoration of the affected employees to their previous positions with backpay. Accordingly, the Assistant Secretary's order imposing such remedies must be set aside.

As to the obligation of the agency during the pendency of the representation proceeding, in the reorganization circumstances here involved, such obligation, contrary to the conclusion of the Assistant Secretary, was not to maintain the status quo absent evidence of an overriding exigency, but to continue recognitions and adhere to the terms of existing agreements to the maximum extent possible until the representation matter is resolved, i.e., consistent with the circumstances of the reorganization and with the

necessary functioning of the agency, an agency must continue to recognize the status of an incumbent labor organization as the exclusive representative of the employees; adhere to the terms of existing agreements; and otherwise maintain existing personnel policies and practices and matters affecting working conditions to the extent consistent with the bargaining obligation under section 11(a) of the Order. However, while we set aside the Assistant Secretary's finding that the agency, in the absence of an overriding exigency, violated the Order by its failure to maintain the status quo, we remand the case to the Assistant Secretary to determine if in changing the competitive areas, the agency maintained the previously existing conditions to the maximum extent possible and met its obligation to negotiate with respect to any changes in competive areas. Further, if an unfair labor practice is found, the Assistant Secretary shall direct a remedy consistent with the principles enunciated herein.

Therefore, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and order and remand the case to him for appropriate action consistent with our decision herein.

By the Council.

Henry B. Frazier III
Executive Director

Issued: September 17, 1976

National Office, National Border Patrol Council, National I&NS Council, AFGE and Immigration and Naturalization Service, Department of Justice. The dispute arose during the term of the parties' agreement (covering a nationwide unit) when certain delegations of authority were issued by the Immigration and Naturalization Service (Service), transferring final decisionmaking authority with regard to most personnel management actions to its Regional Commissioners. The Service agreed to negotiate with the union concerning the impact and implementation of the changes in the delegations, but upon receipt of the Service's intended amendments to its regulations, which reflected the revised delegations as well as other changes in policy or regulation, the union submitted "counter proposals," to change the regulations in question in various respects, and, in effect, to incorporate the regulations into the parties' agreement and make them subject to the negotiated grievance procedure. When the parties could not reach agreement on the union's proposals, the union requested the Federal Service Impasses Panel (FSIP) to consider the matter and, while the union's request was pending before the FSIP, the Service apparently implemented the amendments to the regulations. Subsequently, the FSIP dismissed the union's request because of the parties' disagreement over the Service's obligation to bargain in these circumstances; the agency head determined that the union's proposals were nonnegotiable; and the union filed the instant appeal with the Council. The essence of the contentions and arguments of the parties in their submissions to the Council principally related to whether, under the particular circumstances here presented, the Service had met its obligation to bargain over the union's proposals, in contrast to a question of whether the proposals were nonnegotiable, that is, violative of applicable laws and regulations, or the Order.

Council action (September 29, 1976). The Council determined that the substance of the parties' allegations raised unfair labor practice issues appropriate for resolution by the Assistant Secretary under section 6(a)(4) of the Order. In that regard, the Council found that factual determinations were necessary in order to resolve both the unfair labor practice issues and the negotiability issues sought to be raised in the context of those unfair labor practice issues; and concluded that resolution of such issues must be accomplished through the unfair labor practice procedures established by the 1975 amendments to the Order, i.e., pursuant to the authority conferred on the Assistant Secretary by sections 6(a)(4) and 11(d) of the Order, as amended. The Council therefore held that the instant appeal, insofar as it raised negotiability issues, was premature and failed to meet the conditions for review prescribed in section 11(c) of the Order and incorporated in section 2411.22 of the Council's rules of procedure. Accordingly, pursuant to section 2411.22 of its rules, the Council denied the union's appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

September 29, 1976

Mr. John W. Mulholland, Director
Contract Negotiation Department
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: National Office, National Border Patrol Council, National I&NS Council, AFGE and Immigration and Naturalization Service, Department of Justice, FLRC No. 76A-47

Dear Mr. Mulholland:

Reference is made to your petition for review on behalf of the union and the agency's statement of position in the above-entitled case.

The basic facts, essentially as set forth by the agency in its statement of position, and not disputed by the union, are as follows: During the term of its agreement covering a nationwide unit with the American Federation of Government Employees (the union), the Immigration and Naturalization Service (the Service) of the Department of Justice (the agency) issued certain delegations of authority to its Regional Offices transferring final decisionmaking authority with regard to most personnel management actions to the Service's Regional Commissioners. Prior to this action, the union was informed of the Service's intention to effect this decentralization during a national consultation meeting with union officials and, subsequently, it was agreed that the union would be given an opportunity to negotiate concerning the impact and implementation of the changes in the delegations.

Upon receipt of the Service's intended amendments to its regulations (comprising the Service's Administrative Manual) reflecting the revised delegations as well as other changes in policy or regulation, the union submitted "counter proposals," to change the Service's regulations in question in various respects, as well as to append certain general language to each such Service regulation, in effect, incorporating the regulation into the parties' agreement and making it subject to the negotiated grievance procedure. The union met with the Service to negotiate with the assistance of the Federal Mediation and Conciliation Service and, when the parties could not reach agreement on the union's proposals, submitted a request to the Federal Service Impasses Panel (FSIP) to consider the impasse. While the union's request was pending before the FSIP, it appears that the Service's amendments effecting the changes,

concerning which the union had been previously notified, were implemented. The FSIP subsequently dismissed the union's request, stating that there were certain "threshold questions concerning the negotiability of the Union's proposals arising from disagreement between the parties as to the Employer's obligation to bargain both under the Order and under the parties' labor agreement." The union then requested an agency head negotiability determination and, upon receipt of a determination of non-negotiability, filed the instant appeal with the Council.

The agency principally contends that "the Service is not obliged by Section 11(a) to entertain such proposals under the particular circumstances in which they were raised in this instance." In support of this contention, the agency cites several decisions of the Assistant Secretary as well as private sector case precedent dealing with the extent of the obligation to bargain with respect to midcontract changes in established personnel policies and practices and the right to implement those changes upon impasse. In this regard, the agency asserts that:

> . . . the Service did not "unilaterally refuse to negotiate the [Union's] proposals based solely on their content," [page reference omitted] although a significant portion of them would appear to be nonnegotiable, nor on the fact that they were raised in mid-contract. Its refusal to entertain them was predicated, rather, on the Union's insistence that they be considered as "counterproposals" to the amendments proposed by management, and thus subject to coterminous negotiation and impasse procedures, when, in fact, they were not legitimate counterproposals in the context in which they were raised. . . . It is our opinion in this regard that a good faith counterproposal where management proposes during the term of an agreement to amend established (but previously unnegotiated) personnel policies and practices must be addressed to the issues raised by those amendments. The nature of this response will depend on whether the underlying regulations are negotiable or nonnegotiable. [Emphasis in original.]

The agency thereafter concludes that:

> . . . regardless of whether or not management's proposed amendments were mandatorily negotiable, the Union's "counterproposals" were not . . . appropriate in that they were not addressed in terms of alternatives, objections, etc., to the Service's amendments.

While the agency also contends that certain of the union's proposals are "inappropriate" under applicable laws and regulations, excepted by section 11(b) of the Order or excluded by section 12(b), it asserts that "if the Council agrees with the principal arguments which we have made, further examination of the specific negotiability determinations . . . is essentially superfluous."

In your appeal to the Council, you contend that "[t]he matter proposed to be negotiated is whether the Union may attempt to persuade the Immigration

and Naturalization Service to bring certain regulations the employer proposes to change during the life of an agreement under the aegis of the parties' negotiated contract." You essentially allege that, contrary to the conclusions of the agency, the Service herein is obligated to bargain upon regulations which affect personnel policies, practices, and matters affecting working conditions which it wishes to change during the life of an agreement, and argue that the Service "may not unilaterally refuse to negotiate the [union's] proposals based solely on their content where the Order does not otherwise limit them." You assert that the Service has adopted a "take it or leave it" position in refusing to negotiate on the union's proposals and, to support this contention, you cite, for guidance, case law and commentary on the duty to bargain in good faith in the private sector. In this regard, you urge that the implementation of changes in personnel policies, practices, or working conditions be enjoined until impasse or negotiability questions are resolved.

You further contend that the scope of your proposals or their relevance to the Service's amendments is not determinative of their negotiability and that the Service's determination to the contrary is erroneous. In sum, you acknowledge that "[i]n all earnesty, the union does not see a question of negotiability . . ." and request that the Council address the policy issues allegedly raised by the instant case in some manner besides a negotiability decision on the appeal; i.e., that a clear policy be established for midcontract bargaining impasses, and that rules be fashioned to clearly delineate the FSIP's role in impasse resolution of midcontract bargaining disputes. Likewise, you request the Council to either hold a factfinding hearing on these issues or, in the alternative, to remand the case to the FSIP for a factfinding hearing on the threshold issue of jurisdiction.

Thus, it is clear that the parties' submissions to the Council in this case focus principally on questions concerning the extent of an agency's obligation under the Order to negotiate with respect to midcontract changes in established personnel policies, practices, and matters affecting working conditions. That is, the essence of the contentions and arguments principally relates to whether, under the particular circumstances here presented, the Service has met its obligation to bargain over the union's proposals, in contrast to a question of whether the union's proposals are themselves nonnegotiable, i.e., violative of applicable laws and regulations, or the Order.

Hence, the substance of the parties' allegations raises unfair labor practice issues appropriate for resolution under the procedures set forth under section 6(a)(4) of the Order. In this regard, it is evident that factual determinations must be made in order to resolve the issues sought to be raised by the parties herein; viz., determinations with respect to the effects of the bargaining history, the parties' agreement, and the circumstances of the Service's midcontract actions underlying the dispute. It is also clear that the resolution of the negotiability issues sought to

be raised in the context of such unfair labor practice issues similarly is dependent upon the above factual determinations; that is, they are negotiability issues such as those discussed by the Council in its Report and Recommendations on the recent amendments to Executive Order 11491 [Labor-Management Relations in the Federal Service (1975), at 48]. In recommending the assignment of authority to the Assistant Secretary to resolve negotiability issues arising in the context of unfair labor practice proceedings resulting from unilateral changes in established personnel policies and practices and matters affecting working conditions, the Council stated:

> Where negotiability issues arise in the context of such unfair labor practice proceedings they are often inextricably intertwined with disputed issues of fact which must be resolved in order to arrive at a conclusion concerning the motivation of the parties. Such disputed issues of fact are best resolved through the adversary process of a formal hearing.

It follows, therefore, that resolution of the issues involved in the instant appeal must be accomplished through the procedures set forth in the most recent amendments to the Order discussed above. That is, since the instant case arises out of an alleged unilateral change and involves both claims of a refusal to bargain and related contentions as to negotiability, the Assistant Secretary is empowered under sections 6(a)(4) and 11(d) to exercise his authority. Hence, we must find that, in the particular circumstances presented, the instant appeal, insofar as it raises negotiability issues, is premature and the conditions for Council review as prescribed in section 11(c) of the Order and incorporated in section 2411.22 of the Council's rules of procedure have not been met. The proper forum in which to raise issues as are set forth herein is not through a negotiability appeal before the Council but an unfair labor practice proceeding before the Assistant Secretary. Therefore, we do not pass upon these claims in the circumstances of the instant case.

Accordingly, since your petition fails to meet the conditions for review set forth in section 11(c)(4) of the Order, pursuant to section 2411.22 of the Council's rules of procedure, your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: S. E. McKinley
Justice

Francis E. Warren Air Force Base, Cheyenne, Wyoming and American Federation of Government Employees, Local 2354 (Rentfro, Arbitrator). The arbitrator determined, in essence, that the activity's denial of the request of the grievant for special consideration for repromotion to a particular position vacancy was violative of the parties' agreement; found that the grievant was wrongfully denied the position; and directed that the position should be made available to the grievant. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged that the award violated Civil Service Commission regulations (Report No. 102).

Council action (September 30, 1976). Based upon an interpretation by the Civil Service Commission rendered in response to the Council's request, the Council concluded that the arbitrator's award, insofar as it determined that the grievant was wrongfully denied the subject position and directed the activity to make the position available to the grievant, violated Civil Service Commission regulations. Accordingly, pursuant to section 2411.37(b) of its rules of procedure, the Council set aside the arbitrator's award.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Francis E. Warren Air Force Base,
Cheyenne, Wyoming

and

FLRC No. 75A-127

American Federation of Government
Employees, Local 2354

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose as the result of an arbitrator's award in which he determined that the grievant had been wrongfully denied a WG-8 Engineering Equipment Operator position and directed that such position should be made available to the grievant.

Based upon the entire record before the Council, the circumstances of the case appear as follows:

On February 12, 1975, the activity advertised a vacancy for a position classified at the WG-8 level. The bulletin stated that the position had WG-10 potential and that the person selected "may be promoted to the WG-10 level, without further competition upon completion of the required training." [Emphasis in bulletin.] Employees downgraded from WG-10 or above were to be given preference for the position, in furtherance of established activity policies regarding downgraded personnel. The grievant, a WG-7 level employee who had previously been downgraded from a WG-8 classification, applied for the position and requested that he be given special consideration for repromotion.*/ The position, however, was filled on a competitive basis and the grievant was not selected for the vacancy. The grievant filed a complaint alleging that the activity had not complied with pertinent repromotion procedures incorporated in the

*/ The arbitrator, consistent with the language in the collective bargaining agreement, uses the terms "priority" and "priority consideration" in his opinion in discussing the matter before him. The Civil Service Commission, however, uses the term "special consideration" and it is therefore that term which is used herein. See Civil Service Commission response, note 1 at 3, infra.

collective bargaining agreement,**/ and the matter was ultimately submitted to arbitration.

The Arbitrator's Award

At the arbitration hearing, according to the award, the activity contended, in pertinent part, that, under the Federal Personnel Manual (FPM), the grievant could not be given special consideration for what in effect was a WG-10 vacancy. The arbitrator, in his opinion, referred to pertinent provisions of the FPM as well as the collective bargaining agreement, and noted that the activity, in its contentions before him, had emphasized the competitive features of the FPM while the union had relied on the repromotion provisions of the collective bargaining agreement. The arbitrator then stated that the denial of the grievant's request for special consideration had given rise to a violation of the parties' agreement and awarded as follows: "The Grievant . . . was wrongfully denied the WG-08 position . . . . That position should now be made available to Grievant."

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the

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**/ According to the award, the relevant contractual provision is section 5 of Article XXIX (MERIT PROMOTION), which provides:

. . . . . .

> 5. Repromotion of Previously Downgraded Employees: Employees who were downgraded without personal cause and not at their own request while serving under a career or career conditional appointment may be promoted without competition to a position anywhere in the Air Force not above the grade level, or its equivalent, of the position from which downgraded. These employees will also be entitled to priority referral for noncompetitive consideration for permanent promotion to position vacancies for which they are qualified and which are serviced by this Civilian Personnel Office. They will be referred to the selecting supervisor before a competitive promotion certificate is issued and before referral of candidates from other sources, unless there are employees with higher mandatory priority placement entitlement. A demotion following a temporary promotion does not confer eligibility for noncompetitive promotion. A previously downgraded employee, nonselected for repromotion under the above provision, who is among those certified for competitive consideration must be selected unless persuasive reasons to the contrary exist. Selection of a previously downgraded employee without supervisory experience, certified for a supervisory position, is optional. In all other cases, the selecting supervisor's reasons for nonselection must be presented in writing to the CPO who, acting for the Commander, will determine whether or not approval of nonselection is justified. [Emphasis in original.]

agency's exception which alleged that the award violates Civil Service Commission regulations.***/ The union filed a brief.

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously stated, the Council accepted the agency's petition for review insofar as it alleged that the arbitrator's award violates Civil Service Commission regulations. In accordance with established practice, the Council sought from the Civil Service Commission an interpretation of Commission regulations as they pertain to the questions raised in the present case. The Commission replied in relevant part as follows:

> In this case, the agency issued a vacancy announcement for a position at the WG-8 level, wherein it was specified that the position carried a promotional potential to the WG-10 level. An employee who had previously been demoted from WG-8 to WG-7 without personal fault and not at his own request, applied for the position, requesting that he be given "special consideration" for repromotion to the WG-8 level, as provided in the Federal Personnel Manual (FPM), the agency regulations, and the negotiated agreement.1/ The agency refused to accord "special consideration" on the grounds that he was not entitled to noncompetitive repromotion to a position from which he could subsequently receive a further noncompetitive "career promotion" to a grade higher than that from which he had originally been demoted. The vacancy was filled competitively, and, while the employee was given competitive consideration along with other applicants for the vacancy, he was not selected. The employee then grieved the agency decision refusing him "special consideration". The arbitrator, finding for the grievant, held that the agency could not refuse to accord "special consideration" simply by arguing the existence of some future

1/ Throughout the case file, the terms "special consideration" and "priority consideration" have been used interchangeably. As defined in the Federal Personnel Manual, they have different meanings. "Special consideration", defined above, is the appropriate term for the disputed issue in this case. For a definition of "priority consideration", see FPM Chapter 335, 4-3(f) and 6-4(c). [Footnote in original.]

***/ The agency requested and the Council granted, pursuant to section 2411.47(f) of the Council's rules of procedure, a stay of the award pending the determination of the appeal.

unguaranteed promotional potential, and ordered that the position in question be "made available" to the grievant.

The concepts of "special consideration" and "career promotion", as defined in the FPM, are both germane to this case. "Special consideration" and the employees entitled to it are defined by inference in FPM Chapter 335, Subchapter 2 (Requirement 1):

> "(c) The competitive procedures of the (agency promotion) plans will not apply to:
>
> "(3) Repromotion to a grade or position from which an employee was demoted without personal cause and not at his request . . . Competitive procedures of the promotion plan will not be used before noncompetitive consideration of these employees."

Subchapter 4-3 (c) (2) of the same chapter further defines "special consideration" as follows:

> "Special consideration for repromotion. An employee demoted without personal cause is entitled to special consideration for repromotion in the agency in which he was demoted. Although he is not guaranteed repromotion, ordinarily he should be repromoted when a vacancy occurs in a position at his former grade . . . for which he has demonstrated that he is well-qualified, unless there are persuasive reasons for not doing so . . ."

"Special consideration" is intended to give an employee an opportunity to be promoted noncompetitively to a position at the same grade he held before he was demoted without personal cause. "Special consideration" is not intended to give an employee any benefit or advantage which he did not enjoy previous to his demotion.

"Career promotions" are defined in FPM Chapter 335, Subchapter 4-2:

> "a. General provisions. (1) Career promotion is the promotion of an employee without current competition when:
>
> "(a) Competition was held at an earlier stage, that is, the employee was selected from a civil service register or under competitive promotion procedures, for an assignment intended (with the intention made a matter of record) to prepare him for the position being filled . . ."

In those instances where an employee is selected for a position with a clearly stated promotional potential to a higher grade, such future noncompetitive promotions, when made, are "career promotions". The potential for such future promotions, when clearly documented (such as on a vacancy announcement for the position), suffices to identify

the position as a "career promotion" one. It is not necessary for the announcement to either guarantee future promotion, or specify an absolute time frame in which such promotion will occur. To the contrary, agencies are prohibited from stating that a "career promotion" is guaranteed to occur after a specified period of time, because such promotions are always contingent on the employee's performance, his meeting time-in-grade requirements, the availability of work, etc.

Where an employee who is entitled to "special consideration" for repromotion seeks to receive such consideration for a position with "career promotion" potential, Commission instructions require that "special consideration" can only be granted if the target grade of the position (i.e., the highest grade to which one may be noncompetitively promoted as indicated, for example, on the vacancy announcement) is not higher than the grade from which the employee was demoted or the grade to which he previously could have received a "career promotion".2/ If the target grade level of the new position is higher than that which the employee previously held or was noncompetitively eligible for, "special consideration" may not be given to the employee, because such an opportunity would give him a benefit which he did not enjoy -- or earn -- prior to his demotion. Instead, the employee would have to be considered competitively with other eligible individuals pursuant to the agency's merit promotion plan.

In this case, the vacancy announcement for the WG-8 position clearly stated that the potential for "career promotion" to WG-10 existed. Unless the grievant had successfully attained a position with a promotional potential equal to or greater than WG-10 prior to his demotion, his entitlement to "special consideration" could not have been properly applied to this vacancy. (There is no indication in this file that the grievant ever attained a position with such a potential, nor does the arbitrator make any such findings.) To grant him "special consideration" for this position would allow the grievant to gain more by the repromotion than he lost in the demotion, all at the expense of other employees who were also eligible for the announced vacancy.

Quite apart from his determination of the merits of the case, the arbitrator's remedy (i.e., his order that the position be "made available" to the grievant) violates Commission instructions. FPM Chapter 335, Subchapter 2 (Requirement 6) sets forth management's right to select or nonselect a candidate for promotion. While the

---

2/ For example, if a WG-8 employee was demoted to WG-7, he could not be accorded "special consideration" for (and subsequently be promoted to) a new position at the WG-8 level if that position was one from which he could again be noncompetitively promoted (through a "career promotion") to WG-10, unless his former position at WG-8 also had a known promotional potential to WG-10 or higher. [Footnote and emphasis in original.]

FPM and agency regulations strongly encourage the repromotion of "special consideration" candidates (when appropriate), there is no express or implied guarantee that such repromotion will occur.3/ Thus, even had the agency erred in its refusal to accord the grievant "special consideration", management still could not have been deprived of its right to select or nonselect him without a violation of Commission instructions.

Therefore, in response to your question, the arbitrator's award conflicts with Commission directives and instructions in that (a) it is founded on a misinterpretation and misapplication of FPM provisions, and (b) it violates a management right to select or nonselect which is required by controlling FPM regulations.

3/ In Kirk Army Hospital, FLRC No. 72A-18, the Council had occasion to cite FPM Chapter 335, Subchapter 4-3 (c) (2), commenting that: "With respect to the repromotion rights of such employees, the FPM plainly states that, even though they are entitled to 'special consideration', they are 'not guaranteed promotion.' In other words, a selection decision remains to be made by the selecting official." [Footnote in original.]

Based upon the foregoing interpretation by the Civil Service Commission, we must conclude that the arbitrator's award, insofar as it determines that the grievant was wrongfully denied the WG-8 position and directs the activity to make available the WG-8 position to him, violates Civil Service Commission regulations and therefore must be set aside.

Conclusion

For the foregoing reasons, and pursuant to section 2411.37(b) of the Council's rules of procedure, we set aside the arbitrator's award.

By the Council.

Henry B. Frazier III
Executive Director

Issued: September 30, 1976

Internal Revenue Service, National Office, Washington, D.C., A/SLMR No. 630. The Assistant Secretary, upon a petition for clarification of unit filed by the National Treasury Employees Union (NTEU), seeking to clarify the status of certain employees of the agency so as to include them in the unit represented by NTEU, concluded that the subject employees were not management officials within the meaning of the Order, as contended by the agency. Accordingly, the Assistant Secretary clarified the unit involved by including the disputed employees therein. The agency appealed to the Council, contending that the Assistant Secretary's decision presented major policy issues. The agency also requested a stay of that decision.

Council action (September 30, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not raise a major policy issue, and the agency neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.

CORRECTED COPY

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

September 30, 1976

Ms. Phyllis Magram, Attorney
Office of Chief Counsel
General Legal Services Division
Branch No. 1 - Room 4562
Internal Revenue Service
1111 Constitution Avenue, NW.
Washington, D.C. 20224

Re: Internal Revenue Service, National Office, Washington, D.C., A/SLMR No. 630, FLRC No. 76A-66

Dear Ms. Magram:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision, and the union's opposition thereto, in the above-entitled case.

This case arose when the National Treasury Employees Union (the union), the certified exclusive representative of certain employees of the Internal Revenue Service (the agency), filed a petition for clarification of unit. The petition sought to clarify the status of approximately 213 employees in several classifications within the agency's Training and Accounts and Data Processing Divisions so as to include them in the union's certified unit. The agency contended that the employees in the disputed classifications should be excluded from the unit because they were management officials. In his decision, the Assistant Secretary reviewed the record evidence as to the duties and responsibilities of the employees in the disputed classifications and concluded that they were not management officials within the meaning of the Order. Citing his previous decision wherein he promulgated the definition of "management official" which he would use to decide questions regarding the appropriate unit pursuant to section 6(a)(1) of the Order, the Assistant Secretary concluded:

> . . . [T]he record reveals in each instance that the individuals involved serve as resource persons whose recommendations are subject to extensive review before either acceptance or implementation and that they are not individuals who actively

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> participate in the ultimate determination of what policy, in fact, will be. Based on these considerations, I find that none of the employees in the aforementioned classifications are management officials within the meaning of the Order.

Accordingly, he clarified the unit for which the union was certified by including therein all of the disputed employees.

In your petition for review on behalf of the agency, you allege that the Assistant Secretary's decision presents two major policy issues: (1) "[w]hether the definition of 'management official' which has been adopted by the Assistant Secretary is consistent with the intent and purposes of Executive Order 11491, as amended" and (2) "[w]hether the Assistant Secretary's application of that definition to the Federal Sector is consistent with the intent of the Order."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not raise a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

With respect to your first alleged major policy issue, in its 1975 Report and Recommendations on the Amendment of the Order, the Council considered definitions pertaining to inclusions and exclusions, including the section 10(b)(1) exclusion of management official from units of exclusive recognition. The Council noted that the Order contained no definition of the term and, as a consequence, it became necessary for the Assistant Secretary to define the term in connection with carrying out his responsibilities to decide questions regarding the appropriateness of units pursuant to section 6(a)(1) of the Order. In this regard, the Council observed that there was little comment in the oral and written submissions to the Council concerning the definitions at issue and concluded that, "[w]hile they appear to be working satisfactorily, we believe that more experience should be acquired with them before giving further consideration to including them in the Order." [Labor-Management Relations in the Federal Service (1975), at 29-30.] In the Council's opinion, your appeal fails to demonstrate that the Assistant Secretary's definition is no longer working satisfactorily or that experience under such definition now requires the Council to consider the adoption of an alternative definition.

Accordingly, while the Council may deem it necessary to reconsider the matter if it should appear in the future that the definition of management official as formulated by the Assistant Secretary is not working satisfactorily, no major policy issue warranting review is raised by the instant decision. Department of Health, Education, and Welfare, Social Security Administration, Bureau of Field Operations, District Office, Minneapolis,

Minnesota, A/SLMR No. 621, FLRC No. 76A-50 (Aug. 31, 1976), Report No. 111. Likewise, insofar as your second alleged major policy issue merely takes issue with the Assistant Secretary's "application of that definition" of management official to the facts of this case, no basis for Council review is thereby presented. National Science Foundation, A/SLMR No. 487, FLRC No. 75A-109 (Mar. 3, 1976), Report No. 99.

Since the Assistant Secretary's decision does not present a major policy issue, and since you do not contend, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

E. W. Hockenberry, Jr.
NTEU

Local 2449, American Federation of Government Employees (AFL-CIO) and Headquarters, Defense Supply Agency and DSA Field Activities Located at Cameron Station, Virginia (Coburn, Arbitrator). The arbitrator denied the grievance related to the selection of a candidate from outside the agency to fill a particular position vacancy. The union filed exceptions to the arbitrator's award, which, as stated by the union, alleged that (1) neither the contract, Executive Order 11491, nor agency regulations are susceptible to the interpretation given them by the arbitrator; (2) the award violates public policy; (3) the award does not draw its essence from the parties' agreement; (4) the award lacks entirety; and (5) the arbitrator exceeded his authority.

Council action (October 6, 1976). As to (1), the Council determined that read literally, this exception did not state a ground upon which the Council will accept a petition for review of an arbitration award; and if read as contending that the arbitrator's award violated the Order, a ground upon which a petition will be accepted, the exception was not supported by facts and circumstances described in the petition. With regard to (2), the Council held that, in the circumstances of this case, the exception did not present a ground upon which the Council will grant review of an arbitration award. Finally, as to (3), (4) and (5), the Council held, in essence, that the union's petition for review did not present the required facts and circumstances to support these exceptions. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

October 6, 1976

Mr. James R. Rosa, Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Local 2449, American Federation of Government Employees (AFL-CIO) and Headquarters, Defense Supply Agency and DSA Field Activities Located at Cameron Station, Virginia (Coburn, Arbitrator), FLRC No. 76A-22

Dear Mr. Rosa:

The Council has carefully considered your petition for review of an arbitrator's award filed in the above-entitled case.

According to the award, the dispute in this matter arose when the activity selected a nonagency candidate for the position of Supervisory Procurement and Production Systems Analyst, GS-1101-15. Thereafter, the union filed a grievance alleging that the activity's selection of the nonagency candidate rather than one of the in-house candidates also on the "best qualified" list had violated certain provisions of the parties' collective bargaining agreement,[1/] and subsequently the matter was submitted to arbitration. In his opinion, the arbitrator stated that the record indicated that there were three agency employees on the list of eligibles from which the nonagency

1/ The arbitrator's award indicates that the primary provision of the collective bargaining agreement under which the grievance arose is Part II, Article Q, Section 7, which reads as follows:

> Selection from outside the area of consideration as stated in the job-opportunity-announcement will not be made. However, for positions at the GS-11 or below, consideration may be given to DSA employees outside the announced area of consideration without expanding the announced area, in those cases where there are insufficient, three or less qualified, applicants. (Positions at GS-12 and above will be announced agency-wide. Selection will be made from outside the agency only when it is clearly established that there are no "best qualified" applicants from within the agency.)

employee was selected and "[t]hat fact, standing alone, would require a finding under an application of Section 7 of Part II, Article Q of the Agreement that the Agency had violated a rule against the selection of 'outside' employees, when there are 'best-qualified' applicants within the Agency." He added that "[u]nder recognized principles of contract construction as they are applied in the private sector of the economy, Section 7 would clearly be controlling and dispositive of the issue in this dispute." However, the arbitrator further pointed out that in the Federal sector "the administration of collectively bargained agreements is subject to and conditioned by Federal policy, law and regulations." He also noted that section 12(a) of E.O. 11491, as amended, provides that every collective bargaining agreement between an agency and a union must contain the express provision that the administration of the agreement is governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual and by published agency policies and regulations in existence at the time the agreement was approved. Referring then to a Department of Defense instruction which "mandates the use of the Career Automated Inventory Referral System ('CAIRS'), a departmentwide procurement personnel bank, for filling the vacancy involved in this case," and noting that "[a] referral from CAIRS to an agency would, accordingly, include non-Agency candidates," the arbitrator found that regulations issued by the Department of Defense require that the selecting official of the agency give equal consideration to agency and nonagency applicants for promotion and that, therefore, the selected employee was considered and selected on the basis of what the selecting official believed to be superior qualifications.

Accordingly, the arbitrator denied the grievance, concluding as follows:

> In view of the foregoing it appears to be conclusively established that DoD regulations governing selection of candidates for promotion within the Agency are applicable and controlling in this case, and that, therefore, the provisions of Section 7 of Part II, Article Q of the collective bargaining Agreement in conflict therewith are, accordingly, superseded. I find, therefore, the Agency's selection of [the Employee] for the position of Supervisory Procurement and Production Systems Analyst, GS-1101-15, was properly made.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of five exceptions discussed below. The agency filed an opposition.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

For purposes of discussion, the union's exceptions, as stated by the union, will be considered in the following order:

1. "Neither the contract, Executive Order 11491, nor agency regulations are susceptible to the interpretation given them by the arbitrator."

2. "The arbitrator's award violates public policy."

3. "The award does not draw its essence from the contract."

4. "The arbitration award lacks entirety."

5. "The arbitrator exceeded his authority."

In support of its first exception, that "[n]either the contract, Executive Order 11491, nor agency regulations are susceptible to the interpretation given them by the arbitrator," the union contends first that the arbitrator, in his award, applied DOD regulations erroneously. In addition, the union contends that the arbitrator misinterpreted and misapplied section 12(a) of Executive Order 11491, as amended. Read literally, the union's first exception does not state a ground upon which the Council will accept a petition for review of an arbitrator's award. As stated previously, the Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award violates applicable law, appropriate regulation or the Order. In the present case, however, the union's petition excepts to the arbitrator's "interpretation" of the contract, the Order and agency regulation. Council precedent is clear that a challenge to an arbitrator's interpretation of the collective bargaining agreement between the parties does not assert a ground upon which the Council will accept a petition for review of an arbitrator's award under section 2411.32 of the Council's rules.2/ As to the agency regulation, it is noted that the arbitrator, in the course of rendering his award in this matter, had before him and considered the Department of Defense regulation which dealt with the same subject matter as the provision in the negotiated agreement, and he thereafter considered and applied that regulation in reaching his judgment in the case. Under these circumstances the application of that regulation by the arbitrator may not be challenged in an appeal of the award to the Council. American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator), FLRC No. 75A-45 (Dec. 24, 1975), Report No. 94. Therefore, since the Department of Defense regulation is not, in the facts of this case, an appropriate

2/ E.g., American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (Sept. 17, 1973), Report No. 44; Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96.

regulation within the meaning of that term as used in section 2411.32 of the Council's rules, the union's exception, if read as contending that the award violates an agency regulation, does not present a ground upon which the Council will grant a petition for review of an arbitration award.

As to that part of the union's first exception pertaining to section 12(a) of the Order, the union challenges the arbitrator's reliance on that section to support his conclusion that he is obliged to consider statutes and regulations in the course of administering the collective bargaining agreement. In support of this exception, the union in effect contends that the requirement in section 12(a),3/ that the administration of an agreement be governed by published agency policies and regulations in existence at the time the agreement was approved, does not apply in an arbitration proceeding unless the agency establishes during that proceeding, to the satisfaction of the arbitrator, the compelling need for the agency regulation in question in a manner consistent with the requirements of section 11 of the Order.4/ The Council is of the opinion that the union's exception, if read as contending that the arbitrator's award violates the Order, is not supported by the facts and circumstances described in the petition. In this regard it is noted that the Council stated in the January 1975 report and recommendations on the amendment to the Order, as follows:

> In the course of the review some question was raised by agencies concerning the interpretation and application of regulations by arbitrators in the resolution of grievances through negotiated grievance procedures. Under the present section 13 arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under

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3/ Section 12(a) of Executive Order 11491 provides as follows:

> In the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level[.]

4/ Section 11(a) of Executive Order 11491 provides, in part:

> An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions,

(Continued)

negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation. . . . 5/

Thus, in the instant case, the arbitrator considered the agency regulation in the course of resolving the grievance before him. Moreover, while an arbitrator must consider an agency regulation in the course of resolving a grievance, there is no requirement imposed, nor authorization conferred, by the Order upon an arbitrator to determine whether a compelling need exists for an agency regulation before considering and applying that regulation in the resolution of a grievance. Accordingly, the union's first exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

The union's second exception is that the arbitrator's award violates public policy. In support of this exception, the union contends that "the same public policy which requires review of awards that violate appropriate regulation requires review of erroneous interpretations or applications of agency regulations which are both clearly erroneous (in light of Section 11 and 12 of Executive Order 11491) and central to an arbitrator's decision against an appellant union." Again, in the Council's opinion, the union's contention is based upon its disagreement with the arbitrator's interpretation and application of the agency regulation. As previously indicated, in the circumstances of this case, the exception challenging the arbitrator's interpretation of the agency regulation does not present a ground upon which the Council will grant review of an arbitration ward.

The union's third, fourth, and fifth exceptions are that the award does not draw its essence from the contract, that it lacks entirety and that the arbitrator exceeded his authority. The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the award fails to draw its essence from the collective bargaining agreement (NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton,

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(Continued)

so far as may be appropriate under applicable laws and regulations, including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; . . .

5/ Labor-Management Relations in the Federal Service (1975), at 44.

Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79) or that the arbitrator exceeded his authority by determining issues not included in the questions submitted to arbitration (Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), FLRC No. 74A-40 (Jan. 15, 1975), Report No. 62). The union's specific exception that the award in this case lacks entirety does not assert a ground upon which the Council has previously granted review of an arbitration award nor does it appear to assert a ground similar to that upon which challenges to similar labor arbitration awards are sustained by courts in private sector cases. The union cites no private sector cases in which courts have sustained challenges to arbitration awards on this ground nor has our research disclosed any such cases. However, in any event, the Council is of the opinion that the union's contentions do not provide facts and circumstances to support the three exceptions. In this regard it is noted that the union's contentions are related to the arbitrator's consideration, interpretation and application of the agency regulation in his resolution of the matter before him and his reliance on section 12(a) of the Order to support his conclusion that he was obliged to consider the regulation. As previously indicated, these contentions, under the facts of this case, do not support a basis for acceptance of the union's petition. Therefore, the union's petition for review does not present the facts and circumstances required under section 2411.32 of the Council's rules to support its third, fourth, and fifth exceptions.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

cc: Ronald H. Uscher
DSA

NAGE, Local R12-58 and McClellan Air Force Base. The dispute involved the negotiability under the Order of union proposals concerning (1) the maintenance of vehicles; (2) observation of employee work performance; (3) the assignment of certain duties to particular positions or employees; (4) the assignment of shift supervisors to supervise employees performing duties in connection with ending their shift; (5) overtime; and (6) minimum charge to employees for annual leave.

Council action (October 22, 1976). As to (1), (2), (3) and (4), the Council found that the union's proposals were excepted from the agency's obligation to bargain by section 11(b) of the Order. With regard to (5), the Council held that the proposal clearly contravened section 12(b)(5) of the Order. Finally, as to (6), based upon an interpretation rendered by the Civil Service Commission in response to a Council request, the Council held, contrary to the union's contention, that the agency regulation which was relied on by the agency head to limit negotiation on the union's proposal, did not violate the Federal Personnel Manual. Accordingly, pursuant to section 2411.28 of its rules of procedure, the Council sustained the agency head's determination that the proposals here involved were nonnegotiable.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

NAGE, Local R12-58

and

FLRC No. 75A-90

McClellan Air Force Base

DECISION ON NEGOTIABILITY ISSUES

Background

During negotiations between the NAGE, Local R12-58 and the Department of the Air Force for a contract covering a unit of security police employed at McClellan Air Force Base, disputes arose as to the negotiability of seven union proposals (set forth hereinafter). Upon referral, the Department of Defense (hereinafter the "agency") determined that the proposals were non-negotiable principally under sections 11(b) and 12(b) of the Order and published agency regulations. The union petitioned the Council for review under section 11(c)(4) of the Order, and the agency filed a statement of its position.

Opinion

The union's proposals will be discussed separately, or in groups concerning similar issues of negotiability, below.

1. Article VIII, Equipment

The disputed proposal is as follows:

> Section 3. All policemen (operators) will perform emergency roadside vehicle maintenance, but will not be required to perform routine vehicle repairs, washing or waxing.

The agency principally contends that this proposal would interfere with management's determination of job content and, hence, is excepted from the obligation to bargain by section 11(b) of the Order[1/] under principles

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1/ Section 11(b) provides in pertinent part that:

> . . . the obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. [Emphasis supplied.]

stated by the Council in its Griffiss[2/] and Wright-Patterson[3/] decisions. The union, while it concedes that management has the right to assign duties to employees, in effect contends that such right is limited in that it must take into consideration the job classification of the employees to whom the duties are being assigned. In this regard, the union asserts that U.S. Civil Service Commission job classification standards for "Police Officer" do not mention "washing or waxing" vehicles and, further, the union argues, without explanation, that such work is "demeaning" to the police officers, apparently intending to suggest thereby the unrelatedness or inappropriateness of such duties to the positions or employees involved. We find merit in the agency's position under the Council's Griffiss and Wright-Patterson decisions, as elaborated below.

In Griffiss, the union's proposal would have prohibited the assignment of allegedly unrelated duties to positions in the unit. The Council held that the specific duties assigned to particular positions or employees, including duties allegedly unrelated to the principal functions of the employees concerned, i.e., the job content, are "excluded from the obligation to bargain under the words 'organization' and 'numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty' in section 11(b) of the Order."

Subsequently, in Wright-Patterson, where the union's proposals would have conditioned the assignment of duties to employees on the "'scope of the classification assigned' to the respective unit employees as defined in 'appropriate classification standards'," the Council said:[4/]

2/ International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, New York, 1 FLRC 323 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36].

3/ Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio, FLRC No. 74A-2 (Dec. 5, 1974), Report No. 60.

4/ Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio, FLRC No. 74A-2 (Dec. 5, 1974), Report No. 60. The proposals (considered as a single union proposal for convenience) provided:

> Section 7. In the interests of maintaining morale in a good employer-employee relationship, the Employer agrees that, to the fullest extent possible in maintaining the efficiency of the Government operations, every effort will be made to assign work within the scope of the classification assigned as defined by appropriate classification standards.
>
> Section 10. The Employer agrees that to the maximum extent possible, efforts will be made to assign work within the scope of the classification assigned to bargaining unit employees, as defined in appropriate classification standards . . . . [Emphasis in original.]

> The classification standards so referred to in the union's proposal . . . constitute groupings by the Civil Service Commission of duties, skills, knowledges and other aspects of jobs, for establishing the grade levels of particular jobs. These standards are neither designed nor intended by the Commission to limit the agencies in any manner in the actual assignment of job duties. Therefore, the use of these standards to effect such a limitation, as proposed by the union, would impose extraneous conditions on the agency's authority to determine work assignments required only by the agreement itself. [Emphasis in original.]

Hence, the Council found that the proposal was excepted from the agency's obligation to negotiate under section 11(b), because it would limit the agency in the assignment of duties to unit employees unless conditions prescribed in the agreement exist -- there, conformity of the duties with the scope of the job grading standards.

Turning to the instant proposal, it is clear that it would limit management in the assignment of duties to particular positions or employees as did the proposal in Griffiss and must, therefore, be found to be excepted from the bargaining obligation by section 11(b). It both prescribes that the duties involved in "emergency roadside vehicle maintenance" will be performed by the covered employees and, also, renders nugatory the assignment of certain other duties to such employees by precluding the employees' being "required to perform routine vehicle repairs, washing or waxing."[5/] As to the union's

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5/ See, e.g., American Federation of Government Employees Local 2241 and Veterans Administration Hospital, Denver, Colorado, FLRC No. 74A-67 (Nov. 28, 1975), Report No. 92; AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, FLRC No. 73A-25 (Sept. 30, 1974), Report No. 57; Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 611 [FLRC No. 72A-46 (Dec. 27, 1973), Report No. 47]; American Federation of Government Employees Local 196 and Veterans Administration Hospital, Lebanon, Pennsylvania, 1 FLRC 585 [FLRC No. 72A-41 (Dec. 12, 1973), Report No. 46]; Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 445 [FLRC No. 72A-33 (June 29, 1973), Report No. 41]. The proposal in the latter case, similar to the one at issue here, provided:

> No employee in the unit shall be assigned janitorial duties, painting of spaces or equipment, or other duties involving the use of cleaning agents, detergents or chemicals unless such duties are outlined in the job rating description of the employees.

Accord, AFGE Council of Locals 1497 and 2165 and Region 3, General Services Administration, Baltimore, Maryland, FLRC No. 74A-48 (June 26, 1975), Report No. 75.

contention with respect to the agency's being limited in the assignment of duties by Civil Service Commission classification standards the Wright-Patterson decision is dispositive in its determination as indicated, that "these standards are neither designed nor intended by the Commission to limit the agencies in any manner in the actual assignment of job duties."

Accordingly, we find that the union's proposal is excepted from the agency's obligation to bargain by section 11(b) of the Order and, therefore, must sustain the agency's determination as to the nonnegotiability of the union's proposed Article VIII, Section 3.

2. Article X, Working Conditions

The disputed proposal is as follows:

> Section 4. The Employer agrees to make employees aware when observing an employee's work performance. Supervisors will contact employees at least once during each shift to inspect working conditions and areas in which the employee is working, to discuss with the employee any unusual conditions or problems that have come to the attention of the employee, and to instruct the employee on any new procedures that have been implemented by the Employer. [Only the underscored portion is in dispute.]

The agency determined that this proposal is excepted from the obligation to bargain by section 11(b) of the Order because the unit to which the proposal would apply is "composed of police performing internal security functions at the activity" and the proposal would greatly diminish management's ability "to administer the internal security program efficiently and effectively." In support, the agency argues that it is necessary to evaluate the actual working or functioning of an internal security system to insure its adequacy and effectiveness and that "the ability to test the system to gauge its effectiveness is inherent in the administration of the program." In this regard the agency contends that the only realistic means of accomplishing such evaluation is unannounced observation of the internal security police during the performance of their duties, i.e., carrying out the design or intent of the system or plan for internal security at the activity. The union denies that the proposal would diminish management's ability to administer the internal security program, contending that the proposal does not involve the internal security practices of the activity but, only, management's practice of unannounced observation of employees (security policemen) during the performance of their duties. Consequently, the union maintains that its proposal is not a matter with respect to internal security practices excepted from the agency's obligation to bargain under section 11(b) and that the proposal is negotiable.

Section 11(b) of the Order provides in relevant part that:

> 11(b). In prescribing regulations relating to personnel policies and practices and working conditions, an agency shall have due regard for the obligation imposed by paragraph (a) of this section. However, the obligation to meet and confer does not include matters with respect to . . . internal security practices. [Emphasis supplied.]

The issue here is whether or not the instant proposal would require the agency to negotiate matters with respect to its internal security practices within the meaning of section 11(b). It is clear that the phrase "internal security practices" in section 11(b) includes the actual system or plan of internal security adopted by the activity. It is equally clear that the instant proposal does not seek the negotiation of such a system itself, although, the proposal would apply to a unit of employees (policemen) who are responsible for carrying out such internal security system or plan. In this latter regard, the carrying-out of an internal security system or plan, unlike numerous other governmental operations, results in no tangible work product that can be reviewed and evaluated to test the capability of the system or plan which has been established. Hence, in the circumstances presented, i.e., in a unit of internal security policemen carrying out the functions of an activity's internal security program, we find merit in the agency's assertion that to insure a valid test of the adequacy of internal security practices which make up the security system requires spot checks, security checks and similar unannounced observations of the employees' execution of internal security practices. A test conducted after preannouncement, as the agency asserts, "could only confirm the capability of the system, not how the system and those assigned to it are actually functioning." Therefore, we find that, under the circumstances presented in this case, spot checks, security checks and similar unannounced observations of internal security policemen during the execution of internal security practices as mandated by the internal security system adopted by the activity and conducted solely for the purpose of evaluating the adequacy and effectiveness of such internal security system, is essential to the effective functioning of and, thus, is a necessary part of the internal security system itself. Hence, the union's proposal, in effect, to preannounce observation of such employees carrying out internal security practices is a matter concerning "internal security practices" under section 11(b) of the Order.6/

Accordingly, we find that the agency's determination--that Article X, Working Conditions, Section 4, is excepted from the agency's obligation to bargain by section 11(b) of the Order--was proper and must be sustained.

3. Article X, Working Conditions

Two of the disputed provisions are as follows:

. . . . . .

Section 8. The Employer agrees the Policeman manning a post where an incident occurred will conduct the preliminary investigations.

Section 9. No personnel will be utilized to replace the regularly assigned desk sergeants/dispatchers, except in cases where the regular assignees are not available.

6/ This decision should not be construed to be in derogation, in any manner, of the rights to and protection of the privacy of employees afforded them under applicable laws and regulations or policies of appropriate authorities.

The agency principally contends, with respect to each of these proposals, that they involve the assignment of duties, i.e., job content, and are, thus, excepted from the obligation to bargain by section 11(b) of the Order.[7/] The union, on the other hand, contends that the proposals do not restrict management's rights in assigning duties but merely set forth "procedures to be followed in management's exercise of such rights and are, therefore, negotiable under section 11(a) of the Order."

Section 11(b) of the Order as previously set forth (note 1, supra) provides in pertinent part that the obligation to meet and confer does not include matters with respect to the agency's "organization" and "the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty."

The proposed Article X, Section 8 mandates that the agency assign the specific duty of conducting the preliminary investigation of an incident to the particular "policeman manning the post where the incident occurred," and proposed Section 9 would prohibit the agency from assigning replacement personnel for desk sergeants/dispatchers unless such regularly assigned desk sergeants/dispatchers were not available. Thus, each of the proposals by its very language seeks to limit the agency's authority to assign specific duties to particular positions or employees by imposing certain conditions on such authority.

The Council consistently has held that the exception from the obligation to bargain over job content under section 11(b) of the Order applies, not only to proposals which totally would proscribe the assignment of duties to particular types of employees,[8/] but also to proposals, such as the two presently under consideration, which would prevent the agency from assigning such duties unless certain conditions prescribed in the agreement exist.[9/]

7/ The agency also contends that Article X, Section 8 is prohibited from negotiation by section 12(b)(5) of the Order. In our view, as set forth hereinafter, the proposal is primarily concerned with job content, and section 12(b)(5) is, therefore, not applicable.

8/ International Association of Fire Fighters, Local F-111 and Griffiss Air Force Base, Rome, N.Y., 1 FLRC 323 [FLRC No. 71A-30 (Apr. 19, 1973), Report No. 36].

9/ AFGE Local 1738 and VA Hospital, Salisbury, North Carolina, FLRC No. 75A-103 (July 8, 1976), Report No. 107; Local Lodge 2333, International Association of Machinists and Aerospace Workers and Wright-Patterson Air Force Base, Ohio, FLRC No. 74A-2 (Dec. 5, 1974), Report No. 60; AFGE (National Border Patrol Council and National Council of Immigration and Naturalization Service Locals) and Immigration and Naturalization Service, FLRC No. 73A-25 (Sept. 30, 1974), Report No. 57; Federal Employees Metal Trades Council of Charleston and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 611 [FLRC No. 72A-46 (Dec. 27, 1973), Report No. 47]; American

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The subject conditions (namely, as to Section 8, manning a post where an incident occurred and, as to Section 9, where the regular assignees are not available) plainly impose limitations on which types of positions or employees will actually perform the duties involved. Such limitations on the agency's reserved authority to assign duties fall outside the agency's obligation to bargain under section 11(b).

Thus, we must find that Sections 8 and 9 of Article X are excepted from the bargaining obligation by section 11(b) of the Order. Accordingly, the agency head's determination that each of these proposals is nonnegotiable was proper and must be sustained.

4. Article X, Working Conditions

The proposal in dispute is as follows:

> Section 12. The Employer agrees to have at least one (1) supervisor from the off-going shift stand by until all employees have been properly relieved and have turned in their Government issued equipment.

The agency, relying on the Council's Charleston Naval Shipyard decision,[10/] principally contends that this proposal, "by requiring that at least one supervisor from the off-going shift stand by until all employees have turned in their equipment," concerns a matter which is excepted from the obligation to bargain by section 11(b) of the Order. The union maintains that the proposal is negotiable and that its purpose is "to protect employees in the unit from adverse actions which could result from accidents which may be prevented with supervision."

Section 11(b) as previously set forth excepts from the bargaining obligation, among other things, the agency's "organization." In the Charleston decision relied upon by the agency herein, the Council held a proposal concerning "assignment of each unit employee to one appropriate civilian supervisor" to be excepted from the bargaining obligation by section 11(b) of the Order, as follows:

> In our opinion, the union proposal must be regarded as a subject within the provisions of section 11(b) of the Order, i.e., one about which the agency may, but is not required to negotiate. The supervisory structure

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(Continued)
Federation of Government Employees Local 1966 and Veterans Administration Hospital, Lebanon, Pennsylvania, 1 FLRC 585 [FLRC No. 72A-41 (Dec. 12, 1973), Report No. 46]; Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 445 [FLRC No. 72A-33 (June 29, 1973), Report No. 41].

10/ Federal Employees Metal Trades Council of Charleston, AFL-CIO and Charleston Naval Shipyard, Charleston, South Carolina, 1 FLRC 451 [FLRC No. 72A-35 (June 29, 1973), Report No. 41].

of an agency and the designation of the supervisory positions to which non-supervisory positions are assigned are essential parts of the overall organization of an agency, i.e., the administrative and functional structure of an agency.

Subsequently, with regard to a proposal that particular work "shall be done under proper supervision," the Council applied the above-quoted language and found the proposal to be concerned with a matter with respect to the "organization" of the agency and, thus, excepted from the bargaining obligation by section 11(b).11/ We think, in accordance with the aforementioned Charleston decision, that the proposal here in dispute, by requiring management to assign "at least one supervisor from the off-going shift" to supervise employees performing duties in connection with ending their shift, deals with the "administrative and functional structure" of the agency. Thus, we must find that it concerns a matter with respect to the agency's "organization" and is excepted from the obligation to bargain by section 11(b) of the Order.

Accordingly, we hold that the agency head's determination that this proposal is nonnegotiable was proper and must be sustained.

5. Article XII, Hours of Work and Overtime

The proposal in dispute is as follows:

. . . . . .

Section 8. Employees will not be systematically excluded from receipt of overtime by Management employing other personnel for the purpose of denying overtime to said employees.

The agency contends that this provision violates management's right under section 12(b)(5) of the Order to determine "who" will conduct agency operations.12/ In this regard, the agency maintains that the proposal does not merely insure fair and equitable assignment of overtime and treatment of unit employees as did the proposal which the Council found negotiable in its Philadelphia Naval Shipyard decision.13/ Rather, the agency asserts, the language of the proposal in the present case:

11/ Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, FLRC No. 75A-77 (Aug. 2, 1976), Report No. 110.

12/ The agency also contends that the proposal is excepted from the obligation to bargain by section 11(b) of the Order. In view of our decision herein, however, we find it unnecessary to pass on this contention.

13/ Philadelphia Metal Trades Council, AFL-CIO and Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, 1 FLRC 457 [FLRC No. 72A-40 (June 29, 1973), Report No. 41]. Here, the proposal found by the Council to be negotiable under section 11(a) of the Order provided:

(Continued)

. . . would effectively preclude management from taking action to reduce or eliminate the need for overtime work by impairing management's ability to assign all or part of the work in question to another organizational segment of the activity as well as management's ability to hire or assign additional personnel so that the workload could be handled in the unit without the continuing use of overtime.

The union, on the other hand, contends that the proposal is not intended to impair management's right to reduce or eliminate the need for overtime work but merely sets out "procedures" for overtime work. In particular, the union indicates the proposal is "to protect the employee from [management's] improper practice of relieving an employee from duty by military personnel for the sole purpose of denying the employee overtime." In our opinion, for the reasons set forth below, the agency's position has merit.

Section 12(b)(5) of the Order provides:

Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--

. . . . . .

(b) management officials of the agency retain the right, in accordance with applicable laws and regulations--

. . . . . .

(5) to determine the methods, means, and personnel by which such operations are to be conducted.

In its Tidewater decision,[14/] the Council examined "the precise scope of the right reserved to management under section 12(b)(5)" and determined, as to the meaning of the language of that section, that:

[A]s used in the Order, personnel means the total body of persons engaged in the performance of agency operations (i.e., the composition of that body in terms of numbers, types of occupations and levels) and the particular groups of persons that make up the personnel conducting agency

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(Continued)

Article X, Section 11

Section 11. Supervisors, Shop Planners, Planners and Estimators or Employees not covered by this Agreement shall not be assigned to perform the duties of employees in the unit on overtime assignments for the sole purpose of eliminating the need for such employees on overtime.

14/ Tidewater Virginia Federal Employees Metal Trades Council and Norfolk Naval Public Works Center, Norfolk, Virginia, 1 FLRC 432 [FLRC No. 71A-56 (June 29, 1973), Report No. 41].

operations (e.g., military or civilian personnel; supervisory or nonsupervisory personnel; professional or nonprofessional personnel; Government personnel or contract personnel). In short, personnel means who will conduct agency operations. [Emphasis in original.]

In Tidewater, the union proposal[15/] before the Council sought to establish a principle of bargaining unit work preservation and, hence, as the Council there found, "would generally ban the assignment of certain work to military personnel, supervisory personnel and nonunit personnel." In the course of finding that proposal to be nonnegotiable, the Council explained further that the proposal:

> . . . explicitly would deny management the authority to assign "bargaining unit work" to nonunit employees, particularly supervisors and military personnel, except in certain limited circumstances. Thus, management's right to determine the composition of the total body of persons engaged in certain operations at the Public Works Center would be limited. As a general rule, it could not include supervisors or military personnel among the particular groups of persons that make up the personnel conducting these particular agency operations and, thus, its options in exercising this reserved management right would be restricted. In other words, MTC's proposal relates to the exercise of the substantive right as reserved to management by section 12(b)(5) to determine the type of personnel, or which personnel will conduct these particular agency operations. Therefore, the proposal clearly contravenes section 12(b)(5). . . .

In sharp contrast, the proposal which the Council found negotiable in the Philadelphia Naval Shipyard case,[16/] had, as the Council there found, several distinguishing characteristics compared to the work assignment proposal in Tidewater, which distinctions the Council found to be of controlling significance, as follows:

> The union's proposal in this [Philadelphia] case is significantly different in scope and effect from [the Tidewater] proposal. Here, unlike in that case, the union proposal would only affect assignment of overtime. The proposal, if agreed to, would not restrict management in any way in otherwise assigning to nonunit employees work usually performed by unit employees, during nonovertime periods. Further, and equally important, under the union's proposal in this case, assignment to nonunit personnel of work normally assigned to employees in the unit

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15/ The union's proposal provided in pertinent part:

Article IX - Work Assignment

Section 1. The employer agrees that work regularly and historically assigned to and performed by bargaining unit employees covered by this Agreement will not be assigned to military personnel or to Public Works Center employees excluded from the bargaining unit.

16/ See note 13, supra.

could be made even in situations involving overtime, for any purpose determined by management to be valid, except "for the sole purpose of eliminating the need for such [unit] employees on overtime."

Thus, while the agency contends that the proposal violates management's reserved right under section 12(b)(5) of the Order to determine the type of personnel by whom certain work of the Philadelphia Naval Shipyard would be accomplished, such contention is without merit because, as we noted above, the proposal, in effect, is solely concerned with the assignment of overtime.

Turning to the union's proposal in the instant case, it is similar in effect to the one found nonnegotiable in Tidewater. Unlike the proposal in Philadelphia, it is not "solely concerned with the assignment of overtime" and it clearly involves more than a mere procedure for the assignment of employees to overtime, as the union contends. In our opinion, the literal language of the proposal, as claimed by the agency, "explicitly would deny management the authority to assign 'bargaining unit work' to nonunit employees" for the purpose of reducing or eliminating the necessity for overtime work. That is, the proposal before us contains no qualification or clarification of its express restriction on management's "employing other personnel for the purpose of denying overtime to [unit] employees." Thus, the proposal, by its plain language, would prohibit management from assigning other types of personnel to work on a particular project or from hiring part-time personnel to perform the work during regular worktime in order to avoid the necessity of overtime on the project. Further, the proposal would prohibit management from assigning nonunit personnel along with unit members during overtime periods in order to finish the work more quickly. Thus, as the Council found with regard to the proposal in Tidewater, the instant proposal "explicitly would deny management the authority to assign 'bargaining unit work' to nonunit employees" and would, therefore, establish a principle of bargaining unit work preservation.

Finally, the proposal at issue here is clearly distinguished from the provision involving overtime which was held to be negotiable by the Council in its recent Miami decision.[17/] There the Council found the disputed provision to be concerned solely with "a procedure for the assignment of overtime," similar to the Philadelphia proposal discussed above, and explained further that:

17/ Local 1485, National Federation of Federal Employees and Coast Guard Base, Miami Beach, Florida, FLRC No. 75A-77 (Aug. 2, 1976), Report No. 110. The provision found by the Council to be negotiable under section 11(a) of the Order provided:

Article X (Overtime)

Section 6. The Employer shall not assign normal scheduled overtime to the employees who do not perform this job description during the week except in emergency situations.

> Under the disputed provision in the present case, if management determines that "normal scheduled overtime" work is necessary to accomplish certain tasks, which are assigned to and performed "during the week" by particular employees at the base, then management shall not assign the same tasks to other employees to perform on overtime, "except in emergency situations." Thus, it is clear that the instant provision, unlike the proposal in Tidewater: (1) is concerned only with the type of work which management has previously assigned to unit employees to perform on a regular-time basis, i.e., "during the week"; (2) relates to such work only when the agency has specifically designated it to be performed as scheduled overtime; and (3) would not restrict management in any way in otherwise assigning to unit or nonunit employees work to be performed during periods which have not been designated as scheduled overtime. [Emphasis in original.]

The proposal in the instant case, however, involves more than merely a procedure for the assignment of work which management has designated to be performed as scheduled overtime. As already indicated the proposal here at issue by its plain language would prevent management from employing nonunit personnel at any time, for any work if such employment would have the effect of denying overtime to unit members. Thus, the proposal clearly contravenes "the substantive right as reserved to management" by section 12(b)(5) of the Order "to determine the type of personnel, or which personnel, will conduct particular agency operations."

Accordingly we must conclude that the agency determination, that the proposal is nonnegotiable, was proper and must be sustained.

6. Article XIX

The final disputed proposal is as follows:

> Section 6. The Employer agrees that requests for scheduled and unscheduled annual leave due to emergencies or other unforeseen circumstances will be approved and granted in fifteen (15) minute increments.

The agency determined that the proposal conflicts with published agency policies and regulations[18/] establishing the minimum leave charge at one hour with additional leave charged in multiples of one hour, and therefore

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18/ Air Force Regulation (AFR) 40-630, "Leave Administration," para. 4a provides in pertinent part:

> The minimum charge for either annual or sick leave is 1 hour, and additional leave is charged in multiples of 1 hour.

is nonnegotiable under section 11(a) of the Order.[19/] The union contends that the regulations relied upon violate the Federal Personnel Manual (FPM) (Chapter 630.2-4b, set forth hereinafter) and consequently, are not a valid bar to negotiation of the proposal.

Since the disposition of the negotiability dispute as to Article XIX hinges upon the interpretation of the relevant provision of the FPM and since the Civil Service Commission has primary responsibility for the issuance and interpretation of its own directives, that agency was requested, in accordance with Council practice, for an interpretation of Commission directives as they pertain to the question presented in the case. The Commission replied in relevant part as follows:

> We find no violation of Commission policy or instruction in the Air Force regulation setting the minimum leave charge at one hour. FPM Chapter 630, Subchapter 2-4b provides--
>
> > "Unless an agency establishes a minimum charge of less than one hour, or establishes a different minimum charge through negotiations, one hour is the minimum charge for either annual or sick leave, and additional leave is charged in multiples of one hour. . . ."
>
> The intent of this provision is to preclude an agency from establishing by regulation a minimum leave charge of more than one hour. The agency has complete discretion to establish a minimum charge of one hour or less by administrative action or to establish a different minimum (either more or less than one hour) through negotiation. [Emphasis in original.]

Based on the foregoing interpretation by the Civil Service Commission of its own directives, we find that AFR 40-630 is not in conflict with Civil Service Commission requirements. Further, the union does not contend nor is it apparent that the regulation in question is otherwise improper as a bar to negotiations under section 11(a). Accordingly, we must sustain the agency head's determination that the instant proposal is nonnegotiable because it conflicts with published agency policies and regulations.

19/ Section 11(a) at the time the agency head rendered his determination and the union petitioned the Council for review thereof provided, in pertinent part, for an obligation to bargain "so far as may be appropriate under . . . published agency policies and regulations . . . ."

Conclusions

For the reasons discussed above and pursuant to section 2411.28 of the Council's Rules and Regulations, we find that the agency head's determination that the proposals here involved are nonnegotiable was proper and must be sustained.

By the Council.

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

Issued: October 22, 1976

Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Kane, Arbitrator). The arbitrator, interpreting section 12(a) of the Order as incorporated in the parties' agreement, determined that the union's grievance concerning an employee's work assignment was arbitrable, but that the assignment action did not violate the parties' agreement or a facility handbook, and therefore denied the grievance. The agency filed an exception to the arbitration award with the Council, contending that the award, to the extent that it found the grievance arbitrable, violated the Order; and in this regard, the agency also requested a statement on a major policy issue allegedly presented by the award and simultaneously asserted the alleged major policy issue as a ground, or in support of a ground, for review of the award. The union opposed the petition for review, requesting dismissal of the appeal for various reasons, including procedural grounds.

Council action (October 22, 1976). The Council denied the union's request to dismiss the agency's appeal on procedural grounds; and denied the agency's request for a statement on a major policy issue as not meeting the requirements of section 2410.3(b)(6) of the Council's rules of procedure. In that latter regard, the Council noted that the allegation that the subject award presented a major policy issue was not a ground for review of an arbitration award under section 2411.32 of the Council's rules. Finally, the Council, without in any manner adopting the arbitrator's interpretation of section 12(a) of the Order, held that the agency's petition did not contain a description of facts and circumstances to support its exception alleging that the arbitrator's award violated the Order. Accordingly, the Council denied the agency's petition since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

October 22, 1976

Mr. R. J. Alfultis
Director of Personnel and
Training
Federal Aviation Administration
Department of Transportation
Washington, D. C. 20591

Re: Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Kane, Arbitrator), FLRC No. 76A-31

Dear Mr. Alfultis:

The Council has carefully considered your petition for review of an arbitrator's award, and the union's opposition thereto, in the above-entitled case.

According to the arbitrator's award, the grievance in this case alleged that a floor supervisor of the Anchorage, Alaska Air Route Traffic Control Center had assigned an air traffic controller who was taking medication to assist another controller in an emergency situation and that such assignment had violated Article 42, Section 1 of the parties' collective bargaining agreement[1/] as well as a provision of the facility handbook dealing with staffing.[2/] In his award the arbitrator stated the issues before him as follows:

1/ Article 42, Section 1 of the parties' labor agreement incorporates, as required by the Order, section 12(a) of Executive Order 11491, as amended, into the agreement and provides as follows:

> In the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level.

2/ According to the award, the facility handbook contained a provision prohibiting the performance of particular duties by controllers who use certain drugs or medications.

I. Did management violate the Patco/AAA [sic] Agreement by not adhering to their published agency policies and regulations as described by Article 42 of the Agreement?

II. If the answer is yes: What is the remedy available to the parties?

III. The subject matter of the dispute is not arbitrable under provisions of Executive Order 11491, in effect and the Patco/AAA [sic] Contract, Section 2 of Article 42.3/ [Footnote added.]

In first addressing the question of whether the grievance was arbitrable, the arbitrator examined Article 42, Section 1 of the collective bargaining agreement (which, as previously noted, incorporates section 12(a) of the Order into the agreement), and determined that the issue was arbitrable, concluding that Article 42, Section 1 established a grievant's right to grieve over an alleged violation of an agency policy or regulation. The arbitrator then determined that the floor supervisor's assignment of the controller did not violate the facility handbook or the parties' labor agreement and therefore denied the grievance.

3/ Article 42, Section 2 of the parties' labor agreement incorporates, as required by the Order, section 12(b) of Executive Order 11491, as amended, into the agreement and provides as follows:

> Management officials of the agency retain the right, in accordance with applicable laws and regulations:
>
> (a) to direct employees of the agency;
>
> (b) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
>
> (c) to relieve employees from duties because of lack of work or for other legitimate reasons;
>
> (d) to maintain the efficiency of the Government operations entrusted to them;
>
> (e) to determine the methods, means, and personnel by which such operations are to be conducted; and
>
> (f) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

The agency requests that the Council accept its petition for review of the arbitrator's award based on the exception discussed below.4/ The union filed an opposition.5/

4/ In addition to the petition for review, the agency's submission to the Council also included a request pursuant to section 2410.2 of the Council's rules of procedure for a statement on a major policy issue assertedly presented by the arbitration award. The submission simultaneously asserted the alleged major policy issue as a ground, or in support of a ground, for review of the arbitration award under section 2411.32 of the Council's rules. As to the request for a statement on a major policy issue, the Council has carefully considered the request pursuant to the provisions of section 2410.3 of its rules and, noting particularly that the alleged issue has previously been addressed by the Council (see note 6 infra), has concluded that it does not appear that the submission meets the requirements of section 2410.3(b)(6) of the Council's rules which provides:

> (b) On deciding whether to issue an interpretation or a policy statement, the Council shall consider:
>
> . . . . . .
>
> (6) Whether Council resolution of the question of interpretation or major policy issue would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the order.

As to the petition for review of the arbitration award itself, the allegation that the award presents a major policy issue is not a ground for review of an arbitration award under section 2411.32 of the Council's rules.

5/ In its opposition to the petition for review the union in part requests dismissal of the agency's petition on two procedural grounds. The union first contends that there is no evidence in the petition that the agency's submission was approved by the head of the agency or his designee as required by section 2411.42 of the Council's rules. Secondly, the union contends that the filing of the petition by the Office of the Secretary of Transportation through the Director of Personnel and Training was improper. In this regard, the union argues that there were two parties, PATCO and the Federal Aviation Administration (FAA), to the arbitration proceeding, and that therefore the Department of Transportation is not a "party aggrieved" by the award under section 2411.33(a) of the Council's rules.

(Continued)

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its exception, the agency contends that the award, to the extent that it found the grievance arbitrable, violates section 12(a) of the Order. While the exception that the award violates the Order states a ground upon which the Council will grant review of an arbitrator's award, the Council is of the opinion that the petition does not contain a description of facts and circumstances to support this exception. In this regard it is noted that the agency prevailed on the merits of the subject grievance at the arbitration hearing, that the grievance was denied, and that the arbitrator's award neither requires the agency to perform any affirmative act which is contrary to the Order or law, nor does it deny any rights guaranteed by the Order or law. Therefore, this exception provides no basis for acceptance of the agency's petition under section 2411.32 of the Council's rules.

Accordingly, your petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.6/

(Continued)

The Council finds no merit in either of the union's contentions. As to the provisions of section 2411.42, the Council, under this section of its rules, consistently refrains, as a matter of course, from inquiring into an internal delegation of authority to file an appeal with the Council, particularly where the individual filing the appeal is a high level representative of either the agency or the labor organization involved. Here, the Director of Personnel and Training is clearly a high level agency official. As to the union's contention that the Department of Transportation (DOT) is not a party to the instant proceeding, FAA is a constituent element of DOT and as such, DOT is a party entitled to file a petition for review of an arbitration award involving FAA pursuant to section 2411.33(a) of the Council's rules and regulations. Accordingly, the union's request to dismiss the agency's petition on procedural grounds is denied.

6/ The Council in denying the petition for review of the award, in no manner adopts the arbitrator's interpretation of section 12(a) of the Order made in connection with his finding that the subject grievance was

(Continued)

By the Council.

Sincerely,

Harold D. Kessler
Acting Executive Director

cc: W. B. Peer
PATCO

(Continued)

arbitrable. In Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96, the Council noted with regard to a contention concerning section 12(a) of the Order similar to the interpretation given to section 12(a) by the arbitrator in the instant case:

> The theory which appears to underlie the union's contention is that by operation of section 12(a) of the Order, which is incorporated in . . . the subject agreement, the coverage and scope of the negotiated grievance procedure is extended to include grievances alleging violations of all laws, regulations of appropriate authorities and policies, including agency policies and regulations. However, section 13 of Executive Order 11491 provides "[t]he coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order." [Emphasis added.] The union's theory concerning the interpretation of section 12(a) of the Order would render section 13 meaningless. The scope of the negotiated grievance procedure is to be negotiated by the parties. Section 12(a) constitutes an obligation in the administration of labor agreements to comply with the legal and regulatory requirements cited therein and is not an extension of the negotiated grievance procedure to include grievances over all such requirements. FLRC No. 75A-101, Report No. 96 at 5 of the decision, n.8. [Emphasis in original.]

Defense Supply Agency and American Federation of Government Employees, Local 2047 (AFL-CIO) (Daly, Arbitrator). The arbitrator dismissed the grievance concerning the manner of the activity's implementation of a previous arbitration award "on the basis of arbitrability without any consideration being given to the merit of the dispute." The union filed an exception to the award with the Council, contending, in effect, that the award was contrary to the Order. The union also requested a stay of the award.

Council action (October 22, 1976). The Council held, in effect, that although the union's exception stated a ground upon which the Council will grant review of an arbitrator's award, the union's petition did not describe facts and circumstances to support its exception. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. The Council likewise denied the union's request for a stay of the award.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

October 22, 1976

Ms. Maralyn G. Blatch, Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D. C. 20005

Re: Defense Supply Agency and American Federation of Government Employees, Local 2047 (AFL-CIO) (Daly, Arbitrator), FLRC No. 76A-34

Dear Ms. Blatch:

The Council has carefully considered your petition for review of an arbitrator's award, and the agency's opposition thereto, filed in the above-entitled case.

According to the arbitrator's award, the dispute in this case concerned the agency's implementation of an arbitration award rendered by a different arbitrator in a previous arbitration between the same parties.[1/] In the previous arbitration the arbitrator had directed the activity to fill a position in accordance with the requirements of the parties' collective bargaining agreement. Subsequently, the activity took steps to implement the award; in doing so the agency extended its area of consideration beyond the Defense Supply Agency. The union contended that by failing to limit the area of consideration in filling the position to employees of the Defense Supply Agency, the activity was not complying with the award and the union sought clarification of the award from the previous arbitrator. When the activity refused to join in the request for clarification the arbitrator declined to clarify the award. Thereafter the union filed a grievance resulting in arbitration and the award which has now been appealed to the Council.

According to the award in the instant case, the union phrased the issue before the arbitrator in this case as follows:

> Whether or not the Vacancy Announcement of August 13, 1975, Number 13975 [issued by the activity in implementation of the previous award] is in conformity with policies existing in May 1974 at the time of [the previous award].

1/ Defense Supply Agency and American Federation of Government Employees, Local 2047 (AFL-CIO), FMCS Case No. 75K07894 (Strongin, Arbitrator), May 15, 1975. A copy of this award was submitted to the Council by the union as part of its petition for review in the instant case.

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The union sought the following remedy:

> [T]o limit the area of consideration to the Defense Supply Agency (DSA), and that qualifications of applicants be that as they existed prior to May 1974.

The activity contended before the arbitrator that the issue as phrased by the union was not arbitrable, asserting that the responsibility for enforcement and/or implementation of arbitration awards is that of the Assistant Secretary of Labor for Labor Management Relations. In his discussion the arbitrator quoted section 13(d) of the Order and concluded as follows:

> Since the [previous award] itself is not questioned, but the manner of implementation is, and since the Parties cannot resolve the question of arbitrability - there is no doubt that the matter may or should be referred to the Assistant Secretary of Labor for Labor-Management Relations for decision.
>
> The arbitrator has no right to infringe upon the area of responsibility and authority of the Assitant Secretary of Labor for Labor-Management Relations as specified in Section 13(d) of Executive Order 11491.
>
> Accordingly, the Union's grievance is dismissed on the basis of arbitrability without any consideration being given to the merits of the dispute.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below and requests a stay of the award. The agency filed an opposition.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its exception the union contends, in effect, that the award in this case is contrary to the Order, specifically citing section 13(d), as well as Council precedent interpreting the Order, especially that precedent regarding the appropriate method of enforcing and clarifying arbitration awards.

While the union's exception that the award is contrary to the Order states a ground upon which the Council will grant review of an arbitrator's award, the Council is of the opinion that the union's petition does not describe facts and circumstances to support its exception. Section 13(d) of the Order currently provides as follows:

> (d) Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter for which a statutory appeal procedure exists, shall be referred to the Assistant Secretary for decision. Other questions as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under that agreement, may by agreement of the parties be submitted to arbitration or may be referred to the Assistant Secretary for decision.

The Council addressed section 13(d) in the January 1975 report and recommendations on the amendment to the Order as follows:

> In order to insure consistent application of the 1971 revisions with respect to negotiated grievance procedures, and especially the consistent application and interpretation of those revisions with respect to the coverage of statutory appeal procedures, provision was made in the present section 13(d) for the referral to the Assistant Secretary of questions as to whether a grievance is on a matter subject to the grievance procedure in an existing agreement or is subject to arbitration under that agreement. The need for consistency existed primarily because of the distinction made in section 13(a) between grievances preempted by statutory appeal procedures and grievances within the coverage of negotiated grievance procedures. Section 13(d) did not reflect this distinction, however. Our review indicates that such a distinction is in order.
>
> Of the various proposals concerning the present section 13(d) a number requested clarification as to whether the Order requires all questions as to whether a matter is grievable or arbitrable under the negotiated procedure to be determined exclusively by the Assistant Secretary. Several proposals were made to revise section 13(d) to permit the parties to agree to submit such questions to the arbitrator under negotiated grievance procedures.
>
> The Council concluded that the proposals to permit the parties to agree to refer such questions to the arbitrator, in lieu of referring them to the Assistant Secretary, have merit. However, since some questions will arise because it is asserted that a grievance is over a matter subject to statutory appeal procedures, we foresee a continuing need for a single uniform body of case

> precedent in the decisions relating to the coverage of statutory appeal procedures. This need can be met best by continuing to refer such questions to the Assistant Secretary. We therefore recommend that section 13(d) be revised to provide for the resolution of those questions by referral to the Assistant Secretary for decision. However, we recommend that the parties be permitted bilaterally to agree to refer all other questions as to whether a matter is grievable or arbitrable under the terms of a negotiated grievance procedure to the arbitrator in lieu of referral to the Assistant Secretary.2/

In this case, however, there is no clear indication that, when the agency raised the question of arbitrability before the arbitrator, both parties then bilaterally or mutually agreed to allow the arbitrator to decide that question. Thus, under the circumstances of this case, in the absence of such an agreement by the parties, the arbitrator determined that the question of arbitrability "may or should be referred to the Assistant Secretary . . . for decision." Accordingly, the union's petition for review does not furnish sufficient facts and circumstances to support its exception that the award violates section 13(d) of the Order3/ as required by section 2411.32 of the Council's rules of procedure.

2/ Labor-Management Relations in the Federal Service (1975), at 44.

3/ In his award, the arbitrator quoted section 13(d) as follows:

> Questions that cannot be resolved by the parties as to whether or not a grievance is on a matter subject to the grievance procedure in an existing agreement, or is subject to arbitration under the [sic] agreement, may be referred to the Assistant Secretary for decision.

That section is quoted and relied upon by the arbitrator as it appeared prior to amendment by E.O. 11838 of February 6, 1975, despite the fact that the award indicates that the instant arbitration, and the events which gave rise thereto, occurred subsequent to the effective date of E.O. 11838. The amendments to E.O. 11491 made by E.O. 11838, with the exception of certain amendments to section 11(a) and 11(c) of the Order became effective on May 7, 1975. Under the particular facts of the case, however, the reliance by the arbitrator on section 13(d) prior to its amendment is not material to Council resolution of the matter. In this regard, it should be noted that the only substantive change made to section 13(d) (set forth as amended in text, supra,) by E.O. 11838 was the requirement that questions as to whether a grievance is over a matter

(Continued)

Likewise, the Council is of the opinion that there are no facts and circumstances in the union's petition to support its assertion that the arbitrator's award conflicts with the Order as interpreted by the Council regarding the appropriate method of enforcing and clarifying arbitration awards. Regarding the enforcement of arbitration awards, the Council, in Department of the Army, Aberdeen Proving Ground and International Association of Machinists and Aerospace Workers, Local Lodge 2424, A/SLMR No. 412, FLRC No. 74A-46 (March 20, 1973), Report No. 67, stated in pertinent part:

> . . . [T]he enforcement of arbitration awards was not a role contemplated for the Council in carrying out its function of considering "exceptions to arbitration awards" under section 4(c)(3) of the Order and as amplified in the Study Committee Report which led to the issuance of the Order. . . . Instead, the resolution of enforcement questions under the unfair labor practice procedures of the Assistant Secretary is required to assure the effectuation of the purposes of the Order.
>
> Therefore, the Council holds that the Assistant Secretary of Labor has the authority under sections 6(a)(4) and 19 of the Order to decide unfair labor practice complaints which allege that a party has refused to comply with an arbitration award issued under a grievance procedure contained in an agreement negotiated under the Order. Such authority obtains: (1) if the party has failed to file with the Council a petition for review of the award under the Council's rules of procedure, or (2) if such appeal was filed but the Council rejected acceptance of the appeal or issued a decision upholding the award. . . .4/ [Footnote added.]

(Continued)

subject to a statutory appeal procedure be referred to the Assistant Secretary. Thus the Council, in the report and recommendations on the amendment to the Order, recommended that "section 13(d) be revised to provide for the resolution of [questions concerning the coverage of statutory appeal procedures] by referral to the Assistant Secretary for decision." [Emphasis added.] Labor-Management Relations in the Federal Service (1975) at 44 (set forth in text, supra.) The further specification in section 13(d) recommended by the Council relating to the right of parties to agree to submit a question of grievability or arbitrability to an arbitrator for determination only clarified previously existing rights and added nothing new to section 13(d).

4/ This holding, that enforcement questions are resolved under the unfair labor practice procedures of the Assistant Secretary, has been consistently applied by the Council. Pacific Southwest Forest and Range Experiment

(Continued)

As to the clarification of arbitration awards, where the meaning of an award is unclear to the parties who contracted for arbitration, those parties may agree to seek clarification or interpretation of the award from an arbitrator.5/ Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator), FLRC No. 74A-64 (March 3, 1976) Report No. 100. However, the union in its petition for review in the instant case only cites to Council precedent regarding enforcement and clarification of arbitration awards and, in the Council's opinion, in so doing has not established a nexus between the arbitrator's award dismissing the grievance and the alleged conflict with the aforementioned Council precedent. In this regard it is noted that the union states that it filed the grievance in this case in an effort to obtain clarification of the previous award. As previously indicated, in the absence of a mutual agreement by the parties to submit a question of arbitrability to an arbitrator, the question of arbitrability may be referred by either party to the Assistant Secretary for decision. Thus, in this case, without considering the merits of the dispute, the arbitrator determined that the question of arbitrability "may or should be referred to the Assistant Secretary . . . for decision." Therefore, the union's petition fails to present the necessary facts and circumstances in support of its assertion that the award conflicts with the Order as interpreted by the Council regarding the appropriate method of enforcing and clarifying arbitration awards, and no basis is thus provided for the acceptance of the union's petition under section 2411.32 of the Council's rules.

(Continued)

Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Meyers, Arbitrator) FLRC No. 75A-4 (March 18, 1976) Report No. 101, n. 10; American Federation of Government Employees, Local 2677, and Office of Economic Opportunity (Kleeb, Arbitrator) FLRC No. 74A-57 (Aug. 29, 1975), Report No. 82; and American Federation of Government Employees Local 2677 and Office of Economic Opportunity (Dougherty, Arbitrator), FLRC No. 74A-4 (Aug. 29, 1975), Report No. 82.

5/ In addition, should the Assistant Secretary determine, in the course of processing a case of enforcement of an arbitration award through his unfair labor practice procedures, that a dispute exists between the parties over the meaning of an award and that clarification and interpretation of the award is necessary to resolve the dispute, he may direct the parties to resubmit the award to the arbitrator for such clarification and interpretation. American Federation of Government Employees, Local 2677, and Office of Economic Opportunity (Kleeb, Arbitrator, FLRC No. 74A-57 (Aug. 29, 1975), Report No. 82.

Accordingly, the Union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure. Likewise, the union's request for a stay of the award is denied.

By the Council.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

cc: C. A. Duke
DSA

Long Beach Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO (Leventhal, Arbitrator). The union excepted to the arbitrator's reasoning as to the central issue in the dispute, which related to the grievant's entitlement to overtime pay, and to the arbitrator's interpretation of the parties' agreement as denying him authority over such a dispute.

Council action (November 5, 1976). The Council held that the union's exception provided no basis for acceptance of the petition under section 2411.32 of the Council's rules of procedure. Accordingly, the Council denied the union's petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

November 5, 1976

Mr. Thomas Martin
19626-1/2 South Normandie Avenue
Torrance, California 90502

Re: Long Beach Naval Shipyard and Federal Employees Metal Trades Council, AFL-CIO (Leventhal, Arbitrator), FLRC No. 76A-59

Dear Mr. Martin:

The Council has carefully considered your petition for review of the arbitrator's award in the above-entitled case.

According to the award, this case arose when the grievant was injured near the end of his regularly scheduled shift and went to the activity's dispensary for treatment. Although not released from the dispensary until approximately 1 hour after the end of his shift, the grievant received no overtime pay for that hour. The union, relying upon its reading of a certain activity instruction,[1/] invoked arbitration on the question of whether overtime should have been paid. The activity,

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1/ The instruction, Shipyard Instruction 12550.1, is characterized by the arbitrator as dealing with the activity's obligations under the Fair Labor Standards Act (29 U.S.C. §§ 201-219 (1970), as amended (Supp. V, 1975)) and is partially set forth in the arbitrator's award as follows:

> 6 b - Basic Rule
>
> "Hours worked" in general, include all the time an employee is required to be on duty or on the Agency's premises or at a prescribed workplace, and all time during which he is "suffered or permitted" to work for the agency.
>
> 7. - Overtime Entitlement and Computation
>
> a. FLSA vs. other Pay Laws. The FLSA does not change anything on overtime entitlements with respect to "exempt" employees; however, "non-exempt" employees, for overtime purposes, beginning May 1, 1974 are covered by two laws. Where FLSA and other statutes are not consistent, non-exempt employees will receive the greater benefit.

in turn, cited a second activity instruction[2/] as controlling over the question of whether the grievant was entitled to overtime and further asserted that the matter was not arbitrable since the Civil Service Commission has jurisdiction over the enforcement of Fair Labor Standards Act (FLSA) provisions. The union then contended before the arbitrator that the question was arbitrable because there existed an "inherent contradiction" between the activity's two instructions.

In his award the arbitrator stated that there was no dispute between the parties that if the issue is arbitrable the matter to be decided is:

> Is an employee entitled to overtime pay if he remains at the dispensary beyond his shift?

Addressing first the issue of arbitrability the arbitrator ruled that, under the provisions of Article XXX, Section 2 of the parties' agreement,[3/] the arbitrability of a dispute might properly be challenged when a "higher level authority . . . [c]learly has jurisdiction over the issue [and] has not made an express ruling regarding the matter in dispute . . . ." The arbitrator found such an authority in the Civil Service Commission, which, in his view, "has the authority to administer FLSA for the employees represented by the [union]" and which "has not

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2/ According to the arbitrator, this second instruction (Shipyard Instruction 12630.1D) was issued subsequent to Instruction 12550.1, supra note 1, and provides in part as follows:

> f. Medical examination and treatment for on-the-job injury.
>
> (1) Any employee who is injured on the job will be sent to the Dispensary for examination and treatment. Time so spent at the Dispensary will be paid time (not charged to leave) provided it is within the limits of his regularly scheduled shift or overtime shift. If the treatment extends beyond the scheduled shift, time so spent will not be paid time. . . .

3/ According to the award, Section 2 of Article XXX ("Grievance Procedure") provides as follows:

> This procedure is the sole method of processing employee grievances involving interpretation or application of this agreement or any alleged violation thereof. It is agreed that an employee grievance concerning the interpretation of any Department of the Navy or higher authority regulation or policy shall be forwarded via the Employer to the cognizant subject matter office in the Department of the Navy for review and decision. . . .

issued a definitive ruling pertaining to the issue in this dispute." Noting that the activity had already referred the disputed overtime question through agency channels to the Civil Service Commission for guidance, the arbitrator found that the Commission was in effect "being asked if Instruction 12630.1D as it deals with payment for time spent at the dispensary is in conflict with FLSA." The arbitrator then concluded that "[t]he referral of this type of dispute and the concomitant challenge to arbitrability are proper actions" for the activity to take under Article XXX, Section 2 of the parties' agreement, and that the question of conflict between the two activity instructions "is therefore not arbitrable." Accordingly, the arbitrator held himself without jurisdiction over the matter.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below. The agency did not file an opposition to the union's petition.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

The union states its exception to the arbitrator's award as follows: "It is the contention of petitioner union that the arbitrator was in error and that the resolution of the Shipyard instruction dispute was within the scope of the arbitrator's authority." In support of its exception, the union refers to the two pertinent activity instructions and asserts that the arbitrator should have found that "the issue [in this case] is a resolution of the dispute of two conflicting Activity Instructions and does not involve the [Fair Labor Standards Act] or the [Civil Service Commission]." Since the arbitrator found specifically to the contrary and interpreted the parties' negotiated grievance procedure as excluding such a dispute from arbitration, in the Council's opinion the union is in substance merely disagreeing with the arbitrator's conclusion. That is, the union in essence objects both to the arbitrator's reasoning as to the central issue of the dispute and to his interpretation of the parties' agreement as denying him authority over such a dispute.

As the Council has held, it is the arbitrator's award--rather than the reasoning employed in arriving at that award--which is subject to review. E.g., Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (Jan. 30, 1976), Report No. 96. Therefore, to the extent the union's exception in this case rests upon disagreement with the arbitrator's reasoning, as reflected in his failure to adopt the union's

characterization of the dispute before him, the exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules. Likewise, the Council has repeatedly held that the interpretation of provisions in a negotiated agreement is a matter to be left to the arbitrator's judgment. E.g., Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO and Norfolk Naval Shipyard (Seidenberg, Arbitrator), FLRC No. 75A-110 (Apr. 13, 1976), Report No. 103, and cases cited therein. Therefore, this exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: James Houston
Long Beach Naval Shipyard

Automated Logistics Management Systems Agency and National Federation of Federal Employees, Local 1763 (Erbs, Arbitrator). The arbitrator denied the grievances related to a reduction-in-force. The union filed exceptions to the arbitrator's award with the Council, alleging, in essence, (1) that the award violated appropriate regulations; (2) that the award violated the Order; (3) that the arbitrator exceeded his authority; and (4) that the arbitrator reached an incorrect result in his interpretation of the parties' agreement.

Council action (November 5, 1976). As to (1), (2), and (3), the Council held that the union's petition did not describe facts and circumstances to support these exceptions. As to (4), the Council held that this exception did not state a ground upon which the Council will accept a petition for review of an arbitration award. Accordingly, the Council denied the union's petition because it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

November 5, 1976

Ms. Janet Cooper, Staff Attorney
National Federation of
Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Automated Logistics Management Systems Agency and National Federation of Federal Employees, Local 1763 (Erbs, Arbitrator), FLRC No. 76A-69

Dear Ms. Cooper:

The Council has carefully considered your petition for review of an arbitration award, and the agency's opposition thereto, in the above-entitled case.

According to the arbitrator's award, this matter involved the grievances of five employees of the activity who, through a reduction-in-force (RIF), were reduced from their former grade of GS-13. In regard to this RIF, according to the award, the grievances alleged that the activity had violated Article 15, Section 3[1/] of the parties' labor agreement by failing to make every effort to train or retrain the grievants until they were repromoted to GS-13 positions, and that the activity had violated Article 3, Section 5[2/] of the parties' labor agreement concerning

1/ According to the award, Article 15, Section 3 of the parties' labor agreement states, in pertinent part:

> Reduction-in-force actions shall be in accordance with existing directives and regulations. The Employer recognizes the reduction-in-force placement and retreat rights of an employee on approved leave without pay. Every effort will be made to train or retrain employees affected by reductions-in-force, so as to assure priority in any employment opportunities at the same activity or any other agency/activity within the commuting area.

2/ According to the award, Article 3, Section 5 of the parties' labor agreement states, in pertinent part:

> The Employer agrees to consult or advise, as applicable, with the Union prior to making any changes in personnel policies, practices and procedures, or negotiate, under the Amendment Article, any questions arising thereunder, that are applicable to employees in the unit. . . .

consultation over changes in personnel policies. Regarding the alleged violation of Article 15, Section 3, the arbitrator found:

> . . . In accordance with [the] terms [of Article 15, section 3], this arbitrator is of the opinion that the obligation to train applies only to vacancies which are existent at the time of the effective date of the RIF and such obligation does not continue for an indefinite period of time . . . . The arbitrator holds that there has been no violation of Article 15 Section 3.

The arbitrator further determined that there was no violation of Article 3, Section 5 of the agreement, finding that "[t]he Union has not carried the burden of proof that there has been a change in management position." Therefore the arbitrator denied the grievances.

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of its four exceptions discussed below. The agency filed an opposition.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its first exception, the union contends that "the arbitrator's award violates regulations on repromotion rights and career referrals." In support of this exception the union asserts that the award violates FPM chapter 335, subchapter 4, section 4-3c[3/], Department of the Army

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3/ FPM chapter 335, subchapter 4, section 4-3c states, in pertinent part:

> c. Repromotion to grades or positions from which demoted without personal cause. (1) General. An agency must provide for an exception to competitive promotion procedures to allow for repromotion to a grade or position from which an employee was demoted in the agency without personal cause, that is, without misconduct or inefficiency on the part of the employee and not at his request. An agency may provide the same exception for employees who were demoted without personal cause in another agency. Acceptance of a lower-grade position in lieu of reduction in force or in lieu of relocation in a transfer of function is not a demotion at the employee's request for this purpose.

(Continued)

regulations CPR 950-1 and CPR 950-23, and "Colonel Smith's . . . pronouncement dated April 30, 1974."4/

As to the union's assertion that the award violates the Federal Personnel Manual, the Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents a ground that the award violates appropriate regulations. E.g., Office of Economic Opportunity and Local 2677, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator), FLRC No. 75A-26 (May 19, 1975), Report No. 70 at 4 of the digest. Here, however, the union simply quotes at length from the cited portion of the FPM and recites certain facts of the case, advancing no persuasive argument in support of its exception and describing no facts or circumstances sufficient to show that any basis exists for finding the award violative of appropriate regulations. The Council has consistently declined to review arbitration awards where the petition for review fails to set forth any support for the exceptions presented. Airway Facilities Division, Federal Aviation Administration,

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(Continued)

(2) Special consideration for repromotion. An employee demoted without personal cause is entitled to special consideration for repromotion in the agency in which he was demoted. Although he is not guaranteed repromotion, ordinarily he should be repromoted when a vacancy occurs in a position at his former grade (or any intervening grade) for which he has demonstrated that he is well-qualified, unless there are persuasive reasons for not doing so. Consideration of an employee entitled to special consideration for repromotion must precede efforts to fill the vacancy by other means, including competitive promotion procedures, except when another employee has a statutory or regulatory right to be placed in or considered for the position. If a selecting official considers an employee entitled to special consideration for repromotion under this paragraph but decides not to select him for promotion and then the employee is certified to the official as one of the best-qualified under competitive promotion procedures for the same position, the official must state his reasons for the record if he does not then select the employee.

4/ According to the union, Department of Army regulation CPR 950-1 contains "language very similar" to the language in FPM chapter 335, subchapter 4, section 4-3c, and CPR 950-23 outlines the Army's career referral program for automated data processing jobs. According to the union's petition, Colonel Smith's statement of April 30, 1974, concurred in a policy concerning repromotion of employees demoted through no fault of their own.

Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (Aug. 15, 1975), Report No. 82 and cases cited therein. Therefore, the union's assertion that the award violates the Federal Personnel Manual provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Similarly, in regard to the union's assertion that the award violates Department of the Army regulations CPR 950-1 and CPR 950-23, and Colonel Smith's pronouncement dated April 30, 1974, the union simply refers to the regulations and again advances no persuasive arguments in support of its exception and describes no facts and circumstances sufficient to show that any basis exists for granting review of the award on the basis that it is violative of appropriate regulations.5/ Accordingly, the union's first exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its second exception, the union contends that the award violates the Order. In support of this exception the union contends that the arbitrator's finding that the activity had not violated Article 3, Section 5 (set forth n.2, supra), of the parties' labor agreement violates section 11(a) of the Order with respect to the requirement in that section regarding meeting at reasonable times and conferring in good faith with respect to personnel policies and practices and matters affecting working conditions. While the exception that the award violates the Order states a ground upon which the Council will grant review of an arbitration award, the Council is of the opinion that the petition does not contain a description of facts and circumstances to support this exception. In this regard it is noted that the arbitrator specifically found with respect to the alleged violation of Article 3, Section 5 that "[t]he Union has not carried the burden of proof that there has been a change in management [personnel policies, practices and procedures]." In effect, the union is contending that the arbitrator was incorrect in his decision concerning the grievance. The Council has consistently held that the interpretation of contract provisions and, hence, resolution of the grievance is a matter to be left to the arbitrator's judgment. Department of the Air Force, Scott Air Force Base and National Association

5/ We do not pass upon the question whether the cited agency regulations and "Colonel Smith's pronouncement" constitute an "appropriate regulation" within the meaning of section 2411.32 of the Council's rules. Cf. American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator), FLRC No. 75A-45 (Dec. 24, 1975), Report No. 94, and American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (Dec. 5, 1974), Report No. 61.

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of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (Jan. 30, 1976), Report No. 96. Accordingly, the union's second exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

In its third exception, the union contends that the arbitrator went beyond his duty to interpret the contract provisions in question. In support of its exception the union asserts that the arbitrator "began to interpret agency and Civil Service Commission regulations which is specifically outside his realm of authority" under Article 26, Section 18 of the collective bargaining agreement.6/ The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present the ground that the arbitrator exceeded his authority by determining an issue not included in the question(s) submitted to arbitration. Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (Mar. 18, 1976), Report No. 101. However, in this case the Council is of the opinion that the union's exception, if read as contending that the arbitrator exceeded his authority, is not supported by the facts and circumstances described in the petition. In this regard it is noted that the arbitrator specifically discussed and interpreted the contract provisions in question and found no violations. Moreover, the Council stated in the January 1975 report and recommendations on the amendment to the Order, as follows:

> In the course of the review some question was raised by agencies concerning the interpretation and application of regulations by arbitrators in the resolution of grievances through negotiated grievance procedures. Under the present section 13 arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation. . . .7/

6/ According to the union, Article 26, Section 18 of the parties' agreement provides:

> Questions on the interpretation of published AMC and Department of Army policies or regulations, provisions of law, or regulations of appropriate authorities outside the Department of Army shall not be subject to this grievance procedure regardless of whether such policies, laws or regulations are quoted, cited, or otherwise incorporated or referenced in the Agreement.

7/ Labor-Management Relations in the Federal Service (1975), at 44.

Thus in the instant case the arbitrator considered agency and Civil Service Commission regulations in the course of resolving the grievance before him. Accordingly, the union's third exception provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.8/

In its fourth exception, the union contends that the arbitrator's decision regarding Article 15, Section 3 was contrary to the weight of the evidence as to the intent of the parties concerning that section and was thus arbitrary and capricious. In essence, it appears that the union is merely contending that the arbitrator reached an incorrect result in his interpretation of the agreement. As previously stated, the Council has consistently held that disagreement with the arbitrator's interpretation of contract provisions and resolution of grievances is not a ground for review of an arbitrator's award. Accordingly, the union's fourth exception does not state a ground upon which the Council will accept a petition for review of an arbitration award.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: R.G. Walker
Army

8/ The union also asserts that the arbitrator exceeded his authority because in interpreting Article 15, Section 3 of the parties' agreement he "sought a solution in Article 15, Section 4, which the union never felt was violated." However, the union cites no Council or private sector precedent, nor has our research disclosed any, which would support Council acceptance of a petition for review on the grounds that an arbitrator, in the course of interpreting a particular provision of an agreement and deciding if that provision was violated, referred to other provisions in the agreement.

U.S. Department of Agriculture and Office of Investigation and Office of Audit, A/SLMR No. 643. The Assistant Secretary, upon the filing of two separate unfair labor practice complaints by the National Federation of Federal Employees (NFFE), found, respectively, that the agency and its Office of Investigation (OI) and Office of Audit (OA) did not violate section 19(a)(1), (2), (5) and (6) of the Order by refusing to negotiate a new collective bargaining agreement, as alleged by NFFE in the first complaint; and that the agency did not violate section 19(a)(1) and (5) of the Order by invoking section 3(b)(4) of the Order so as to exclude the employees of the OI and OA from the coverage of the Order, as alleged by NFFE in the second complaint. NFFE appealed to the Council, contending that the decision of the Assistant Secretary with respect to the first complaint was arbitrary and capricious and presented major policy issues; and that his decision with respect to the second complaint presented major policy issues.

Council action (November 5, 1976). The Council held that the decision of the Assistant Secretary did not appear arbitrary and capricious and did not present any major policy issues. Accordingly, since NFFE's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure, the Council denied review of the appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

November 5, 1976

Ms. Lisa Renee Strax, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: U.S. Department of Agriculture and Office of Investigation and Office of Audit, A/SLMR No. 643, FLRC No. 76A-74

Dear Ms. Strax:

The Council has carefully considered your petition for review, and the opposition thereto filed by the agency, in the above-entitled case.

This case arose upon the filing of two unfair labor practice complaints by the National Federation of Federal Employees, Local 1375 (NFFE). One complaint alleged that the U.S. Department of Agriculture (agency), and the agency's Office of Investigation (OI) and Office of Audit (OA) violated section 19(a)(1), (2), (5), and (6) of the Order by refusing to negotiate with NFFE concerning a new collective bargaining agreement. The other complaint alleged that the agency violated section 19(a)(1), (4), (5), and (6) of the Order when it invoked section 3(b)(4) of the Order in determining that the agency's OI and OA fell within the meaning of that section.

As found by the Assistant Secretary, the agency's Office of Inspector General (OIG) granted exclusive recognition to NFFE in 1964 for a unit of all investigatory employees. In 1966, OIG granted exclusive recognition to NFFE for a unit of all auditors. The two units were later merged into one by the terms of the parties' collective bargaining agreement. In January 1974, the functions, delegations, and responsibilities pertaining to the investigative activities and the audit activities were transferred to two separate entities, the OI and OA, respectively. Discussions were thereafter held between the agency and NFFE with respect to the agency reorganization, an amendment of certification (AC) petition (which the parties jointly filed with the Assistant Secretary, although NFFE subsequently withdrew its support) with respect to the bargaining unit as a result of the reorganization, and the tentative scheduling of a date to discuss renegotiation of the agreement which terminated April 10, 1974. In approximately May 1974, the American Federation of Government Employees (AFGE) filed a representation petition (RO), seeking to represent eligible employees in the OI, Southwest Region, Temple, Texas. NFFE did not timely intervene in that proceeding. On December 11, 1974, the agency informed NFFE that because AFGE's RO petition was pending, it would be "inappropriate to renegotiate the contract" at that time, and on December 12, NFFE charged the agency with refusal to renegotiate the agreement. On

January 2, 1975, the Under Secretary of Agriculture, on behalf of the agency and in the absence of the Secretary of Agriculture, invoked section 3(b)(4) of the Order and withdrew recognition from NFFE as the bargaining representative for OI and OA.

The Assistant Secretary, adopting the findings, conclusions, and recommendations of the Administrative Law Judge (ALJ), found that the agency, OI, and OA did not violate section 19(a)(1), (2), (5), and (6) of the Order by refusing to negotiate a new agreement as alleged, since the record failed to establish that they failed or refused to negotiate with NFFE at any time prior to December 11, 1974, concerning a new agreement, and since there was no obligation to do so while the RO petition filed by AFGE was pending. In the latter regard, he noted that, if the agency had negotiated a new agreement with NFFE, it would have violated the agency's obligation to remain neutral during the pendency of an RO petition. Without passing upon whether there would have been any obligation to bargain with NFFE over a unit different than the overall unit, the Assistant Secretary further noted that the record did not establish that NFFE "ever demanded bargaining for such a less than 'overall' unit."

With respect to the second complaint, the Assistant Secretary determined, based on the Council's decision in Audit Division (Code DU), National Aeronautics and Space Agency, Assistant Secretary Case No. 46-1848(RO), 1 FLRC 83 [FLRC No. 70A-7 (Apr. 29, 1971), Report No. 7] (NASA), that the agency did not violate section 19(a)(1) and (5) of the Order by invoking section 3(b)(4) so as to exclude the employees of the OI and OA from the coverage of the Order, since the determination that such employees have as a primary function the responsibility of ensuring that employees of the agency perform their work with honesty and integrity was not arbitrary and capricious. The Assistant Secretary further noted that the standard of review with respect to his factual determination is the same whether a withdrawal of recognition or an initial recognition is involved. Moreover, he concluded the Order does not require an agency to bargain about a section 3(b)(4) determination; rather, that determination is expressly in the agency head's sole discretion. Without deciding whether the agency was obligated to bargain about the impact or implementation of its section 3(b)(4) decision, it was noted that the record does not establish any request by NFFE to bargain about such implementation and impact or any refusal to bargain by the agency.

Finally, the Assistant Secretary noted that since his authority to review an agency head's determination to exclude employees pursuant to section 3(b)(4) of the Order is limited to assessing whether the agency head's factual determination—that the organizational unit involved has as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties—is arbitrary and capricious, it was unnecessary to pass upon the ALJ's conclusion that the determination to apply section 3(b)(4) in the instant case was not made for discriminatory purposes.

In your petition for review on behalf of NFFE, you allege that the decision of the Assistant Secretary with respect to the refusal to negotiate complaint is arbitrary and capricious since the findings of law and fact are not supported by the evidence, and raises as major policy issues: "whether the dilatory tactics employed by the respondent subsequent to a formal request for re-negotiation by the complainant, constituted a refusal to negotiate," and "whether a refusal to re-negotiate a contract can be justified by a third party's pending RO petition filed in regard to a small fraction of the unit covered by the contract." You further contend that the agency head's decision to invoke section 3(b)(4) was not a bar to negotiations prior to January 2, 1975, since such a determination cannot be applied retroactively.

With respect to the complaint growing out of the invocation of section 3(b)(4), you allege as major policy issues: (1) "[W]hether the authority delegated to 'the head of an agency' by virtue of E.O. 11491 S. [section] 3(b)(4), can be exercised by the Under Secretary of an Agency"; (2) "whether the implementation of the decision allegedly reached pursuant to S. [section] 3(b)(4), is reviewable on issues relating to the decision's factual accuracy, its procedural regularity, as well as the existence of bad faith motivation"; (3) "whether the Assistant Secretary's decision reflects an accurate interpretation and application of . . . [NASA] and Naval Electronics Systems Command Activity [Boston, Mass., Assistant Secretary Case No. 31-3371(EO), 1 FLRC 144 [FLRC No. 71A-12 (Jan. 19, 1972), Report No. 18] (NESCA)]" (specifically, you contend that on whatever aspects section 3(b)(3) decisions are reviewable, determinations under section 3(b)(4) are likewise reviewable; the language of the NASA case implies that review of the factual bases of a section 3(b)(4) determination is merely the minimum, but not the exclusive, area for review; and, further, the NASA decision is not applicable to review of a section 3(b)(4) determination made in the context of an unfair labor practice complaint); (4) "[i]n light of the fact that the present case involves the withdrawal of recognition, rather than the initial determination thereof, was the Agency obliged to present issues customarily within the scope of S. [section] 3(b)(4) to the Department of Labor for review"; (5) "whether the previously established bargaining history imposed upon the Agency the duty to timely consult, confer, or negotiate with NFFE Local 1375 in regard to the decision herein challenged"; and (6) what construction is to be given to substantive phrases in section 3(b)(4), contending, in essence, that the Assistant Secretary's decision gives a meaning to those phrases at variance with the intended meaning.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, nor present any major policy issues. With respect to your contention that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that he acted without reasonable justification in reaching his decision herein. In

this connection, your appeal neither discloses any probative evidence presented, which the Assistant Secretary failed to consider, nor establishes that such decision is inconsistent with his previously published decisions or applicable precedent.

As to your alleged major policy issues regarding the "refusal to bargain" complaint, noting particularly that the Assistant Secretary found that the record failed to establish that either the agency, OI, or OA failed or refused to negotiate with NFFE at any time prior to December 11, 1974, concerning a new agreement, and since there was no obligation to do so while AFGE's RO petition was pending, no major policy issues are presented warranting review. In this latter regard, consistent with his previous holding in Department of the Air Force, Headquarters, 31st Combat Support Group, Homestead Air Force Base, Homestead, Florida, A/SLMR No. 574 (Oct. 31, 1975) [review denied, FLRC No. 75A-112 (Mar. 9, 1976), Report No. 100], the Assistant Secretary found:

> . . . Because the two previously separate collective bargaining units had been combined in 1968 into one collective bargaining unit and there was, at that time, a timely representation petition pending for a portion Respondents quite properly refused to negotiate a new collective bargaining agreement with NFFE Local 1375.

Moreover, the Assistant Secretary's decision appears to be consistent with prior decisions of the Council. (See generally Headquarters, U.S. Army Aviation Systems Command, A/SLMR No. 168, 1 FLRC 472 [FLRC No. 72A-30 (July 25, 1973), Report No. 42], wherein the Council stated that an agency which has acted in apparent good faith "should not be forced to assume the risk" of an unfair labor practice finding "during the period in which the underlying representation issue is still pending before the Assistant Secretary.")

With respect to whether the Under Secretary of Agriculture had the authority to make a section 3(b)(4) determination, noting that the Under Secretary made his determination when acting as head of an agency, no major policy issue is raised warranting review. Nor is any major policy issue presented with regard to the reviewability of section 3(b)(4) determinations and the Assistant Secretary's interpretation and application of the NASA decision.

In its decision in NASA, at 86, the Council stated:

> It is readily apparent that section 3(b)(4) establishes two conditions for the exclusion of a segment of an agency from coverage of the Order for internal security reasons. The first condition is wholly factual: the organizational group must have "as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties." The second requirement is discretionary in nature: "when the head of the

agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency." While the exercise of discretion by the agency head is excepted from review by the express terms of section 3(b)(4), the language of that section is silent as to whether the findings of fact by the agency head, upon which he predicated his determination, are likewise unreviewable.

The history of section 3(b)(4) provides no specific guidance on this question. Offices, bureaus or entities engaged in internal security functions had been covered without qualification under the provisions of E.O. 10988 which preceded E.O. 11491. The Report accompanying E.O. 11491 does not detail or clarify either the reasons, criteria or methods for excluding such groups under section 3(b)(4) of the Order. (Labor-Management Relations in the Federal Service (1969), pp. 17-43). Nor was this permissive exemption adverted to in any prior report or issuance indicative of the intent of that section.

The Council determined, nevertheless, that the basic purposes and procedures established in E.O. 11491, including the Assistant Secretary's initial responsibility for resolving representation controversies, make evident that third-party review was intended under section 3(b)(4), at least to prevent arbitrary or capricious findings by an agency head as to whether the organizational group has as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties.

However, as the Council further stated in NASA, the agency head's determination that the Order cannot be applied to the group in question, consistent with the internal security of the agency, is, by the express terms of section 3(b)(4), purely discretionary, and therefore excepted from review. Thus, the Assistant Secretary's decision, based on the Council's decision in NASA, that the agency did not violate the Order by invoking section 3(b)(4) so as to exclude the employees of the OI and OA from the coverage of the Order, since the determination that such employees have as a primary function the responsibility of ensuring that employees of the agency perform their work with honesty and integrity was not arbitrary and capricious, presents no major policy issue warranting review. Nor is a major policy issue raised by the Assistant Secretary's conclusion that the same standard of review is applicable whether a withdrawal of recognition or an initial recognition is involved. In this regard, section 3(b)(4) permits the agency head to exercise authority to exclude a segment of an agency from the coverage of the Order for internal security reasons. Neither the Order, its legislative history, or the Council's NASA decision indicate any requirement that the exercise of authority be exercised in a particular context with respect to an existing bargaining representative or labor organization seeking to represent such employees.

Similarly, as to your contention that the agency had a duty to bargain with NFFE about the procedures and impact of the section 3(b)(4) determination, the Council noted in its decision in NASA, at 87, that:

> The exclusion of a segment of an agency from the operation of the Order obviously limits effective collective bargaining within the agency, and deprives the employees concerned of the opportunity to participate in the formulation and implementation of personnel policies and practices, sought to be extended by E.O. 11491. . . .

Finally, with respect to the alleged major policy issue regarding the meaning of section 3(b)(4), in the Council's opinion, such assertions constitute, in effect, nothing more than disagreement with the Assistant Secretary's factual determinations or with the Council's decision in NASA. Such contentions, in the facts of this case, therefore, do not present a basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

L. Rich, Esq.
Agriculture

U.S. Department of Agriculture, Office of Investigation, Temple, Texas, A/SLMR No. 644. The Assistant Secretary dismissed the representation petition filed by Local 3542, American Federation of Government Employees, AFL-CIO (AFGE), seeking an election in a unit of certain employees of the agency's Office of Investigation, finding, among other things, that AFGE had not met its burden of establishing that the Acting Assistant Secretary of Agriculture acted arbitrarily or capriciously in invoking section 3(b)(4) of the Order to exclude the employees of the Office of Investigation, among others, from coverage of the Order. AFGE appealed to the Council, contending that the Assistant Secretary's decision presented major policy issues.

Council action (November 5, 1976). The Council held that the decision of the Assistant Secretary did not present any major policy issues, and AFGE neither alleged, nor did it appear, that the decision was arbitrary and capricious. Accordingly, since AFGE's appeal failed to meet the requirements for review set forth in section 2411.12 of the Council's rules of procedure, the Council denied the petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

November 5, 1976

Mr. James Rosa, Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: U.S. Department of Agriculture, Office of Investigation, Temple, Texas, A/SLMR No. 644, FLRC No. 76A-80

Dear Mr. Rosa:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the agency, in the above-entitled case.

In this case, the American Federation of Government Employees, AFL-CIO, Local 3542 (AFGE) filed a petition seeking an election in a unit of all employees in the U.S. Department of Agriculture's (agency) Office of Investigation, Southwest Region, Temple, Texas (activity). Following a determination by the Acting Secretary of Agriculture that the agency's Office of Investigation (OI) and Office of Audit (OA) fell within the meaning of section 3(b)(4) of the Order and that the Order cannot be applied to the employees in these offices in a manner consistent with the internal security of the agency, AFGE challenged that determination and a Notice of Hearing before an Administrative Law Judge (ALJ) on the applicability of section 3(b)(4) was issued by the Acting Assistant Regional Director (ARD) pursuant to Section 202.8(e) of the Assistant Secretary's regulations.

The Assistant Secretary, adopting the findings, conclusions, and recommendations of the ALJ, determined, based on the Council's decision in Audit Division (Code DU) National Aeronautics and Space Agency, Assistant Secretary Case No. 46-1848(RO), 1 FLRC 83 [FLRC No. 70A-7 (Apr. 29, 1971), Report No. 7] (NASA), that AFGE had not met its burden of establishing that the Acting Secretary of Agriculture had acted arbitrarily or capriciously in invoking section 3(b)(4) to exclude the employees of the OI and OA from coverage under the Order, since the record established that the OI and OA both have as a primary function the investigation and audit of agency employees and officials to ensure their honesty and integrity and were, therefore, reasonably related to internal agency security. He further concluded that it was proper to refuse to permit AFGE to question the Acting Secretary of Agriculture, at the hearing, as to the reasons behind the section 3(b)(4) determination

and the facts upon which he actually predicated his decision. Accordingly, since AFGE had not met its burden of establishing that the Acting Secretary of Agriculture acted arbitrarily or capriciously in invoking section 3(b)(4) of the Order to exclude the employees of the OI and the OA from coverage of the Order, the Assistant Secretary dismissed AFGE's representation petition herein.

In your petition for review, on behalf of the union, you contend that the Assistant Secretary's decision presents as major policy issues:

> 1. May an acting agency head exclude employees from the coverage and benefits of Executive Order 11491 pursuant to Section 3(b)(4) thereof for any reason whatsoever—including possible anti-union animous [sic][?]
>
> 2. Is Section 3(b)(4) only to be utilized when an agency head, in his sole judgement, determines that the Order cannot be applied to a group of employees in a manner consistent with the internal security of the agency[?] If so, did the ALJ's (Assistant Secretary's) refusal to allow AFGE an opportunity to examine witnesses to inquire whether internal security—and not some improper motive such [as] anti-union animous [sic]—was at the basis of the agency head's discretionary 3(b)(4) exclusion meet the due process requirements of Executive Order 11491 or improperly deny AFGE and its members an opportunity to call and examine witnesses[?]

In this regard, you assert that the NASA case, contrary to the Assistant Secretary's conclusion, does not support the proposition that an agency head has the right to "arbitrarily and capriciously" exclude employees from coverage of the Order pursuant to section 3(b)(4) once it is shown that they are primarily involved in internal agency security; rather, the case holds that he may exclude them only if they function primarily in the area of internal security "and his decision is predicated upon that basis." Moreover, you allege that the employees excluded by section 3(b)(4) in the instant case were denied due process when AFGE was not permitted to question the Acting Secretary of Agriculture at the hearing as to the reasons behind the section 3(b)(4) determination and the facts upon which his decision was predicated.

In the Council's opinion, your petition for review does not meet the requirements of the Council's rules governing review; that is, the decision of the Assistant Secretary does not present any major policy issues, and you do not allege, nor does it appear, that his decision was arbitrary and capricious.

With respect to your contention as to the Assistant Secretary's interpretation and application of the NASA decision, no major policy issue is presented warranting review.

In its decision in NASA, at 86, the Council stated:

> It is readily apparent that section 3(b)(4) establishes two conditions for the exclusion of a segment of an agency from coverage of the Order for internal security reasons. The first condition is wholly factual: the organizational group must have "as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties." The second requirement is discretionary in nature: "when the head of the agency determines, in his sole judgment, that the Order cannot be applied in a manner consistent with the internal security of the agency." While the exercise of discretion by the agency head is excepted from review by the express terms of section 3(b)(4), the language of that section is silent as to whether the findings of fact by the agency head, upon which he predicated his determination, are likewise unreviewable.
>
> The history of section 3(b)(4) provides no specific guidance on this question. Offices, bureaus or entities engaged in internal security functions had been covered without qualification under the provisions of E.O. 10988 which preceded E.O. 11491. The Report accompanying E.O. 11491 does not detail or clarify either the reasons, criteria or methods for excluding such groups under section 3(b)(4) of the Order. (Labor-Management Relations in the Federal Service (1969) pp. 17-43). Nor was this permissive exemption adverted to in any prior report or issuance indicative of the intent of that section.

The Council determined, nevertheless, that the basic purposes and procedures established in E.O. 11491, including the Assistant Secretary's initial responsibility for resolving representation controversies, make evident that third-party review was intended under section 3(b)(4), at least to prevent arbitrary or capricious findings by an agency head as to whether the organizational group has as a primary function investigation or audit of the conduct or work of officials or employees of the agency for the purpose of ensuring honesty and integrity in the discharge of their official duties.

However, as the Council further stated in NASA, the agency head's determination that the Order cannot be applied to the group in question, consistent with the internal security of the agency, is, by the express terms of section 3(b)(4), purely discretionary, and therefore excepted from review. Thus, the Assistant Secretary's decision, based on the Council's decision in NASA, that AFGE had not met its burden of establishing that the Acting Secretary of Agriculture had acted arbitrarily or capriciously in invoking section 3(b)(4) to exclude the employees of the OI and OA from coverage under the Order, since the record established that the OI and OA both have as a primary function the investigation and

audit of agency employees and officials to ensure their honesty and integrity and were, therefore, reasonably related to internal agency security, presents no major policy issue warranting review.

Furthermore, no major policy issue is raised with regard to your contention that the ALJ's refusal to allow AFGE to question the Acting Secretary of Agriculture at the hearing as to the reasons behind the section 3(b)(4) determination was a denial of due process. The Assistant Secretary, pursuant to his authority under section 6(d) of the Order to prescribe regulations needed to administer his functions under the Order, has provided in Section 203.16(d) of his regulations:

> It shall be the duty of the Administrative Law Judge to inquire fully into the facts as they relate to the matter before him. Upon assignment to him and before transfer of the case to the Assistant Secretary, the Administrative Law Judge shall have the authority to:
>
> . . . . . .
>
> (d) Limit lines of questioning or testimony which are immaterial, irrelevant, or unduly repetitious.

The ALJ's refusal to permit AFGE to question the Acting Secretary of Agriculture, at the hearing, as to the reasons behind the section 3(b)(4) determination and the facts upon which he actually predicated his decision, was based upon the application of this regulation, and your appeal fails to establish that his application of such regulation in the instant case presents a major policy issue warranting review, or that you were in any way prejudiced by this ruling.

Since the Assistant Secretary's decision does not present any major policy issues, and since you do not contend, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

E. J. Taccino
Agriculture

United States Department of Commerce, Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana, A/SLMR No. 665. The Assistant Secretary, upon two separate applications for decision on grievability or arbitrability filed by National Federation of Federal Employees, Local 1438 (NFFE), found that the grievances involved (related to the filling of certain position vacancies by the activity) were not subject to the negotiated grievance procedure of the parties' agreement inasmuch as a provision of that agreement specifically excluded therefrom questions involving the interpretation of "published policies" such as the applicable merit promotion plan. NFFE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented a number of "issues" for review.

Council action (November 5, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious or present a major policy issue. Accordingly, the Council denied the petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

November 5, 1976

Ms. Janet Cooper, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: United States Department of Commerce, Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana, A/SLMR No. 665, FLRC No. 76A-86

Dear Ms. Cooper:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the agency, in the above-entitled case.

In this case, National Federation of Federal Employees, Local 1438 (NFFE) filed two separate applications for decision on grievability or arbitrability (subsequently consolidated for hearing) against the United States Department of Commerce, Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana (activity). The first application, Case No. 50-13033(GR), involved the grievance of an employee who alleged a violation of Article 9, Section 9.1[1/] of the negotiated agreement, asserting that many of the questions asked by the activity during her interview for an announced position vacancy were not job-related, permitted a selection to be made for reasons other than merit, and, therefore, did not "adhere to the principle and the spirit of the merit promotion system." The second application, Case No. 50-13046(GR), involved a grievance by NFFE alleging violations of Article 9, Sections 9.1 and 9.2[2/] of the agreement, arising out of a lateral, noncompetitive reassignment of an employee to a vacant position at the activity.

1/ As found by the Assistant Secretary, Article 9, Section 9.1 of the negotiated agreement provided, in pertinent part:

> ARTICLE 9 - PROMOTIONS, REASSIGNMENTS, AND DETAILS
>
> 9.1 Promotions and Reassignments. . . . It is further agreed that the Employer will adhere to the principle and the spirit of the merit promotion system, as expressed in the Division Merit Promotion Plan and supplements and agreements stated herein . . . .

2/ Article 9, Section 9.2 of the agreement provided, in pertinent part:

> ARTICLE 9 - PROMOTIONS, REASSIGNMENTS, AND DETAILS

(Continued)

246-469 O - 78 - 37

The Assistant Secretary adopted the findings, conclusions, and recommendation of the Administrative Law Judge (ALJ) that neither grievance was subject to the provisions of the negotiated grievance procedure inasmuch as Article 8, Section 8.2[3] of the agreement specifically excluded therefrom questions involving the interpretation of "published policies"[4] such as the merit promotion plan herein.[5]

(Continued)

. . . . . .

9.2 Vacancy Announcements. The Employer agrees that vacant positions . . . will be announced by posting vacancy announcements at appropriate places . . . .

3/ Article 8, Section 8.2 of the agreement provided, in pertinent part:

ARTICLE 8 - GRIEVANCE PROCEDURE

. . . . . .

8.2 Purpose and Application of Article. The purpose of this article is to provide a mutually satisfactory method for the adjustment of employee grievances when the interpretation or application of this Agreement, or the alleged violation of this Agreement, is the sole concern. . . . Questions involving the interpretation of published policies, provisions of law, controlling agreements, regulations of the Department of Commerce or of other authorities shall not be made subject to the procedure contained in this article regardless of whether such policies, provisions, agreements, or regulations are quoted, paraphrased, cited, or otherwise incorporated in this Agreement. . . .

4/ In this regard, it was found to be "clear" and "in effect" conceded by NFFE that the merit promotion plan "is a published policy," and NFFE's contention that "published policies" as used in Section 8.2 of the agreement meant only those policies issued at the level of the Bureau of the Census headquarters or higher was rejected.

5/ In a footnote in his decision, the Assistant Secretary stated that he did not agree with the indications by the ALJ that the Agency's determination of whether its merit promotion plan is subject to a negotiated grievance procedure is binding and may not be challenged. According to the Assistant Secretary, the very issue which he is required to resolve pursuant to section 6(a)(5) and 13(d) of the Order is whether a matter is subject to the particular negotiated grievance procedure. He concluded that while an agency's or activity's contention that a matter is not subject to the grievance procedure of the negotiated agreement may be correct, as he found in the instant case, nevertheless, such contention is but an advocated position and is not a determination which is binding on him.

In your petition for review filed on behalf of NFFE, you contend that the decision of the Assistant Secretary is arbitrary and capricious and presents as "issues" for review:

1. Whether the history of bargaining on an article must be considered when deciding whether an issue which has been raised is grievable under that article?

2. Whether [Department of the Navy, Supervisor of Shipbuilding, Conversion and Repair, Pascagoula, Mississippi,] A/SLMR No. 390 [(May 15, 1974)] has applicability to this case?

3. Whether the equitable doctrine of estoppel applies to agency actions in the processing of grievances under a negotiated grievance procedure?

4. Whether the Supreme Court's ruling in [United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)] has application to grievability determinations under the Order?

5. Whether a local merit promotion plan is considered a published policy under the Order?

6. Whether the determination that these [grievances] involve an interpretation of the merit promotion plan is supported by the record?

7. Whether the Administrative Law Judge's stated reason for the rejection of an informal settlement in case number 50-13033 (GR) is supported by the record?

8. Whether the Administrative Law Judge's statement concerning the union's further processing of case number 50-13046 (GR) is supported by the record?

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious or present a major policy issue.

With regard to your contention that the decision appears arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in finding that the grievances are not on matters subject to the parties' negotiated grievance procedure. As to your contention concerning evidence considered and relied upon, you have not established that the Assistant Secretary failed to consider any material evidence in reaching his conclusion herein, noting particularly that you do not allege that he refused to admit any such evidence. As to the applicability of Pascagoula, you have not shown that the decision herein

is inconsistent with the Assistant Secretary's previously published decisions. Rather, your contention appears to be essentially a disagreement with his determination that the facts of the instant case distinguish it from Pascagoula. Similarly, your contention that the activity should be estopped from raising the grievability issue constitutes nothing more than disagreement with the Assistant Secretary's conclusion that, in effect, the elements necessary for estoppel were not presented in the facts and circumstances of this case.

With respect to the applicability of Warrior & Gulf, no basis is presented for Council review, noting particularly that in that case, the Supreme Court stated (at 584-585) that "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad." [Emphasis added.] Unlike Warrior & Gulf, the exclusion clause in the instant case was found to be clear and broad, whereas the arbitration clause was limited. Your contention concerning the Assistant Secretary's finding that the local merit promotion plan was a "published policy" within the meaning of the negotiated agreement constitutes nothing more than disagreement with the Assistant Secretary's factual determination. Nor have you shown that the decision herein is inconsistent with his previously published decisions or with prior Council decisions. Similarly, as to your sixth, seventh, and eighth contentions concerning evidence in the record, it does not appear that the Assistant Secretary acted without reasonable justification. Rather, your contentions appear to be essentially a disagreement with his factual determinations.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

G. Sabo
Census

Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629. The Assistant Secretary, upon a petition for clarification of unit (CU) filed by the International Federation of Professional and Technical Engineers, Local 174 (IFPTE), seeking the accretion of the unrepresented civilian guards at the activity to an existing unit of General Schedule nonprofessional employees which it represented, and upon a petition for certification of representative (RO) filed by California Teamsters Public, Professional and Medical Employees Union, Local 911 (Teamsters), seeking to represent the same employees in a separate unit, dismissed IFPTE's CU petition and found that the claimed unit under the RO petition was appropriate. IFPTE appealed to the Council, contending that the decision of the Assistant Secretary was arbitrary and capricious and presented a major policy issue. IFPTE also requested a stay of the Assistant Secretary's decision and the certification of representative subsequently issued to the Teamsters.

Council action (November 5, 1976). The Council held that the IFPTE petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's decision did not appear in any manner arbitrary and capricious or present a major policy issue. Accordingly, the Council denied review of IFPTE's petition. The Council likewise denied IFPTE's request for a stay of the Assistant Secretary's decision and the certification of representative issued to the Teamsters.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

November 5, 1976

Mr. Thomas Martin
Attorney at Law
19626-1/2 Normandie Avenue
Torrance, California 90502

Re: Department of the Navy, Naval Support Activity, Long Beach, California, A/SLMR No. 629, FLRC No. 76A-91

Dear Mr. Martin:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision in the above-entitled case.

In this case, as found by the Assistant Secretary, the International Federation of Professional and Technical Engineers, Local 174 (IFPTE) filed a petition for clarification of unit (CU), and the California Teamsters Public, Professional and Medical Employees Union, Local 911 (Teamsters) filed a petition for certification of representative (RO). Both petitions sought the right to represent unrepresented civilian guards at the Department of the Navy, Naval Support Activity, Long Beach, California (the activity). The IFPTE, supported by the activity, contended that the unit should be accreted to its unit of General Schedule (GS) nonprofessional employees at the activity while the Teamsters and the International Brotherhood of Police Officers (IBPO), an intervenor in the RO case, contended that the claimed unit was appropriate for exclusive recognition.

In the CU case, the IFPTE and the activity contended that because Executive Order 11491, as amended by Executive Order 11838, no longer requires that guards may not be included with nonguards in newly established units, the guards should be considered to have accreted into the existing unit of nonprofessional GS employees represented by the IFPTE. In dismissing the CU petition, the Assistant Secretary concluded:

> Although under the amended Order the establishment of mixed units of guards and non-guards is no longer prohibited, neither does the amended Order mandate that unrepresented guards be deemed to have accreted into exclusively recognized units. . . . Executive Order 11838 did not change the existing representational status of guard employees in the Federal sector, absent the raising of a valid question concerning representation and the issuance of an appropriate certification. Accordingly, I find no basis for concluding that the

> unrepresented guard employees herein should be deemed to have been accreted automatically, by operation of the 1975 amendments to Executive Order 11491, into an existing unit from which they had been specifically excluded when the unit was certified.

As to the RO petition, the Assistant Secretary found that the claimed unit of security guards was appropriate. In this regard, the Assistant Secretary concluded that the unit "is, in effect, a residual unit of all unrepresented nonprofessional employees of the Activity [and] constitutes a functionally distinct group of employees who share a community of interest separate and distinct from the other employees of the Activity." In addition, he noted:

> . . . I find that the claimed unit, which is both a residual and functional unit, will promote effective dealings and efficiency of agency operations. In this regard, I do not agree with the Activity's contention that a separate unit would further fragment its labor-management relations and will create an additional hardship on its personnel office. Thus, in my view, under the circumstances of this case . . . the establishment of the claimed unit will, in fact, prevent further fragmentation by establishing only one additional unit for all the remaining unrepresented employees of the Activity. . . .

In your petition for review on behalf of the IFPTE, you allege that the Assistant Secretary's dismissal of the CU petition presents a major policy issue as to "[w]hether a previously unrepresented guard unit is to enjoy separate representation or to be accreted into an existing bargaining unit." In this regard, you assert that the dismissal of the CU petition is contrary to the Council's policy of eliminating separate treatment for guard units[1/] and will promote fragmentation and union rivalry. You further allege that "[t]he Assistant Secretary, in finding that the subject guard unit is an appropriate unit within the meaning of section 10(b) of the Order acted in an arbitrary and capricious manner." [Emphasis in original.] In this connection, you assert the Assistant Secretary failed to give equal weight to, and make affirmative findings concerning, the criteria of section 10(b) of the Order as required by the Council's decision in Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, A/SLMR No. 364, FLRC No. 74A-28 (May 9, 1975), Report No. 69, and that his decision was contrary to the evidence.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the Assistant Secretary's decision does not appear in any manner arbitrary and capricious or present a major policy issue.

1/ E.O. 11838, effective May 7, 1975, amended E.O. 11491 to eliminate the requirement of separate units for guards and the requirement that they be represented only by labor organizations which represent guards exclusively.

With respect to the alleged major policy issue, the Council, in recommending the elimination of the separate representation policy governing guards, stated in its Report and Recommendations accompanying the issuance of E.O. 11838 that:

> Experience acquired under the present Order has demonstrated no need for the special treatment of guards. Mixed units of guards and other employees, which were recognized prior to 1970, have continued to provide effective representation for all members. Guards have demonstrated no conflicts of interest in performing their duties. So long as the existing prohibition on strikes by Federal employees is continued, such conflicts as might exist in the private sector need not be anticipated. Furthermore, the current policy has not contributed to stability; on the contrary, it has encouraged fragmentation in units and rivalries among labor organizations. For these reasons, we recommend that the special representation policy for guards be abandoned. Guards should be treated for representation purposes the same as other employees. [Emphasis added.][2/]

Thus, the Assistant Secretary's finding that the guards had not "automatically" accreted into IFPTE's unit by operation of E.O. 11838 does not appear inconsistent with the purposes of the Order, as amended, that there be no special representation policy for guards and that they should be treated for representation purposes the same as other employees, and therefore presents no major policy issue. With respect to your contention that the Assistant Secretary was arbitrary and capricious in finding the guard unit appropriate, in the Council's view, in the facts and circumstances of this case, it does not appear that the Assistant Secretary, in exercising his responsibility "to decide questions as to the appropriate unit" pursuant to section 6(a)(1) of the Order, acted without any reasonable justification in reaching his decision. In this regard, your arguments in support of the allegation that the Assistant Secretary failed to accord equal weight to, and make affirmative findings concerning, the three section 10(b) criteria as required by the Council's decision in Tulsa, constitute, in effect, nothing more than disagreement with the Assistant Secretary's factual determination and, as such, provide no basis for review, noting particularly that the Assistant Secretary found that the unit is a functional grouping of employees who share a community of interest separate and distinct from other employees at the activity and that the unit would promote effective dealings and efficiency of agency operations by preventing further fragmentation at the activity through establishing only one additional unit for the remaining unrepresented employees at the activity.

Accordingly, since your petition for review fails to meet the requirements for review provided by section 2411.12 of the Council's rules of procedure,

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2/ Labor-Management Relations in the Federal Service (1975), at 30.

review of your petition is hereby denied. Your request for a stay of the Assistant Secretary's decision and the certification of representative issued to the Teamsters is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

B. L. Mayes
Navy

R. Castle, Jr.
Teamsters

R. Griem
IBPO

Department of the Air Force, Base Procurement Office, Vandenberg Air Force Base, California, A/SLMR No. 485. This appeal arose from a decision and order of the Assistant Secretary, who, upon a complaint filed by Local Union 1001, National Federation of Federal Employees, found that, in the circumstances of this case, a supervisor's statement to the local union president that she would be required to perform a fair share of the workload of the branch in which she worked, and that he would assign her a fair share of the work and adjust it later, constituted a violation of section 19(a)(1) of the Order. Upon appeal by the activity, the Council determined that the Assistant Secretary's decision presented a major policy issue, namely: whether, in the circumstances of this case, the statement of the supervisor to the union president constituted a violation of section 19(a)(1) of the Order; and accepted the activity's petition for review (Report No. 70).

Council action (November 19, 1976). The Council found that the Assistant Secretary's decision that the activity violated section 19(a)(1) in the circumstances of this case was inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decision and remanded the case to him for appropriate action consistent with its decision.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Department of the Air Force,
Base Procurement Office,
Vandenberg Air Force Base,
California

and

National Federation of Federal
Employees, Local Union 1001,
Vandenberg Air Force Base,
California

A/SLMR No. 485
FLRC No. 75A-25

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a Decision and Order of the Assistant Secretary who, upon a complaint filed by Local Union 1001, National Federation of Federal Employees, Vandenberg Air Force Base, California (herein called the union), found that, in the circumstances of the case, the Base Procurement Office, Vandenberg Air Force Base, California (herein referred to as the activity), had violated section 19(a)(1) of the Order by interfering with, restraining, or coercing an employee who was President of Local Union 1001 (the local president) in the exercise of rights assured by the Order to join and assist a labor organization.

The factual background of this case, as found by the Assistant Secretary, and based upon the entire record, is as follows: At the time of the events complained of herein, a collective bargaining agreement was in effect between the activity and the union. That agreement contained an article on the use of official time which recognized that certain duties related to the representation of employees in the unit may be accomplished on official time. Thus, it provided that when union officials or members were designated as representatives to present certain complaints, grievances, or appeals, they were to be afforded reasonable time to present the matter and a period of time, not to exceed 8 hours, to prepare for a hearing on such matters.1/

1/ The collective bargaining agreement contained, among others, the following provisions:

Article IX. USE OF OFFICIAL TIME:

(Continued)

The local president's supervisor had received complaints from employees that the local president was not being assigned a fair share of the workload. The supervisor, together with an employee relations specialist from the activity's Civilian Personnel Office, met with the local president to discuss the problem and sought from her an estimate of the amount of time she would require in carrying out her employee representational activities. When the local president argued that she could not provide a specific estimate of the amount of time required because of the number of unknown factors involved, her supervisor informed her that he wanted her to handle a fair share of the workload and, under the circumstances, would assign her a fair share of the work and adjust it later.

The union then filed an unfair labor practice charge alleging various improper actions by the activity with respect to the local president, including the statement of the supervisor concerning the assignment of a fair share of the work to her. In the course of the parties' investigation of this charge,[2/] the Chief of the Base Procurement Office was asked,

(Continued)

> 1. Management and the Union recognize that officials and members of the Union may accomplish certain duties in representing employees of the Unit on official duty time. Management agrees that when union officials or members have been designated as representatives to present a complaint, grievance or appeal under the provisions of AFR 40-771, or as specified in Article VIII, Negotiated Grievance Procedure, they will be afforded reasonable time to present the grievance. In addition, necessary time not to exceed eight hours may be used to prepare for a grievance or appeals hearing. . . .
>
> . . . . . .
>
> 4. The Union agrees to advise its officers and members of their prime responsibility as Vandenberg Air Force Base employees in utilizing official time. No Union official, who is a Vandenberg Air Force Base employee, will conduct union business on official time except as provided herein. The Union agrees that members or officials of Local 1001, who desire to use official time as prescribed herein or provided in Air Force, Command, base or local management directives, or where requested by a management official to attend meetings and be consulted within their capacity as Union representatives will obtain the express consent of their supervisors prior to leaving their duty station. . . .

2/ See Rules and Regulations of the Assistant Secretary, Section 203.2(a)(4) (20 CFR 203.2(a)(4)).

among other things, what the supervisor had meant by the words "a fair share of the work." He responded in a letter as follows:

> I believe that [the supervisor] meant that each contract administrator would be assigned a fair share of the total work load in the Contract Administration Branch. Hopefully each administrator would have an equal work load and if possible an equal number of contracts to administer. He felt it was not fair to give [the local president] a lighter work load in comparison with other employees of the same GS grade and approximate pay. [The local president] draws her pay from the Air Force and the Air Force is entitled to first consideration from [the local president].

When, following this investigation, the parties were unable to resolve the unfair labor practice charge informally, the union filed a complaint with the Assistant Secretary, alleging, in pertinent part, that the activity violated section 19(a)(1) of the Order by virtue of the matters set forth in its charge. Subsequently, but prior to the hearing, the union amended its complaint, referring only to the statement of the supervisor and (for the first time) to a portion of the aforementioned letter of the Chief of the Base Procurement Office[3/] as the basis for the activity's alleged violation.

3/ The amended complaint reads as follows:

> On or about January, . . . [the supervisor], Contract Administration, Vandenberg AFB, advised [the local president] during a meeting, that he would assign her a "fair share" of the work in the office [for] which she would be responsible, thus she would have to gauge her union activities accordingly.
>
> On or about July 12, . . . [the] Chief of the Procurement Division, stated in a letter that his view of [the supervisor's] reference to "a fair share of the work" meant that "each contract administrator . . . would be assigned a fair share of the total work load in the Contract Administration Branch . . . an equal work load. . . ." According to [the Chief of the Base Procurement Office], [the supervisor] "felt it was not fair to give [the local president] a light work load in comparison with other employees of the same GS grade. He concluded that "[the local president] draws her pay from the AIR FORCE and the AIR FORCE is entitled to first consideration from [the local president]."
>
> By the act set forth above, the Activity interfered with, restrained or coerced this employee in the exercise of her rights assured by the Order.

The Assistant Secretary found that the Order does not authorize the use of official time by employees to engage in the conduct of union business. Indeed, he pointed out that "Section 20 of the Order prohibits the use of official time with respect to the solicitation of membership or dues, and other internal business of a labor organization."[4/] However, as to matters unrelated to the internal business of the union, he noted that "the Order does not preclude an agency or activity from entering into an agreement with respect to the use of official time by union representatives in certain other situations. In this connection, the parties' negotiated agreement herein permits official time to be utilized for employee representational purposes in certain specified circumstances." He stated that, in his judgment, "to deprive, or to threaten to deprive, employees or their representatives of the rights accorded them under a negotiated agreement would interfere with, restrain, or coerce employees in the exercise of the rights assured by section 1(a) of the Order." On the basis of these considerations, the Assistant Secretary found "that, in the circumstances of this case, . . . [the supervisor's] statement to . . . [the local president] that she would be required to perform a fair (equal) share of the work, clearly implied that she could be penalized if she performed certain of her representational duties during official time, even though such use of time was permitted by the negotiated agreement." The Assistant Secretary concluded that such conduct interfered with, restrained, or coerced the local president in the exercise of her rights under the Order and, consequently, that it constituted a violation of section 19(a)(1).[5/]

The activity appealed the Assistant Secretary's decision to the Council. The Council accepted the activity's petition for review, concluding that a major policy issue was present, namely: whether, in the circumstances of this case, the statement of the supervisor to the union president (that

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4/ Section 20 provides as follows:

> Sec. 20. Use of official time. Solicitation of membership or dues, and other internal business of a labor organization, shall be conducted during the non-duty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except to the extent that the negotiating parties agree to other arrangements which may provide that the agency will either authorize official time for up to 40 hours or authorize up to one-half the time spent in negotiations during regular working hours, for a reasonable number of employees, which number normally shall not exceed the number of management representatives.

5/ In so concluding, the Assistant Secretary found that the evidence did not establish that the supervisor's statement to the local president led to an actual increase in the latter's workload or a denial of any contractually allowed time to engage in union activities. However, in his view, it was immaterial whether such change actually occurred since "the improper threat of such action is sufficient to constitute a violation of Section 19(a)(1) of the Order."

he wanted her to perform a fair share of the workload, and would assign her a fair share of the work and adjust it later) constitutes a violation of section 19(a)(1) of the Order. The Council also granted the activity's request for a stay, having determined that the request met the criteria set forth in section 2411.47(c)(2) of its rules.6/ The activity and the union filed briefs with the Council as provided in section 2411.16 of the Council's rules.

Opinion

As indicated above, the Assistant Secretary found that the activity violated section 19(a)(1) of the Order when the supervisor of the Contract Administration Office stated to the local president that he wanted her to perform a fair share of the workload and would assign her a fair share of the work and adjust it later. For the reasons stated below, we set aside the Assistant Secretary's decision herein as inconsistent with the intent and purposes of the Order.

Section 19(a)(1) of the Order provides as follows:

> Sec. 19. Unfair labor practices. (a) Agency management shall not—
>
> (1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order.

Thus, in order for the Assistant Secretary to find a violation of section 19(a)(1), he must determine that a right assured by the Order is involved, and that agency management has interfered with, restrained, or coerced an employee in the exercise thereof. Where either element is absent, no violation of section 19(a)(1) can be established.

In the instant case, as previously stated, the Assistant Secretary found that the "right" in question concerned the local president's use of official time for employee representational activities as "permitted by the negotiated agreement." He found this right notwithstanding his further finding, with which we agree, that section 20 of the Order expressly prohibits the use of official time by employees to engage in the internal business of a union and that there is no inherent right under the Order for employees, in their capacity as union officials or representatives, to use official time for employee representational activities.7/

6/ The Council subsequently amended its rules, redesignating the foregoing (without change) as section 2411.47(e)(2) (5 CFR 2411.47(e)(2)).

7/ As the Council stated in Department of the Navy and the U.S. Naval Weapons Station, Yorktown, Virginia, A/SLMR No. 139, 1 FLRC 489 [FLRC No. 72A-20 (Aug. 8, 1973), Report No. 43]:

(Continued)

It is clear that the Order does not prohibit the parties from negotiating contractual provisions for the use of official time in contract administration and other representational activities, as they did in the instant case (n. 1, supra). Thus, as the Council explained in a policy statement in this regard:

> . . . nothing in the Order prohibits an agency and a labor organization from negotiating provisions . . . which provide for official time for union representatives to engage in contract administration and other representational activities which are of mutual interest to both the agency and labor organization and which relate to the labor-management relationship and not to "internal" union business. Examples of such representational and contract administration activities include the investigation and attempted informal resolution of employee grievances, participation in formal grievance resolution procedures, attending or preparing for meetings of committees on which both the union and management are represented and discussing problems in agreement administration with management officials.[8/]

However, the negotiation of such provisions into an agreement does not thereby convert a contractual right into a "right assured by this Order." And, contrary to the reasoning of the Assistant Secretary, "to deprive, or to threaten to deprive, employees or their representatives of the rights accorded them under a negotiated agreement" would not of itself "interfere with, restrain, or coerce employees in the exercise of the rights assured

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> . . . section 1(a) places on heads of agencies an obligation to take action required to assure that no interference, restraint, coercion, or discrimination is practiced within their respective agencies to encourage or discourage membership in a labor organization. In the latter regard, section 19(a) further protects employees against unfair labor practices by management in the exercise of their rights under the Order. However, none of these protections of employee rights in section 1(a) places on agency management any "affirmative obligation to facilitate the exercise of [the] right to present views on behalf of a labor organization" . . . . Accordingly, section 1(a) provides no basis for finding an unfair labor practice because an agency failed and refused to grant official time to witnesses who appeared on behalf of a labor organization at a formal unit determination hearing. [Emphasis in original.]

8/ Request for Interpretations and Policy Statements, FLRC No. 75P-1 (May 23, 1975), Report No. 90.

by section 1(a) of the Order."9/ [Emphasis added.] Stated otherwise, the use of official time for employee representational activities, as recognized by the Assistant Secretary, is a contractual right, not a right guaranteed by the Order, and the threatened violation of that provision in the agreement as here found to have occurred is not thereby a violation of a section 1(a) right remediable under section 19(a)(1) of the Order. Accordingly, we must hold that the considerations relied upon by the Assistant Secretary in this case fail to support his finding of a 19(a)(1) violation.10/

This does not mean that to penalize or threaten to penalize employees for asserting or exercising rights accorded them under a negotiated agreement could not constitute a violation of section 19(a)(1) of the Order where, unlike here, the effect of such penalty or threat of penalty is to interfere with, restrain, or coerce such employees in the exercise of rights assured by the Order, e.g., the rights to form, join, or assist a labor

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9/ Section 1(a) provides as follows:

> Section 1. Policy. (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right. Except as otherwise expressly provided in this Order, the right to assist a labor organization extends to participation in the management of the organization and acting for the organization in the capacity of an organization representative, including presentation of its views to officials of the executive branch, the Congress, or other appropriate authority. The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion or discrimination is practiced within his agency to encourage or discourage membership in a labor organization.

10/ In view of our disposition of the case, it is therefore unnecessary to determine whether, in the circumstances herein, the supervisor's statement to the local president that he wanted her to perform a fair share of the workload and would assign her a fair share of the work and adjust it later, either standing alone or in conjunction with the subsequent interpretation of that statement by the supervisor's superior to mean an "equal" share of the work, would constitute interference, restraint, or coercion had she been exercising or attempting to exercise a right guaranteed by the Order. Nor is it necessary to determine whether the Assistant Secretary in fact relied upon the superior's subsequent interpretation of the supervisor's statement as probative evidence, and, if so, whether such reliance would have been consistent with the purposes of the Order.

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organization.11/ Cf. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, A/SLMR No. 582, FLRC No. 76A-13 (July 27, 1976), Report No. 108.

Moreover, the Council's decision herein should not be construed as holding that no contractual violation may independently constitute an unfair labor practice. In fact, many acts by agency management and labor organizations can conceivably constitute separate violations of both the Order and negotiated agreements. Indeed, section 19(d) of the Order12/ recognizes that certain acts by a party can constitute separate, independent violations of both the Order and a negotiated agreement.13/

11/ However, the protected right to engage in such activity is not without limitation. Pursuant to section 12(a) of the Order, in the administration of the agreement the parties are governed by laws and controlling regulations. Further, the Order mandates the retention to management of certain rights which may not be bargained away, including specifically the right "to direct employees of the agency." Thus, while the Order permits a labor organization to negotiate for the use of official time for contract administration and other employee representational activities and protects employees from interference with rights assured by the Order, the Order does not preclude agency management from insisting that employees abide by the terms of the agreement, applicable laws and regulations, and most certainly does not preclude agency management from directing those employees in the performance of their assigned duties.

12/ Section 19(d) provides, in relevant part, as follows:

> Sec. 19. Unfair labor practices.
>
> . . . . . .
>
> (d) . . . Issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. . . .

13/ In this regard, the Assistant Secretary has recognized that "[a] breach of a contract can be not only a breach but under certain circumstances can be also an unfair labor practice. For example, if sufficiently flagrant and persistent, a breach of contract may rise to the seriousness of a unilateral change in the contract and, hence, a violation of Section 19(a)(6) of the Executive Order. . . . Other examples would be a breach of contract prompted by anti-union motivation to discourage union membership . . . which would violate Section 19(a)(2); or a breach of contract motivated by considerations in violation of Section 19(a)(4) . . . ." General Services Administration, Region 5, Public Buildings

(Continued)

Finally, the Council's conclusion that the Assistant Secretary's 19(a)(1) finding in the instant case must be set aside clearly does not mean that the union is without recourse in this and similar situations. Rather, the relief for alleged violations of negotiated rights (such as involved herein) would be available through the negotiated grievance procedure, which section 13 of the Order[14/] requires the parties to include in their agreement.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's decision that the activity violated section 19(a)(1) in the circumstances of this case is inconsistent with the purposes of the Order. Accordingly, pursuant

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(Continued)

Service, Chicago Field Offices, A/SLMR No. 528 (June 30, 1976), and cases cited therein. Further, the Assistant Secretary himself has recognized that "alleged violations of a negotiated agreement which concern differing and arguable interpretations of such agreement, as distinguished from alleged actions which would constitute clear, unilateral breaches of the agreement, are not deemed to be violative of the Order. In those circumstances . . . the aggrieved party's remedy for such matters lies within the grievance machinery of the negotiated agreement, rather than through the unfair labor practice procedures." [Footnote omitted.] Department of Army, Watervliet Arsenal, Watervliet, New York, A/SLMR No. 624 (Mar. 23, 1976).

14/ At the time when the facts of this case arose, section 13 of the Order provided, in pertinent part:

> Sec. 13. Grievance and arbitration procedures. (a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances over the interpretation or application of the agreement. A negotiated grievance procedure . . . shall be the exclusive procedure available to the parties and the employees in the unit for resolving such grievances. . . . [Labor-Management Relations in the Federal Service (1971), at 13.]

By virtue of the most recent amendments to the Order contained in E.O. 11838, the coverage and scope of the grievance procedure that the parties may negotiate into their agreement have been expanded so that only matters for which a statutory appeal procedure exists may not be included, so long as the negotiated procedure does not otherwise conflict with statute or the Order.

to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decision and remand the case to him for appropriate action consistent with our decision.

By the Council.

Henry B. Frazier III
Executive Director

Issued: November 19, 1976

National Treasury Employees Union; Chapter No. 22, National Treasury Employees Union; and United States Department of the Treasury, Internal Revenue Service, Philadelphia District. The dispute involved the negotiability under the Order of union proposals concerning (1) work-space design and usage, and items used in the performance of work; and (2) free parking.

Council action (November 19, 1976). As to (1), based on applicable discussion and analyses in its decision in the IRS, Chicago District case (FLRC No. 74A-93, Feb. 24, 1976), the Council found that the proposals at issue herein were excluded from the agency's obligation to negotiate under section 11(b) of the Order. As to (2), based on an interpretation rendered by the General Services Administration of its directives in response to the Council's request, the Council held that the union's proposal was nonnegotiable because it conflicted with appropriate regulations outside the agency. Accordingly, pursuant to section 2411.28 of its rules and regulations, the Council sustained the agency head's determination that the proposals here involved were nonnegotiable.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

National Treasury Employees Union

and

Chapter No. 22, National Treasury Employees Union

FLRC No. 75A-118

and

United States Department of the Treasury, Internal Revenue Service, Philadelphia District

DECISION ON NEGOTIABILITY ISSUES

Background

National Treasury Employees Union Chapter No. 22 represents Internal Revenue Service employees at that agency's Philadelphia District Office, including the Wilkes-Barre, Pennsylvania, "place of duty." Having been informed by the agency of plans to transfer the Wilkes-Barre employees from one office building to another, the union presented for negotiation with the District Office a number of proposals dealing with what it terms the "impact and implementation of the move." Upon referral, the agency determined that the nine proposals involved in the instant dispute conflict with the Order and with regulations of appropriate authority outside the agency and are therefore nonnegotiable. The union petitioned the Council for review of that determination under section 11(c)(4) of the Order, and the agency submitted a statement of its position.

Opinion

The union's proposals will be discussed separately, or in groups concerning similar issues of negotiability, below.

1. Workspace Design and Usage, and Items Used in the Performance of Work.

The first eight of the union's proposals read as follows:

[1] All professional employees be assigned a desk that can be secured similar to those in use at this time in the current Wilkes-Barre office (50" x 30" with three drawers and an "L" arm attached). All desks shall have an executive type swivel chair. Desks will be at least three feet apart.

[2] Each professional employee shall have access to at least one locked file cabinet drawer for storage of active case files.

[3] Telephones

b. Field Audit employees be assigned one phone per five employees.

c. Collection Group employees be assigned one phone per three employees.

e. Office Auditors be assigned one phone per two employees plus facilities for a clerk to answer same.

f. Taxpayer Assistance area be assigned two phones on the Federal switch-board plus one commercial line.

[4] A separate room for copy equipment.

[5] Facilities for supplies and forms for each specialty in the work area.

[6] Machines

a. An adding machine/calculator for each group clerk.

b. Two adding machine/calculators for the collection group.

c. Two adding machine/calculators for the office auditors.

e. Two adding machine/calculators for the Taxpayer Assistance area.

f. Three adding machine/calculators; one printing calculator and four pocket calculators for the field agents group.

[7] Conference rooms

b. One room for the District Conferee.

c. Two rooms for the Audit Division.

d. Two rooms for the Collection Division.

[8] Library facilities similar to that now in use in the current Wilkes-Barre office.

The principal contentions of the parties as to all of these proposals are substantially the same. Thus, the agency contends in effect that the design and use of workspace and the items used by employees in performing their work are matters concerning the technology of performing the agency's work which are excepted from the obligation to bargain

by section 11(b) of the Order.1/ The union contends in essence that the proposals are directed toward increasing the efficiency of employees in their work in order to facilitate their receiving more favorable performance evaluations.2/

In our view, the foregoing eight proposals bear no material difference from the disputed proposals concerning confidential office space and conference rooms, and the provision of computer terminals, telephones, and calculators, which were before the Council in the recent IRS, Chicago District case3/ and which were discussed at length in parts 1 and 2 of that decision.

Therefore, based on the applicable discussion and analyses in parts 1 and 2 of the IRS, Chicago District decision, the Council finds that the substantially similar proposals quoted above which are at issue herein are excluded from the agency's obligation to negotiate under section 11(b) of the Order in that each would require the agency to bargain over the adoption of specific technology of performing the agency's work.

1/ Section 11(b) provides, in relevant part, as follows:

> [T]he obligation to meet and confer does not include matters with respect to the mission of an agency; its budget; its organization; the number of employees; and the numbers, types, and grades of positions or employees assigned to an organizational unit, work project or tour of duty; the technology of performing its work; or its internal security practices. . . .

The agency also maintains that some of the proposals are excluded from its obligation to negotiate under section 11(b) because (1) they concern matters with respect to the agency's budget and its internal security practices, and (2) the proposals do not arise from a change in working conditions. As to (1), in view of our decision herein, we find it unnecessary to reach and therefore do not rule upon these contentions. As to (2), without passing on whether any change in working conditions has in fact occurred, we do not find that this contention raises an issue upon which the Council may properly rule under section 11(c) of the Order.

2/ The union also argues, as to some of these proposals, that it is "merely seeking to continue the working conditions present in the old building to the new building." This contention does not state a ground for setting aside an agency determination of nonnegotiability but appears to conjecture an unfair labor practice by agency management. The proper forum in which to raise such an issue is therefore not a negotiability dispute before the Council but an unfair labor practice proceeding before the Assistant Secretary. Accordingly, we do not pass upon this claim in the instant case. See National Treasury Employees Union Chapter No. 010 and Internal Revenue Service, Chicago District, FLRC No. 74A-93 (Feb. 24, 1976), Report No. 98.

3/ Id.

To avoid any possible misunderstanding, we must strongly emphasize that our decision herein does not mean that conditions deriving from the agency's implementation of a chosen technology (i.e., the impact of such technology) would be excepted from the obligation to bargain by section 11(b) of the Order.[4/] For example, as regards the instant dispute, if the union feels that the agency's decision to adopt or not adopt a particular technology detracts from the efficiency of unit employees, and thereby adversely affects those employees' performance evaluations, proposals directed at amelioration of the impact of that decision rather than at the technology itself would be plainly negotiable.

2. Free Parking. The ninth union proposal provides as follows:

> Parking
>
> (a) Free parking for Government owned vehicles.
>
> (b) Free parking facilities be provided for those personally owned vehicles used for the performance of Federal business by professional employees.

The agency head determined that this proposal was nonnegotiable because it conflicted with regulations of the General Services Administration.[5/] Accordingly, the Council requested from GSA an interpretation of its directives as related to the proposal. GSA responded, in pertinent part, as follows:

> Proposal 12a. Free Parking for Government-owned vehicles. The parking of Government-owned vehicles is regulated pursuant to 41 CFR 101-17.101-6 through 101-17-102.1 and the implementing

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4/ See, e.g., id., at part 3 of decision (impact of agency's decision as to technology of office design upon "distraction from traffic" of employees); AFGE Local 2595 and Immigration and Naturalization Service, U.S. Border Patrol, Yuma Sector (Yuma, Arizona), 1 FLRC 71 [FLRC No. 70A-10 (Apr. 15, 1971), Report No. 6] (impact of agency's decision to adopt drag road technology upon safety and health of employees).

5/ Federal Property Management Regulations, 41 CFR § 101-17.101-6 (1975), and Federal Travel Regulations, Part 1-1.2 (May 19, 1975).

The agency also contends that this proposal is nonnegotiable because it does not arise from any change in working conditions. However, without passing on whether any change in working conditions has in fact occurred, we do not find that this contention raises an issue upon which the Council may properly rule under section 11(c)(4) of the Order.

Federal Property Management Regulation (FPMR) issued by GSA. Under these regulations, an agency itself is not empowered to negotiate for or obtain parking space, since GSA, as the property manager for the Federal Government is the only agency authorized to obtain space.

A Federal Agency having a need for parking space for Government-owned vehicles must first contact GSA for a determination as to need and availability. If space is not currently available, GSA will obtain the space for the Government motor vehicles as it determines necessary to meet the agency's needs. . . .

Proposal 12b. Free parking facilities be provided for those personally owned vehicles used for the performance of Federal business by professional employees. Section 5704 of Title 5, United States Code, provides that employees on official Government business may be reimbursed for, among other things, parking fees. Pursuant to this authority and 5 U.S.C. 5707, the Administrator of General Services has promulgated the Federal Travel Regulations.

The Federal Travel Regulations, paragraphs 1-4.1 and 1-4.2, provide that when a privately owned automobile is used on official business, the employee is entitled to an appropriate rate of reimbursement based on mileage. In addition to the mileage rate, the employee may be reimbursed for the costs of parking fees, ferry fares, bridge, road and tunnel tolls when authorized.

There are no provisions in the Federal Travel Regulations which would authorize prepaid free parking for privately owned vehicles used for the performance of Federal business by professional employees. However, if these costs are authorized and incurred by the employees in connection with the performance of official business, a claim for reimbursement, in accordance with the Federal Travel Regulations, may then be submitted.

Therefore, the union proposal is in violation of the Federal Travel Regulations which authorize reimbursement for parking expenses, but does not provide for free prepaid parking of privately-owned vehicles on official Government business.

Thus, based upon GSA's interpretation of its own directives, it is clear that the union's proposal would conflict with those directives because: (1) it would require the agency to provide facilities for the parking of Government-owned vehicles when, under the GSA Federal Property Management Regulations, the agency itself "is not empowered to negotiate for or obtain parking space"; and (2) the proposal, by directing that parking space for Government-owned vehicles and private vehicles used on Government business be provided "free," would require that the necessary costs

for parking such vehicles be covered under some procedure other than the procedure for reimbursement mandated by the GSA Travel Regulations. We conclude, therefore, that the agency head's determination that the proposal is nonnegotiable because it conflicts with appropriate regulations outside the agency was proper and must be sustained.

Conclusion

For the reasons set forth above, and pursuant to section 2411.28 of the Council's rules and regulations, we find that the agency head's determination that the proposals here involved are nonnegotiable was proper and must be sustained.

By the Council.

Henry B. Frazier III
Executive Director

Issued: November 19, 1976

Naval Weapons Station, Concord and American Federation of Government Employees, Local 1931 (Cassady, Arbitrator). The arbitrator's award was dated October 8, 1976, and, under sections 2411.33(b) and 2411.45(a) and (c) of the Council's rules of procedure, the union's appeal was due in the office of the Council no later than the close of business on November 12, 1976. However, the appeal was not filed with the Council until November 19, 1976, and no extension of time was either requested by or on behalf of the union or granted by the Council.

Council action (November 24, 1976). Because the union's appeal was untimely filed, and apart from other considerations, the Council denied the union's petition for review.

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E STREET, N.W. • WASHINGTON, D.C. 20415

November 24, 1976

Mr. O. C. Brown
Local 1931, American Federation
of Government Employees, AFL-CIO
Naval Weapons Station
Concord, California 94520

Re: Naval Weapons Station, Concord and American Federation of Government Employees, Local 1931 (Cassady, Arbitrator), FLRC No. 76A-141

Dear Mr. Brown:

This refers to your petition for review on behalf of Local 1931, American Federation of Government Employees, AFL-CIO (AFGE) in the above-entitled case. For the reasons indicated below, it has been determined that your petition was untimely filed under the Council's rules of procedure and cannot be accepted for review.

The subject arbitration award is dated October 8, 1976, and, under sections 2411.33(b) and 2411.45(a) and (c) of the Council's rules of procedure, your appeal was due in the office of the Council no later than the close of business on November 12, 1976. However, your appeal was not filed with the Council until November 19, 1976, and no extension of time was either requested by or on behalf of AFGE or granted by the Council.

Accordingly, as your appeal was untimely filed, and apart from other considerations, your petition for review is denied.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: J. J. Paulis, Jr.
Navy

Internal Revenue Service, Mid-Atlantic Service Center, A/SLMR No. 421. This appeal arose from a decision and order of the Assistant Secretary who, acting upon a complaint filed by the union (the National Treasury Employees Union and its Chapter No. 071), found, in pertinent part, that the activity did not violate section 19(a)(1) of the Order by denying union representation at a "counselling session" conducted by management with an activity employee. The Council accepted the union's petition for review, concluding that under section 2411.12 of its rules of procedure a major policy issue was raised by the decision of the Assistant Secretary, and referred the parties to the then pending statement on major policy issue identified as FLRC No. 75P-2. The instant case was deferred pending the latter proceeding.

Council action (December 2, 1976). For the reasons set forth in its Statement On Major Policy Issue, FLRC No. 75P-2 (December 2, 1976), Report No. 116, the Council found that the decision of the Assistant Secretary in this case was fully consistent with the intent and purposes of the Order. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council sustained the Assistant Secretary's decision.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Internal Revenue Service,
Mid-Atlantic Service Center

and

A/SLMR No. 421
FLRC No. 74A-68

National Treasury Employees Union
Chapter No. 071 and
National Treasury Employees Union

DECISION ON APPEAL FROM
ASSISTANT SECRETARY DECISION

Background of Case

This appeal arose from a decision and order of the Assistant Secretary who, acting upon a complaint filed by the National Treasury Employees Union Chapter No. 071 and the National Treasury Employees Union (hereinafter referred to as "the union") against the Internal Revenue Service, Mid-Atlantic Service Center, Philadelphia, Pennsylvania (hereinafter referred to as "the activity"), found, in pertinent part, that the activity did not violate section 19(a)(1) and (6) of the Order[1/] by denying union representation at a "counselling session" conducted by management with an activity employee.

The pertinent factual background of this case, as found by the Assistant Secretary and based upon the entire record, is as follows: Joan Walder has been employed by the activity since 1966, and has been exclusively represented by the union at all times material herein. Since 1967, employee Walder has had a continuing problem regarding excessive use of her leave, as a result of which she was placed by her supervisor under a "leave letter" on two separate occasions. The terms of the second leave letter, issued in June 1972 following a physical examination of the employee by the activity's physician who certified her as fit for duty,

1/ Section 19(a)(1) and (6) of the Order provides as follows:

Sec. 19. Unfair labor practices. (a) Agency management shall not—

(1) interfere with, restrain, or coerce an employee in the exercise of the rights assured by this Order;

. . . . . .

(6) refuse to consult, confer, or negotiate with a labor organization as required by this Order.

required Walder to produce a medical certificate to support any absence due to sickness; stated that the activity's physician would review these certificates, and if he recommended that the leave should not be granted, provided that Walder would be charged absence without leave (AWOL); and contained a warning that repeated instances of AWOL were grounds for disciplinary action.

Approximately 2 months after the second leave letter was issued, Walder was absent from work on a Friday and the entire subsequent workweek, a period of 6 days. When she returned to work, Walder submitted to her supervisor a doctor's certificate purporting to justify the first 5 of the 6 days' absence. In accordance with the terms of the leave letter, the certificate was submitted to the activity's physician, who determined that the illness specified in the certificate justified only 1 day's absence and accordingly recommended approval of the leave for 1 day but disapproval of the absence for the remaining 5 days. The chief of the activity's personnel branch and James McNally, an employee relations specialist who worked in the activity's employee-management relations section, thereafter conferred with the activity's physician to determine why the latter had recommended disapproval of the requested leave. At that conference, the physician suggested that Walder should be called in and told that she was fit for duty, that there was no reason for her excessive use of sick leave, and that she should make every effort to come to work and to utilize the services of the activity's health unit if she felt some discomfort.

After the conference with the activity's physician, the chief of the personnel branch instructed McNally to call in Walder and her supervisor and to "counsel" Walder on the matters discussed with the doctor. Walder's supervisor was then contacted and a meeting was arranged for the afternoon of September 22. The supervisor subsequently notified Walder of the meeting that they were both to attend with McNally. Suspecting that the meeting would involve her absence the prior week, Walder called her union president and asked her to be present at the meeting. Walder's supervisor notified McNally of Walder's intention to have a union representative at the meeting, and McNally in turn discussed the matter with the chief of the personnel branch. The latter told McNally that no disciplinary action was contemplated, that no issues affecting other employees were involved, that the meeting was to be a counseling session, and that the union did not have a right to be present. When Walder arrived at the meeting place accompanied by the union president, McNally told the union president that the meeting was an informal discussion with an employee about her leave and did not involve a grievance, and asked the union representative to leave the meeting since there was no need for her to be present. The union president objected to the decision but left the meeting as requested.

During the course of the "counselling session," Walder's leave record was reviewed, she was told the reasons why the activity's physician

would not approve her medical certificate and was notified of the latter's advice that she should make an effort to come to work even when she felt a little discomfort and to utilize the services of the activity's health unit. Walder was also informed at the "counselling session" that the activity did not contemplate any disciplinary action at that time, but that the recommendation of the activity's physician concerning her leave request would be followed and that, accordingly, she would be recorded AWOL for the 5 days for which her leave was disapproved. Thereafter, the union filed an unfair labor practice complaint alleging that such denial of union representation at the "counselling session" violated section 19(a)(1) and (6) of the Order.

The Assistant Secretary, in dismissing the complaint, adopted the findings, conclusions, and recommendations of the Administrative Law Judge (ALJ), as follows:

> . . . I am constrained to find that in the instant case a violation of the Executive Order has not been committed. The "counselling session" of Ms. Walder indeed related to her own particular shortcomings regarding her extensive use of leave over a long period of time. Ms. Walder's continued use of her leave resulted in the Respondent issuing two "leave letters" to her and also requiring her to submit to a physical examination to determine if her use of leave was warranted from a health standpoint. The "counselling session" did not involve a grievance over Ms. Walder's latest request for leave nor did it result in any adverse action--although the potential for adverse action was present by her being marked AWOL. I am fully cognizant of the fact that the Union was concerned about the variance in the application of leave standards by different supervisors, but that was not the issue regarding Ms. Walder's conference with the employee relations specialist. The entire discussion centered around Ms. Walder's continued use of leave and the fact that the doctor recommended denial of a portion of her latest request for leave. In these circumstances, I cannot draw a distinction between the situation in this case and the situation in the Texas Air National Guard case.[2/] Accordingly, I am compelled to hold that the denial of union representation here did not violate

2/ In Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336 (Jan. 8, 1974) [review denied, FLRC No. 74A-11 (June 18, 1974), Report No. 54], the Assistant Secretary found, in pertinent part, that agency management's refusal to allow an employee to have a union representative at two separate "counselling sessions" did not violate either section 19(a)(6) or 19(a)(1) of the Order. Thus, he found that both sessions related to an individual employee's alleged shortcomings with respect to his use of abusive language toward a supervisor and his failure to wear a military uniform as required, and "had no wider ramifications than being limited discussions . . . with an individual employee concerning particular incidents as to him." Accordingly, he concluded that the incidents did not constitute "formal discussions" at

(Continued)

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> Section 19(a)(6) of the Executive Order and find that the Union was not entitled to be represented during the "counselling session." It follows therefore, that the denial of such representation did not interfere with any rights assured Ms. Walder by the Executive Order and thus, did not constitute a violation of 19(a)(1). [Footnote added.]

The union appealed the Assistant Secretary's decision to the Council, alleging that the decision was arbitrary and capricious and presented major policy issues. The Council accepted the union's petition for review, concluding that under section 2411.12 of its rules of procedure (5 CFR 2411.12) a major policy issue is raised by the decision of the Assistant Secretary. The Council further advised the parties that in an Information Announcement released on that same date, May 9, 1975, the Council had decided, pursuant to part 2410 of its rules, to issue a statement on a major policy issue, "which statement could possibly have some implications with respect to the resolution of the issue raised by the Assistant Secretary's decision in this case." The major policy issue identified by the Council (FLRC No. 75P-2), pursuant to section 4(b) of the Order and section 2410.3 of its rules, and concerning which the Council solicited the views of Heads of Agencies and Presidents of Labor Organizations pursuant to section 2410.6 of its rules, was as follows:

> Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

The Council deferred the decision on this case pending the resolution of the major policy issue. The union and the Internal Revenue Service filed briefs on the merits with the Council as provided for in section 2411.16 of the Council's rules (5 CFR 2411.16). The union's views concerning the major policy issue identified by the Council in FLRC No. 75P-2, as set forth above, were included in its brief on the merits in this case; Department of the Treasury submitted a separate document containing its views with respect thereto.

(Continued)

which the union was entitled to be represented by virtue of section 10(e) of the Order, that such denial of representation did not constitute a violation of section 19(a)(6) of the Order, and, since the exclusive representative was not entitled to be represented at the "counselling sessions," that the denial of such representation did not interfere with any rights accorded the employee under the Order and therefore did not constitute a violation of section 19(a)(1).

Opinion

The major policy issue in the instant case is, in effect, whether the Assistant Secretary's finding that an employee was not entitled to union representation at an informal "counselling session," and that the activity therefore did not violate section 19(a)(1) by denying such representation, is consistent with the intent and purposes of the Order.

On this date, the Council has issued its Statement On Major Policy Issue, FLRC No. 75P-2 (Dec. 2, 1976), Report No. 116, a copy of which is attached hereto. For the reasons fully detailed in that statement, the Council decided, in pertinent part:

> An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management. . . .

In the instant case, as previously stated, the Assistant Secretary found, in effect, that the meeting called by the activity to discuss employee Walder's continued use of leave was a nonformal "counselling session" rather than a "formal discussion" within the meaning of the last sentence of section 10(e) of the Order. His finding in this regard is fully supported by the record. In FLRC No. 75P-2, supra, the Council decided that an employee has no right under the Order to union representation at nonformal meetings such as the "counselling session" herein. Accordingly, for the reasons fully explicated by the Council in FLRC No. 75P-2, we agree with the Assistant Secretary's conclusion that employee Walder had no right under the Order to union representation in the circumstances of this case, and that the denial of such representation therefore did not constitute a violation of section 19(a)(1) of the Order.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's decision is fully consistent with the intent and purposes of the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure (5 CFR 2411.18(b)), the Assistant Secretary's Decision and Order in the instant case is hereby sustained.

By the Council.

Henry B. Frazier III
Executive Director

Attachment

Issued: December 2, 1976

American Federation of Government Employees, AFL-CIO, Local 1592, A/SLMR No. 724. Upon appeal by the union, the Council advised the union that the appeal failed to comply with cited requirements of the Council's rules of procedure, and provided the union time to effect such compliance. However, the union made no submission in compliance with the requirements within the time provided therefor.

Council action*/ (December 6, 1976). The Council dismissed the union's appeal for failure to comply with the Council's rules of procedure.

*/ The Secretary of Labor did not participate in this decision.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 6, 1976

Mr. C. C. Patterson
Attorney-at-Law
427 - 27th Street
Ogden, Utah 84401

Re: American Federation of Government Employees, AFL-CIO, Local 1592, A/SLMR No. 724, FLRC No. 76A-136

Dear Mr. Patterson:

By Council letter of November 9, 1976, you were advised that preliminary examination of your appeal on behalf of Local 1592, American Federation of Government Employees, AFL-CIO in the above-entitled case disclosed apparent deficiencies in meeting various requirements of the Council's rules of procedure (a copy of which was enclosed for your information).

The pertinent sections of the Council's rules included: section 2411.14 (b) and (c) (5 C.F.R. § 2411.14(b) and (c)) which provides that a petition for review of a decision of the Assistant Secretary must contain a summary of the evidence or rulings bearing on the issues, together with a summary of the arguments, and a copy of the decision of the Assistant Secretary being appealed including a copy of any decision, determination, report, or recommendation issued at an earlier stage in the proceeding and considered in his decision; section 2411.42 (5 C.F.R. § 2411.42) which provides that the Council shall consider a petition for review from a labor organization only when the national president of the labor organization or his designee has approved submission of the petition; and section 2411.44 (5 C.F.R. § 2411.44) which provides that any document filed with the Council must be submitted in an original and three copies.

You were also advised in the Council's letter:

> Further processing of your appeal is contingent upon your compliance with the above-designated provision(s) of the Council's rules. Accordingly, you are hereby granted until the close of business on November 29, 1976, to take necessary action and file additional materials in compliance with the above provision(s). Moreover, you must serve a copy of the required additional submission on the other parties including all representatives of other parties who entered

appearances in the subject proceeding before the Assistant Secretary . . . in accordance with section 2411.46(a) of the rules; and you must include a statement of such service with your additional submission to the Council.

Failure to comply with the above requirements will result in dismissal of your appeal.

You have made no submission in compliance with the above requirements within the time limits provided therefor. Accordingly, your appeal is hereby dismissed for failure to comply with the Council's rules of procedure.

For the Council.*/

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

B. Bloch
Labor

C. Rolnick
LMSE

*/ The Secretary of Labor did not participate in this decision.

National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms (Brown, Arbitrator). The arbitrator denied the grievance related to a promotion action. The union filed an exception to the award with the Council, alleging that the award violated appropriate regulations.

Council action (December 7, 1976). Without passing on the question of whether one of the regulations cited by the union was an "appropriate regulation" within the meaning of section 2411.32 of its rules of procedure, the Council held, in substance, that the union's petition did not describe facts and circumstances to support its exception. Accordingly the Council denied the union's petition since it failed to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 7, 1976

Mr. Michael E. Goldman
Assistant Counsel
National Treasury Employees Union
Suite 1101
1730 K Street, NW.
Washington, D.C. 20006

Re: National Treasury Employees Union and Bureau of Alcohol, Tobacco and Firearms (Brown, Arbitrator), FLRC No. 76A-51

Dear Mr. Goldman:

The Council has carefully considered your petition for review, and the agency's opposition thereto, of an arbitrator's award filed in the above-entitled case.

According to the award, the union filed a grievance alleging that the names of the two grievants had been erroneously omitted from the "best qualified list" for promotion to the position of Alcohol Tobacco Tax Examiner (GS-9) and that the agency had therefore not adhered to the provisions of the collective bargaining agreement. The issue submitted to arbitration was:

> Whether the Agency followed the Agency merit Promotion Plan and the negotiated promotion plan in the Collective Bargaining Agreement insofar as [the grievants] were concerned.

The arbitrator denied the grievance, concluding that "the Agency followed the Agency Merit Promotion Plan and the negotiated Promotion plan in the Collective Bargaining Agreement, and that [the grievants] are not entitled to any remedy under the terms of the existing Collective Bargaining Agreement between the parties."

The union requests that the Council accept its petition for review of the arbitrator's award on the basis of the exception discussed below. The agency filed an opposition.

Under section 2411.32 of the Council's rules of procedure, review of an arbitration award will be granted "only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable

law, appropriate regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations."

In its exception, the union contends that the arbitrator, in rendering his decision, disregarded applicable regulations promulgated by the Civil Service Commission. In support of this exception, the union first asserts that since the grievants were omitted from the best qualified list (despite the evaluation panel's determining them to be best qualified), they "were not given consideration for promotion as required by [Federal Personnel Manual] FPM Chapter 335, Subchapter 3-3c." [Emphasis in original.][1/] Thus the union argues that the arbitrator's determination that the promotion action was in accordance with the agency merit promotion plan "was clearly erroneous and violative of FPM Chapter 335, Subchapter 3-3c."

As previously indicated, the Council will grant review of an arbitration award in cases where it appears, based upon the facts and circumstances described in the petition, that the exception to the award presents a ground that the award violates appropriate regulations. E.g., Office of Economic Opportunity and Local 2677, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator), FLRC No. 75A-26 (May 19, 1975), Report No. 70 at 4 of the digest. However, in this case the union's petition does not contain a description of facts and circumstances to support its exception that the award violates appropriate regulation. In the Council's opinion, the union has failed to establish a nexus between the cited FPM provision regarding the minimum area of consideration and the arbitrator's conclusion that the agency followed the agency merit promotion plan. That is, the union has failed to show in what manner this conclusion violates the requirements of FPM chapter 335, subchapter 3-3c that all employees within the minimum area of consideration must have the opportunity to be considered for promotion to positions for which they are eligible. The union only asserts that the grievants' names were not submitted to the selecting official, thus apparently alleging that mandatory consideration of eligible employees within the minimum area requires a mandatory inclusion on the promotion certificate. However, the union does not cite a provision in FPM chapter 335 which establishes such a requirement and the union does not otherwise present facts and circumstances to support its assertion that the grievants did

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1/ FPM chapter 335, subchapter 3-3c provides:

> c. Consideration of employees within the minimum area. All employees within the minimum area of consideration must have the opportunity to be considered for promotion to positions for which they are eligible. . . . If vacancies are announced, consideration may be limited to those who apply. If vacancies are not announced, all eligible candidates within the minimum area must be considered. No matter what method is used, procedures must assure appropriate consideration for employees temporarily absent on detail, on leave, at training courses, in the military service . . . or for service in public international organizations . . . .

not have the opportunity to be considered for promotion as required by the FPM. Further, the union, in its petition for review, states that the promotion panel in this matter did evaluate all the candidates, including the grievants. Therefore, the union's assertion that the arbitrator's award violates FPM chapter 335, subchapter 3-3c provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

The union also asserts, in support of its exception, that the award is in conflict with § 0335.35b(3) of the Bureau of Alcohol, Tobacco and Firearms (ATF) Manual implementing the FPM merit promotion policy. The union states that §0335.35b(3) provides that "the evaluation panel should consist of at least three voting members" [emphasis in original] but that the panel in the instant case consisted "ostensibly" of two members and "in reality" of only one. Without passing on whether or not the ATF manual constitutes an "appropriate regulation" within the meaning of section 2411.32 of the Council's rules, the Council is of the opinion that the union's petition does not describe facts and circumstances to support this assertion. In this regard, it is noted that nothing in the agency regulation, as paraphrased in the union's petition,2/ requires a three-member evaluation panel. Therefore, this assertion provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules.

Finally, the union asserts that the arbitrator's failure to make the determination that the grievants would have been selected to the position in question violates FPM chapter 335, subchapter 6-4c(2).3/ The union argues that since the grievants were not considered properly for promotion when their names were omitted from the best qualified list, they were entitled to priority consideration under the cited FPM provision. Again, however, the Council is of the opinion that the union has failed to establish a nexus between the FPM provision regarding priority consideration and the arbitrator's conclusion that the agency followed the agency

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2/ According to the union's petition, "[s]ection 0335.35b(3) provides that the evaluation panel should consist of at least three voting members." [Emphasis in original.]

3/ FPM chapter 335, subchapter 6-4c(2) provides:

> c. Action involving nonselected employees.
>
> . . . . . .
>
> (2) If the corrective action did not include vacating the position, an employee who was not promoted or given proper consideration because of the violation is to be given priority consideration for the next appropriate vacancy before candidates under a new promotion or other placement action are considered. An employee may be selected on the basis of this consideration as an exception to competitive promotion procedures (see section 4-3f).

merit promotion plan and the negotiated promotion plan in the collective bargaining agreement and that the grievants were not entitled to any remedy under the terms of the agreement. That is, the union has failed to show in what manner this conclusion and award violate FPM chapter 335, subchapter 6-4c(2). Furthermore, this exception is based on the assumption, discussed in connection with the union's first exception, supra, that the grievants were not properly considered for promotion when their names were omitted from the best qualified list. Thus, it appears that the union is, in essence, disagreeing with the arbitrator's reasoning in arriving at his award. The Council has held that it is the arbitrator's award rather than the conclusion or specific reasoning employed that is subject to review. American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), 1 FLRC 545 [FLRC No. 72A-55 (Sept. 17, 1973), Report No. 44]. Therefore, this assertion provides no basis for acceptance of the union's petition under section 2411.32 of the Council's rules of procedure.

Accordingly, the union's petition for review is denied because it fails to meet the requirements for review set forth in section 2411.32 of the Council's rules of procedure.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: C. Nolte
ATF

Puget Sound Naval Shipyard, Bremerton, Washington, Assistant Secretary Case No. 71-3492. The Assistant Secretary, in agreement with the Assistant Regional Director, found, in pertinent part, that the grievance concerning the termination of a probationary employee for alleged misuse of annual and sick leave was on a matter subject to the negotiated grievance procedure of the agreement between the activity and Local 282, International Association of Machinists and Aerospace Workers. The agency appealed to the Council, contending that the Assistant Secretary's decision presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (December 7, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not raise a major policy issue, and the agency neither alleged, nor did it appear, that his decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 7, 1976

Mr. A. Di Pasquale, Director
Labor and Employee Relations Division
Office of Civilian Manpower Management
Department of the Navy
Washington, D.C. 20390

Re: Puget Sound Naval Shipyard, Bremerton, Washington, Assistant Secretary Case No. 71-3492, FLRC No. 76A-57

Dear Mr. Di Pasquale:

The Council has carefully considered your petition for review and request for a stay in the above-entitled case.

In this case, as found by the Assistant Secretary, the Puget Sound Naval Shipyard, Bremerton, Washington (the activity) and IAM, Local 282 (the union) were parties to a collective bargaining agreement covering employees at the activity. Probationary employee James P. Morgan was terminated for alleged misuse of annual and sick leave. Morgan filed a formal grievance concerning his termination, which the activity denied.

The Assistant Regional Director concluded, in pertinent part, that the question of proper usage of sick and annual leave which was raised in the grievance involved application of articles of the agreement and that the coverage of that agreement extends to the grievant. In agreement with the Assistant Regional Director, the Assistant Secretary found, in pertinent part, that the grievance was on a matter subject to the negotiated grievance procedure.

In your petition for review on behalf of the activity you allege that the Assistant Secretary's decision presents major policy issues: (1) May an arbitrator reverse or modify an agency decision not to retain a probationary employee, or is the maintenance of the right of management under section 12(b)(2) of the Order inviolate in the absence of applicable laws and regulations to the contrary? (2) Subordinate to the answer to the first question is the issue of the incongruity of the finding by the Assistant Secretary that a matter is grievable under the negotiated agreement if an arbitrator would be barred from granting the remedy sought. (3) If the answer to the first question is that an arbitrator may reverse management's decision to separate a probationary employee, can such power be assumed without the express consent of management?

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not raise a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

The essence of your allegations and supporting arguments is the contention that any reversal or modification of the activity's decision at the conclusion of the grievance and arbitration procedure not to retain the terminated employee would violate the Order. However, in the Council's view, such a contention, based on supposition, does not warrant review of the Assistant Secretary's decision, noting particularly, in this regard, section 2411.32 of the Council's rules provides, in pertinent part, that the Council will grant a petition for review of an arbitration award where it appears that the exceptions to the award present grounds that the award violates applicable law, appropriate regulation, or the Order.1/

In support of alleged major policy issue (3), supra, your petition for review cites and quotes a portion of the Council's decision in Department of the Navy, Naval Ammunition Depot, Crane, Indiana, Assistant Secretary Case No. 50-9667, FLRC No. 74A-19 (Feb. 7, 1975), Report No. 63. In Crane, a probationary employee grieved his termination under the provisions of a negotiated grievance procedure, claiming that such termination violated a provision of the agreement relating to "acceptable level of competence." The activity denied that the termination was grievable under the agreement, and the union then filed an application with the Assistant Secretary for a decision on grievability. The Assistant Secretary referred both the issue as to whether the grievant's termination was covered by the agreement as well as the issue as to whether the activity violated such agreement in its treatment of the grievant to the negotiated grievance procedure for resolution. On appeal, the Council stated that: (1) Where an issue is presented concerning the applicability of a statutory appeal procedure, the Assistant Secretary must decide that question; (2) where a dispute is referred to him as to whether a grievance is on a matter subject to a negotiated grievance procedure, the Assistant Secretary must decide such grievability dispute; and (3) in resolving the dispute referred to in (2), above, the Assistant Secretary must consider the relevant agreement provisions in light of related provisions of statute, the Order, and regulations, especially where special meaning is attached to words used in the

1/ While the instant appeal merely argues that a potential award by the arbitrator would violate the Order and does not challenge the Assistant Secretary's decision on grievability or arbitrability itself, we note additionally the Assistant Secretary's findings that the grievance herein concerned the proper application of specific provisions in the negotiated agreement, that coverage was extended to the grievant by the terms of such negotiated agreement, and that no statutory appeal procedure existed under which the grievant could appeal the specific allegations raised in the grievance.

relevant agreement provisions by such statute, regulation, or the Order and there is no indication that any other than the special meaning was intended by the parties. Accordingly, the Council set aside the Assistant Secretary's decision and remanded the case to him for reconsideration consistent with the foregoing principles.2/

On remand, the Assistant Secretary found that the grievance was not on a matter subject to the parties' negotiated grievance procedure. In so finding, he concluded that the parties intended the provision dealing with "acceptable level of competence" to apply to evaluations of General Schedule employees relative to their within-grade step increases and not to evaluations or determinations to terminate a probationary Wage Grade Employee such as the grievant. Therefore, he concluded that the grievant could not grieve concerning the alleged failure of the activity to comply with the requirements of the provision dealing with "acceptable level of competence" with respect to his termination as a probationary employee. Department of the Navy, Naval Ammunition Depot, Crane, Indiana, A/SLMR No. 684 (July 26, 1976).

Thus, the Assistant Secretary's ultimate disposition of Crane appears to support the general proposition that contractual provisions which deal with matters unrelated to the termination of probationary employees may not be relied upon as a basis to grieve the termination of such an employee. As you note in your petition, the probationary status is described in the Federal Personnel Manual, FPM chapter 315, subchapter 8-1a, as "a final and highly significant step in the examining process." Its foundation lies in statute; 5 U.S.C. § 3321 (1966) provides: "The President may prescribe rules, which shall provide, as nearly as conditions of good administration warrant, that there shall be a period of probation before an appointment in the competitive service becomes absolute."

The Civil Service Commission (CSC) has issued regulations to implement this provision which provide, in pertinent part, that "[t]he first year of service of an employee who is given a career or career-conditional appointment . . . is a probationary period . . ." (5 CFR § 315.801(a)); that "[t]he agency shall utilize the probationary period as fully as possible to determine the fitness of the employee and shall terminate his services during this period if he fails to demonstrate fully his qualifications for continued employment" (5 CFR § 315.803); and that "[w]hen an agency

2/ In the instant case, unlike Crane, the Assistant Secretary did decide the issue concerning the applicability of the statutory appeal procedure, finding that the allegations raised by the grievance were not appealable through any existing statutory appeal procedure, and decided the question as to whether the grievance was on a matter subject to a negotiated grievance procedure. Moreover, unlike Crane, there was no allegation herein that the relevant agreement provisions contained words to which special meaning was attached by statute, regulation, or the Order.

decides to terminate an employee serving a probationary or trial period because his work performance or conduct during this period fails to demonstrate his fitness or his qualifications for continued employment, it shall terminate his services by notifying him in writing as to why he is being separated and the effective date of the action" (5 CFR § 315.804). If an employee is terminated during such probationary period, he is afforded certain limited statutory appeal rights under CSC regulations, specifically 5 CFR § 315.806, which provides, in pertinent part:

> Sec. 315.806 Appeal rights to the Commission. (a) Right of appeal. An employee may appeal to the Commission in writing an agency's decision to terminate him under section 315.804 or section 315.805 only as provided in paragraphs (b) and (c) of this section. The Commission's review is confined to the issues stated in paragraphs (b) and (c) of this section.
>
> (b) On discrimination. (1) An employee may appeal under this subparagraph a termination which he alleges was based on discrimination because of race, color, religion, sex, or national origin; or age, Provided, That at the time of the alleged discriminatory action the employee was at least 40 years of age but less than 65 years of age. The Commission refers the issue of discrimination to the agency for investigation of that issue and a report thereon to the Commission.
>
> (2) An employee may appeal under this subparagraph a termination not required by statute which he alleges was based on partisan political reasons or marital status or a termination which he alleges resulted from improper discrimination because of physical handicap.
>
> (c) On improper procedure. A probationer whose termination is subject to section 315.805 may appeal on the ground that his termination was not effected in accordance with the procedural requirements of that section.

The Assistant Secretary's ultimate disposition of Crane may be distinguished from an instance in which an agreement contains specific language relating to the right of probationers, the denial of which could result in corrective action. In this regard, as noted in your petition for review, in National Archives and Records Service and American Federation of Government Employees, Local 2578 (Strongin, Arbitrator), FLRC No. 75A-74 (Oct. 10, 1975), Report No. 87, the Council denied review of an arbitrator's award which ordered a probationary employee reinstated with backpay, where the employee had been terminated without first having received an appraisal report from agency management by the end of the eighth month of his probationary period as required by a specific provision of the negotiated agreement. In the instant case, the Assistant Secretary, as noted above, has found the grievance to deal with the proper usage of sick and annual leave involving the application of articles in the agreement rather than with the right of probationers, and therefore is a matter subject to the negotiated grievance procedure.

Since the Assistant Secretary's decision does not present a major policy issue, and since you neither contend, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

L. Finneman
IAM

246-469 O - 78 - 40

Department of the Air Force, 4500 Air Base Wing, Langley Air Force Base, Virginia, Assistant Secretary Case No. 22-6644(CA). The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), found that further proceedings on the complaint filed by Ms. Joan Greene, which alleged that the activity violated section 19(a)(1) and (3) of the Order, were not warranted, since there was insufficient evidence to establish a reasonable basis for the allegations contained in the complaint. Accordingly, the Assistant Secretary denied the complainant's request for review seeking reversal of the ARA's dismissal of her complaint. Ms. Greene appealed to the Council, contending, in substance, that the Assistant Secretary's decision was arbitrary and capricious and presented a major policy issue.

Council action (December 7, 1976). The Council held that Ms. Greene's appeal did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious, nor did it present any major policy issues. Accordingly, the Council denied review of Ms. Greene's appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 7, 1976

Ms. Joan Greene
2032 Cunningham Drive
Apartment #201
Hampton, Virginia 23666

Re: Department of the Air Force, 4500 Air Base Wing, Langley Air Force Base, Virginia, Assistant Secretary Case No. 22-6644(CA), FLRC No. 76A-100

Dear Ms. Greene:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

In this case, you filed a complaint against the Department of the Air Force, 4500 Air Base Wing, Langley Air Force Base, Virginia (the activity) alleging that the activity violated section 19(a)(1) of the Order by negotiating ground rules for bargaining with a nonemployee agent of the exclusive representative (the President Pro Tem of the National Association of Government Employees, Local R4-106 (NAGE)) without the participation of bargaining unit employees acting as "employee representatives." The complaint further alleged that, in violation of section 19(a)(3) of the Order, the activity rendered improper assistance to NAGE by signing an agreement with the President Pro Tem on the expiration date of NAGE's certification bar against challenge by other labor organizations for exclusive representative status.

The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), found that further proceedings were unwarranted, since there was "insufficient evidence to establish a reasonable basis for the Section 19 (a)(1) and (3) allegations contained in the instant complaint." Accordingly, he denied your request for review seeking reversal of the ARA's dismissal of the complaint.

In your petition for review, you allege that the Assistant Secretary's decision is arbitrary, capricious, and inconsistent with the purposes and effectuation of the Order, in that "[t]here is a reasonable basis for the complaint." You further allege that a major policy issue exists in the instant case, since the agreement negotiated by the parties based upon only the activity's proposals was "a sham" caused by the activity's solicitation of, and collusion with, the National President and President Pro Tem of NAGE, thus causing irreparable loss of employees' rights guaranteed by the Order.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear arbitrary and capricious, nor does it present any major policy issues.

As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without any reasonable justification in reaching his decision. In this regard, the ARA's investigation of your complaint revealed that the chief negotiator for NAGE Local R4-106 at the negotiation of ground rules and at contract negotiations was the appointed President and authorized representative of the local and that no evidence had been presented that the activity failed at any time to allow him to negotiate as he saw fit on behalf of the employees. Further, you contend only that a reasonable basis has been established for the unfair labor practices as filed; and therefore, your contention constitutes nothing more than a disagreement with the Assistant Secretary's contrary determination pursuant to his regulations. Likewise, your allegation that the Assistant Secretary's decision presents a major policy issue constitutes nothing more than disagreement with his contrary determinations, pursuant to his regulations, that there was insufficient evidence to establish a reasonable basis for the allegations in the complaint. Accordingly, no basis for Council review is thereby presented.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present any major policy issues, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Capt. E. K. Brehl
Air Force

Department of Defense, Defense Mapping Agency Depot, Hawaii, A/SLMR No. 747. The International Brotherhood of Electrical Workers, Local 1186, AFL-CIO (IBEW) appealed to the Council from a decision and direction of election issued by the Assistant Secretary, wherein, among other things, the Assistant Secretary directed a representation election among the employees in the unit he found appropriate, in which election IBEW was to be provided a place on the ballot. However, no final disposition of the entire representation case had been rendered by the Assistant Secretary. The IBEW also requested a stay of the Assistant Secretary's decision.

Council action (December 9, 1976). The Council, pursuant to section 2411.41 of its rules of procedure, denied review of IBEW's interlocutory appeal, without prejudice to the renewal of its contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. The Council likewise denied IBEW's request for a stay.

UNITED STATES
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1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 9, 1976

Mr. Benjamin C. Sigal
Attorney at Law
Shim, Sigal, Tam and Naito
333 Queen Street
Honolulu, Hawaii 96813

Re: Department of Defense, Defense Mapping Agency Depot, Hawaii, A/SLMR No. 747, FLRC No. 76A-148

Dear Mr. Sigal:

This refers to your petition for review and request for a stay of the Assistant Secretary's decision and direction of election in the above-entitled case on behalf of International Brotherhood of Electrical Workers, Local 1186, AFL-CIO (IBEW).

In his subject action, from which you are appealing, the Assistant Secretary, among other things, directed a representation election among the employees in the unit he found appropriate, in which election IBEW is to be provided a place on the ballot. Such election has not been conducted and no certification of the results or certification of representative has issued. Thus, no final disposition of the entire case has been rendered.

Section 2411.41 of the Council's rules of procedure (5 C.F.R. § 2411.41) prohibits interlocutory appeals. That is, the Council will not consider a petition for review of a decision of the Assistant Secretary until a final decision has been rendered on the entire proceeding before him. More particularly, in a case such as here involved, the Council will entertain an appeal only after a certification of representative or of the results of the election has issued, or after other final disposition has been made of the entire representation matter by the Assistant Secretary.

Since a final decision has not been so rendered in the present case, your appeal is interlocutory and is hereby denied, without prejudice

to the renewal of your contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary. Likewise, your request for a stay is also denied.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

F. E. Foltz
DMA

D. M. Lewis, Jr., Lt. Col.
Air Force

M. J. Merrill
IAM&AW

Department of Transportation, Federal Aviation Administration, Montgomery RAPCON/Tower, Montgomery, Alabama and Professional Air Traffic Controllers Organization (Amis, Arbitrator). The arbitrator directed that the grievant be granted a Special Achievement Award and be provided the maximum cash benefit permitted under the regulations. The Council accepted the agency's petition for review insofar as it related to the agency's exception which alleged, in effect, that the award, in directing the expenditure of appropriated funds in the manner indicated, violated applicable law. The Council also granted the agency's request for a stay. (Report No. 76.)

Council action (December 20, 1976). Based upon a decision by the Comptroller General rendered in response to the Council's request, the Council concluded that the arbitrator's award, insofar as it specifically directed that the grievant be granted a Special Achievement Award and be provided the maximum cash benefit permitted under regulations, was violative of law and could not be implemented. However, the Council also determined that the Comptroller General's decision indicated that if the award directed that the grievant be recommended and considered for a Special Achievement Award pursuant to applicable regulations, it would not be violative of law. Accordingly, the Council, pursuant to section 2411.37(b) of its rules of procedure, modified the award to provide that the grievant be recommended and considered for a Special Achievement Award pursuant to applicable regulations at the maximum cash benefit permitted under the regulations. As so modified, the Council sustained the award and vacated the stay which it had previously granted.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Department of Transportation, Federal
Aviation Administration, Montgomery
RAPCON/Tower, Montgomery, Alabama

and

FLRC No. 75A-32

Professional Air Traffic Controllers
Organization

DECISION ON APPEAL FROM ARBITRATION AWARD

Background of Case

This appeal arose from the arbitrator's award granting the grievant a Special Achievement Award at "the maximum cash benefit permitted under the regulations."

Based on the findings of the arbitrator and the entire record, it appears that the grievant, an Air Traffic Controller, was employed at the activity for five years with an excellent work record. The grievant's former supervisor intended to recommend him for a Special Achievement Award but was unable to do so because of a sudden illness and subsequent retirement. Prior to his retirement, however, he advised the supervisor who succeeded him that the grievant was eligible for the award and suggested that such action be taken. When the successor supervisor failed to recommend the grievant for a Special Achievement Award, the grievant filed a formal grievance on May 31, 1974, and the matter was ultimately submitted to arbitration.

The Arbitrator's Award

The issue submitted to arbitration is stated in the award as follows:

> Have management officials at the Montgomery RAPCON/Tower used the Recognition and Awards Program to discriminate against employees who are receiving compensation for service connected disabilities or retired pay and thereby violated the provisions of Article 50, Section 1 of the PATCO/FAA Agreement?1/

1/ Article 50 - RECOGNITION AND AWARDS PROGRAM, provides in Section 1:

> The Employer agrees that quality step increases, special achievement awards, or other awards based entirely upon job performance, shall be used exclusively for rewarding employees for the performance of assigned duties. This program shall not be used to discriminate among employees or to effect favoritism.

The arbitrator determined that the fact that the grievant had not been recommended for an award despite his obvious eligibility for consideration, based on his performance over a substantial period of time, indicated that the grievant had been discriminated against in violation of the agreement since it was clear, on the basis of the evidence, that "the supervisor had a long standing prejudice . . . concerning employees drawing dual compensation" and this influenced the supervisor's decision in denying a Special Achievement Award to the grievant who was receiving compensation for a service-connected disability.

As his award, the arbitrator sustained the grievance in its entirety and directed that the grievant be granted a Special Achievement Award effective May 31, 1974, and be provided the maximum cash benefit permitted under the regulations.

Agency's Appeal to the Council

The agency filed a petition for review of the arbitrator's award with the Council. Under section 2411.32 of the Council's rules of procedure, the Council accepted the petition for review insofar as it related to the agency's exception which alleged, in effect, that the award, in directing the expenditure of appropriated funds in the manner indicated, violates applicable law.2/

Opinion

Section 2411.37(a) of the Council's rules of procedure provides that:.

> (a) An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

As previously noted, the Council accepted the agency's petition for review insofar as it related to its exception which alleged, in effect, that the award, which directs an expenditure of appropriated funds, violates applicable law. Because this case concerns issues within the jurisdiction of the Comptroller General's Office, the Council requested from him a decision as to whether the arbitrator's award violates applicable law and regulation. The Comptroller General's decision in the matter, B-180010.01, November 5, 1976, is set forth in relevant part as follows:

2/ The agency requested and the Council granted a stay of the award pending determination of the appeal, pursuant to section 2411.47(d) [now 2411.47(f)] of the Council's rules of procedure.

The arbitrator's opinion indicates that [grievant] was a model employee. His former supervisor, who retired as a result of sudden illness in February 1973, intended to recommend [grievant] for a Special Achievement Award. Prior to his retirement he advised his replacement that [grievant] was eligible for the award and suggested that he prepare a recommendation. [Grievant's] present supervisor did not submit a recommendation but subsequently stated that he would have done so except that [grievant] used extraneous language in giving control instructions. The extraneous language consisted of amenities such as "thank you" and "please" which were not a hinderance to safety. The supervisor had rated [grievant] on all other phases of his work as "exceeds requirements" except for this phase on which he rated him as "meets requirements."

In addition, the arbitrator found that [grievant's] performance evaluations for a 2-year period, from September 1, 1972, to September 1, 1974, satisfied the criteria for a Special Achievement Award as set forth in the agency's official eligibility requirements.

The arbitrator further found that the supervisor had exhibited a deep-seated negative bias toward employees receiving dual compensation from the Federal Government and that this bias had caused the supervisor to discriminate against [grievant] who was receiving additional compensation for a service-connected disability, by not recommending him for a Special Achievement Award despite his obvious eligibility for consideration. The arbitrator concluded that such discrimination was a violation of the collective bargaining agreement. Accordingly, he made the following award:

> "AWARD: Grievance sustained. [Grievant] shall be given a Special Achievement Award effective May 31, 1974, and shall be provided the maximum cash benefit permitted under the regulations."

The Department of Transportation appealed the arbitrator's award to the Federal Labor Relations Council, and the Council has requested our decision as to whether the expenditure of appropriated funds as ordered by the arbitrator may legally be made.

We must look to the Incentive Awards Act, 5 U.S.C. §§ 4501-06 (1970), to determine the legality of the payment. Section 4503 of title 5 provides as follows:

> "The head of an agency may pay a cash award to, and incur necessary expense for the honorary recognition of, an employee who --
>
> "(1) by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations; or

"(2) performs a special act or service in the public interest in connection with or related to his official employment."

Section 4506 of title 5 of the United States Code grants authority to the Civil Service Commission to prescribe regulations and instructions governing agency awards programs.

The Commission has exercised this authority and issued regulations governing the awards program in 5 C.F.R. Part 451. The regulations read in pertinent part as follows:

"451.102 Policy.

"The policy of the Commission in administering chapter 45 of title 5, United States Code, is to:

"(a) Establish broad principles and standards for the administration of the Incentive Awards Program

"(b) Delegate to heads of agencies authority to establish and operate incentive awards plans consistent with these principles and standards * * *."

The awards statute and implementing regulations vest discretion in heads of agencies to make or not to make awards and to tailor the awards as they see fit in accordance with the regulations, and the courts will not upset agency determinations except for a clear showing of abuse of discretion. Shaller v. United States, 202 Ct. Cl. 571 (1973), cert denied, 414 U.S. 1092. See also Serbin and Stedman v. United States, 168 Ct. Cl. 934 (1964); Kempinski v. United States, 164 Ct. Cl. 451 (1964), cert denied, 377 U.S. 981; Martilla v. United States, 118 Ct. Cl. 177 (1950). Thus, an agency would normally be free to accept or reject a recommendation in regard to a performance award, and to do so without a review by this Office or the courts of that exercise of discretion, provided it acts in good faith and not in abuse of its discretion. See 46 Comp. Gen. 730, 735 (1967).

In recent decisions this Office has attempted to give meaningful effect to the labor-management program established under Executive Order 11491 and to arbitration awards rendered thereunder if such awards are consistent with laws, regulations and our decisions. 54 Comp. Gen. 312, 320 (1974). We have held that provisions in collective bargaining agreements under the Executive Order may become nondiscretionary agency policies and, if the agency has agreed to binding arbitration, that the arbitrator's decision is entitled to the same weight as the agency head's decision would be given. Id. at 316. But we further stated therein that our decision "should not be construed to mean that any provision in a

collective bargaining agreement automatically becomes a nondiscretionary agency policy," and we added that "/w/hen there is doubt as to whether an award may be properly implemented, a decision from the Council or from this Office should be sought." Id. at 319, 320.

The issue to be resolved, therefore, is whether the PATCO-FAA agreement makes the grant of a performance award mandatory where, as here, there has been a finding that an employee has been discriminated against by his immediate supervisor in violation of section 1, Article 50, of the agreement. The FAA order which implements the awards program (FAA Order 3450.7B)--which the FAA-PATCO agreement is made subject to by section 12(a) of Executive Order 11491--specifically provides that, although an employee's immediate supervisor is responsible for initiating a special achievement award recommendation (paragraph 32.d.(1) and 33.b.), there must be at least two levels of supervision involved in the initiation and approval process for such awards, except for those approved by the administrator, Deputy Administrator, and officials reporting to the Administrator. Thus, a supervisor's recommendation does not necessarily mean that an award will be granted since approval at a higher level is required.

We find nothing in the negotiated agreement that changes the procedure for making incentive awards established in FAA Order 3450.7B or that creates any vested right in employees to receive awards. Section 1 of Article 50 requires that awards are to be based upon performance of assigned duties and may not be used to discriminate or to effect favoritism. However, that provision does not purport to eliminate the procedures set up by the FAA order or to take away the agency's discretion to select eligible employees for awards. In other words, the agreement did not change the granting of awards into a mandatory agency policy, even where discrimination is found. Therefore, notwithstanding the arbitrator's finding of discrimination in the failure of the grievant's supervisor to recommend him for a special achievement award, the grievant would not necessarily have been granted an award if he had been so recommended, since a single supervisor's recommendation is not by itself the decisive act in the awards process.

Accordingly, since the granting of a special achievement award remained discretionary with the FAA, the expenditure of appropriated funds for the cash award to [the grievant] ordered by the arbitrator may not legally be required. However, we would not object to a remedy which requires that an award recommendation be prepared and considered for [grievant] pursuant to agency regulations.

Based upon the foregoing decision by the Comptroller General, it is clear that the arbitrator's award, insofar as it specifically directs that the

grievant be granted a Special Achievement Award and be provided the maximum cash benefit permitted under regulations, is violative of law and may not be implemented. However, the Comptroller General's decision also indicates that if the award directed that the employee be recommended and considered for a Special Achievement Award pursuant to applicable regulations, it would not be violative of law. Therefore, we believe that the arbitrator's award should be modified to provide that the grievant be recommended for a Special Achievement Award.

Conclusion

For the reasons discussed above, and pursuant to section 2411.37(b) of the Council's rules of procedure, we modify the arbitrator's award to read as follows:

> AWARD: Grievance sustained. [Grievant] shall be recommended and considered for a Special Achievement Award pursuant to applicable regulations at the maximum cash benefit permitted under the regulations.

As so modified, the award is sustained and the stay of the award is vacated.

By the Council.

Henry B. Frazier III
Executive Director

Issued: December 20, 1976

Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, A/SLMR No. 669. The Assistant Secretary upon a complaint filed by Local 3202, American Federation of Government Employees, AFL-CIO (AFGE), found, in a decision clarified in response to the Council's request, that the agency violated section 19(a)(1) of the Order by its conduct in terminating the dues deductions of certain employees following an intra-agency reorganization. The agency filed a petition for review of the Assistant Secretary's decision, as clarified, contending that it presented major policy issues. The agency also requested a stay of the Assistant Secretary's decision.

Council action (December 20, 1976). The Council held that the agency's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's clarified decision did not raise a major policy issue, and the agency neither alleged, nor did it appear, that such decision was arbitrary and capricious. Accordingly, the Council denied the agency's petition for review. The Council likewise denied the agency's request for a stay.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 20, 1976

Mr. Robert E. Edwards
Associate General Counsel
Chief, Labor Relations Law Branch
Headquarters Army and Air Force
Exchange Service
Departments of the Army and the
Air Force
Dallas, Texas 75222

Re: Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, A/SLMR No. 669, FLRC No. 75A-93

Dear Mr. Edwards:

The Council has carefully considered your petition for review and request for a stay of the Assistant Secretary's decision in the above-entitled case.

This case arose when Local 3202, American Federation of Government Employees, AFL-CIO (the union) filed an unfair labor practice complaint alleging that the Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas (STAE) violated section 19(a)(1), (5), and (6) of the Order when, following a reorganization, STAE ceased recognizing the union as the exclusive representative of certain maintenance employees located at the Fort Sam Houston Exchange.

As found by the Assistant Secretary, as the result of an intra-agency reorganization within the Army and Air Force Exchange Service, the previously autonomous Fort Sam Houston Exchange (among others) was added to the STAE, headquartered some 13 miles away at Lackland Air Force Base. Operating as a new managerial level, the STAE centralized various administrative functions for all exchanges within its jurisdiction, including the Fort Sam Houston Exchange, such as accounting, personnel, contract administration, and certain management operations. At the time of the events herein, the union had been the certified bargaining representative of a unit of employees, including the maintenance employees, at the Fort Sam Houston Exchange, and a negotiated agreement containing a provision for union dues deductions had been in effect covering the unit. As a result of the reorganization, four of the eight maintenance employees at the Fort Sam Houston Exchange were physically transferred to the STAE and, by agreement, were no longer considered part of the bargaining unit. The other maintenance employees remained at the Fort Sam Houston Exchange and

continued to perform the same duties at the same workplace under the same immediate supervision. As to the latter employees, STAE informed the union that dues deductions had been terminated inasmuch as the entire maintenance crew had been transferred to STAE. The union then filed a complaint alleging that by such conduct STAE had violated section 19(a)(1), (5), and (6) of the Order. (STAE resumed dues deductions for the employees in question, placing the money in escrow pending the outcome of this matter.)

The Assistant Secretary initially determined that the employees involved had been "administratively transferred" to STAE; that STAE and the Fort Sam Houston Exchange were "co-employers" with respect to such employees; and that STAE had violated section 19(a)(1) and (5) of the Order by its unilateral termination of their dues deductions. Army and Air Force Exchange Service, South Texas Area Exchange, Lackland Air Force Base, Texas, A/SLMR No. 542 (July 31, 1975). STAE filed a petition for review of that decision with the Council, taking issue, essentially, with the Assistant Secretary's application of the "co-employer doctrine" from his decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, which matter was before the Council on review. Subsequently, the Council issued its decision in Defense Supply Agency, Defense Property Disposal Office, Aberdeen Proving Ground, Aberdeen, Maryland, A/SLMR No. 360, FLRC No. 74A-22 (Dec. 9, 1975), Report No. 88, and thereafter referred the instant case to the Assistant Secretary for further consideration and clarification, in view of his reliance upon certain principles, including the coemployer doctrine, which the Council reversed in the Defense Supply Agency decision. The Council held in abeyance its decision on acceptance or denial of the appeal pending the issuance of the Assistant Secretary's decision as clarified. Thereafter, in response to the Assistant Secretary's request for clarification as to whether the Council's decision in Defense Supply Agency rendered the coemployer doctrine inapplicable in toto or merely with regard to the circumstances of that case, the Council stated:

> While the Council (with Presidential approval) has indicated its intention to deal on a case-by-case basis with questions arising as a result of agency reorganizations, and while the Council therefore rendered a decision in the Defense Supply Agency case which dealt with the issues as they arose from the particular facts of that case, the reasoning of the decision therein should not be construed as in any manner limited solely to that case, nor should the principles enunciated therein be construed as applicable only to other cases which present the identical factual situation presented in Defense Supply Agency. In other words, while the Council has concluded that reorganization problems should be resolved on a case-by-case basis, clearly they will not be resolved on an ad hoc basis; further, consistent with the recognized practice in administrative tribunals, the principles enunciated in the Defense Supply Agency decision constitute valid guidelines and precedent for the resolution of similar questions in future cases.

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> Thus, while there may be "clear factual distinctions" between the Defense Supply Agency case and the instant case (such as the fact that "the reorganization involved in the instant case took place within a single agency as distinguished from a reorganization across agency lines"), the Council did not mean to imply in its Defense Supply Agency decision that such factual distinctions would in any manner render the co-employer doctrine a viable alternative. Instead, as appears from the Council's decision, only the following alternatives would be potentially applicable, depending on the present record or the record which might be developed, namely: it might be determined that the disputed employees remain in the existing unit; that they are no longer a part of the existing unit and are therefore unrepresented; or that a "successorship" has been created by the reorganization within the criteria established in the Defense Supply Agency decision. (Of course, as we stated in Defense Supply Agency, in any appropriate unit determination the necessary equal weight must be accorded to each of the criteria in section 10(b) of the Order.)
>
> Consistent with this approach, the Council has requested that you reexamine your decision herein in light of all of the principles enunciated in its Defense Supply Agency decision, including those relating to the co-employer doctrine, in order to determine in what manner those principles are applicable to the facts herein. It is also recognized that further factual findings may be necessary in order for you to make such a determination, and that additional hearings to supplement the record in this case therefore may be required.

The Assistant Secretary thereafter issued his supplemental decision and order, wherein, "noting particularly that . . . the reorganization herein involved the administrative transfer to the gaining employer of only a small segment of those employees of the existing exclusively recognized unit," he found that no successorship had been created by the reorganization. However, he further found that "the community of interest shared by the maintenance employees at the Fort Sam Houston Exchange with other unit employees was undisturbed by the reorganization," that "the retention of the disputed maintenance employees in the Fort Sam Houston unit will promote effective dealings and efficiency of agency operations," and that "the maintenance employees at the Fort Sam Houston Exchange continue to remain in the existing exclusively recognized unit."

As to the alleged unfair labor practices, the Assistant Secretary found, in pertinent part:

> . . . By thus interfering with the obligation of the Fort Sam Houston Exchange to honor the terms and conditions of its existing negotiated agreement with the [union], . . . the STAE interfered with the obligation of the Fort Sam Houston Exchange to accord appropriate recognition to the [union]. In my view, such improper conduct by the [STAE] had

> the concomitant effect of interfering with, restraining, or coercing the maintenance employees in the unit at the Fort Sam Houston Exchange in the exercise of their right assured by the Order to assist a labor organization. Under these circumstances, I find that the [STAE] violated Section 19(a)(1) of the Order.*/ [Footnote omitted.]

As part of his remedial order, the Assistant Secretary required STAE to "[r]emit to the [union], all money deducted from unit employees' pay which was withheld from the [union], but is retained in escrow."

In your petition for review of the Assistant Secretary's supplemental decision and order, you allege that it presents two major policy issues:

> (1) Whether conduct on the part of South Texas Area Exchange, can form the basis for finding a violation of 19(a)(1), where [the union] does not hold exclusive recognition with STAE, the higher management level.
>
> (2) Whether that part of the remedial order which requires the [STAE] to remit to [the union] all monies deducted from unit employee's [sic] pay on behalf of [the union], but held in escrow, since [STAE] no longer has such funds, as [sic] in the nature of a penalty and is thus not consistent with the purpose of the order.

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules; that is, his decision does not raise a major policy issue, and you neither allege, nor does it appear, that his decision is arbitrary and capricious.

Thus, in the Council's view, no major policy issue is presented by the Assistant Secretary's conclusion that STAE, a "higher management level," violated section 19(a)(1) of the Order in the circumstances of this case. In this regard, we note particularly the Assistant Secretary's finding that, following the reorganization herein, STAE assumed control of such functions as contract administration and personnel, including the deduction of union dues for all unit employees at the Fort Sam Houston Exchange, and that by exercising such control to discontinue dues deductions for the maintenance employees in question, STAE thereby interfered with, restrained, or coerced the maintenance employees in the unit at the Fort Sam Houston Exchange in the exercise of their rights assured by the Order. See The Adjutant General, State of Illinois, Illinois Air National Guard, and

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*/ However, the Assistant Secretary dismissed the complaint insofar as it alleged violations of section 19(a)(5) and (6) of the Order by STAE herein. Such dismissal has not been appealed to the Council and accordingly is not properly before the Council for review.

National Guard Bureau, Washington, D.C., A/SLMR No. 598, FLRC No. 76A-1 (Apr. 23, 1976), Report No. 105.

Nor is a major policy issue presented, as alleged, by the Assistant Secretary's remedial order requiring the remittance by STAE of all dues deductions, noting particularly that the Assistant Secretary's remedial order only requires the remittance of union dues which was deducted by STAE "but is retained in escrow." Moreover, we note, as did the Assistant Secretary, that such contention "may best be raised in the compliance phase of this matter."

Since the Assistant Secretary's decision does not present a major policy issue, and since you neither allege, nor does it appear, that his decision is arbitrary and capricious, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied. Your request for a stay of the Assistant Secretary's decision and order is likewise denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

R. J. Malloy
AFGE

Environmental Protection Agency, Region VII, Kansas City, Missouri, A/SLMR No. 668. The Assistant Secretary dismissed the complaint filed by National Federation of Federal Employees, Local 1205 (NFFE), which alleged that the activity violated section 19(a)(1) and (6) of the Order by failing to confer, consult, or negotiate with NFFE before promulgating an upward mobility program. NFFE filed an appeal with the Council, pursuant to section 2411.17 of the Council's rules of procedure, from "the unfavorable determination of negotiability made by the Assistant Secretary in the context of the [instant] unfair labor practice case."

Council action (December 20, 1976). The Council found that the Assistant Secretary did not make a negotiability determination in this case and held that NFFE's appeal therefore failed to provide any basis for Council review of the Assistant Secretary's decision under section 2411.17 of its rules of procedure. The Council further held that since NFFE neither alleged, nor did it appear, that the Assistant Secretary's decision was arbitrary and capricious, or that it raised a major policy issue, no basis was presented for Council review under section 2411.12 of the Council's rules. Accordingly, the Council denied review of NFFE's appeal.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 20, 1976

Ms. Lisa Renee Strax, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Environmental Protection Agency, Region VII, Kansas City, Missouri, A/SLMR No. 668, FLRC No. 76A-87

Dear Ms. Strax:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the opposition thereto filed by the agency, in the above-entitled case.

The undisputed facts of this case, as stipulated by the parties and found by the Assistant Secretary, are as follows: National Federation of Federal Employees, Local 1205 (NFFE) is the exclusive representative of all nonprofessional employees at the Environmental Protection Agency, Region VII (the activity). The activity had provided NFFE with a copy of the Agency Upward Mobility Program which had been issued previously by agency headquarters. Differing substantially from a draft furnished to NFFE by the activity for comments and suggestions a few weeks earlier, the new Agency Upward Mobility Program superseded the earlier draft document, outlining the procedures for selection, training, and administration. When NFFE expressed concern over the differences between the new agency Program and the prior draft, the activity asserted that the Program was in its final form and that no changes would be made. A few months later, the U.S. Civil Service Commission (CSC) approved the activity's Regional Affirmative Action Plan. As a condition of approval, however, the CSC required the activity to supplement the Regional Affirmative Action Plan with sections dealing with upward mobility, one of which was Attachment 10, entitled "Region VII Upward Mobility Program." The activity distributed copies of the recently approved Regional Affirmative Action Plan with attachments, including Attachment 10, to its employees. NFFE again objected to the differences between the Plan as implemented and the earlier draft, particularly Attachment 10, but the activity informed NFFE that the Plan was in its final form and would not be changed.

Thereafter, NFFE filed a complaint alleging that the activity violated section 19(a)(1) and (6) of the Order by failing to confer, consult, or negotiate with NFFE before promulgating Attachment 10 of the Regional Affirmative Action Plan. The Assistant Secretary, in finding that the activity did not violate section 19(a)(1) and (6) of the Order by failing to meet and confer with regard to Attachment 10 of the Regional Affirmative Action Plan, stated:

> In my view, [NFFE] is, in effect, seeking to modify in certain respects an upward mobility program promulgated by the Agency. It has been held previously in an analogous situation involving an alleged violation of an agency grievance procedure which did not result from any right accorded to individual employees or to labor organizations under the Order, that the policing and enforcing of such an agency established procedure are the responsibility of the U.S. Civil Service Commission. Similarly, I find that, under the circumstances herein, the policing and enforcing of the Agency's Upward Mobility Program were not matters for review under the procedures of Section 19(a) of the Order. [Footnote omitted.]
>
> Moreover, it was noted that the parties herein were in essential agreement that the disputed upward mobility positions enumerated in "Attachment 10" are not a product of the Agency Upward Mobility Program, but were identified and filled prior to the promulgation of such Program. Consequently, the evidence was considered insufficient to support [NFFE's] contention that "Attachment 10" encompassed matters involving the impact of, and the procedures to be utilized in implementing, the Agency Upward Mobility Program. Rather, it appears from the evidence herein that "Attachment 10" was formulated in reply to a request of the U.S. Civil Service Commission and reflected merely actions which already had been taken and procedures which were in existence prior to the formulation of the Agency Upward Mobility Program and the Regional Affirmative Action Plan. [Emphasis in original.]

Accordingly, the Assistant Secretary ordered that NFFE's complaint be dismissed.

Your captioned "Appeal of Assistant Secretary's Determination of Negotiability," filed on behalf of NFFE herein pursuant to section 2411.17 of the Council's rules of procedure, appeals "the unfavorable determination of negotiability made by the Assistant Secretary in the context of the [instant] unfair labor practice case." In this regard, you allege that "[t]he question presented is whether the Activity was under a duty to provide the Union with an opportunity to negotiate on the subject matter contained within 'Attachment 10,'" asserting that the activity's "obligation to negotiate does extend to this subject matter on the ground that this document set forth the impact and implementation of the Activity's Affirmative Action Program."

In the Council's opinion, your appeal fails to provide any basis for Council review of the Assistant Secretary's decision in the instant case. By virtue of the most recent amendments to the Order contained in E.O. 11838, particularly the amendments to sections 4(c)(1), 6(a)(4), and 11(d), the Assistant Secretary was expressly authorized to resolve negotiability issues arising in the context of unfair labor practice proceedings wherein it is alleged that one party has unlawfully refused to negotiate by unilaterally changing an established personnel policy or practice, or matter affecting working conditions; and a party adversely affected by a negotiability determination of the Assistant Secretary "necessary to resolve the merits of the alleged unfair labor practice" in such cases was given the right to have the determination reviewed on appeal by the Council. In promulgating section 2411.17 of its rules to implement the foregoing amendments to the Order, the Council expressly provided, in pertinent part:

> § 2411.17 Determinations of negotiability.
>
> (a) Notwithstanding the procedures of this subpart, the Council, as provided in this section, will, upon an appeal by a party, review a decision of the Assistant Secretary wherein it was necessary for him to make a negotiability determination in order to resolve the merits of an unfair labor practice complaint resulting from an alleged unilateral change in established personnel policies or practices or matters affecting working conditions. [Emphasis added.]

Neither the amendments to the Order nor the Council's implementing regulation set forth above was intended to require the Council to review a decision of the Assistant Secretary wherein he did not make a negotiability determination or wherein it was not necessary for him to do so in order to resolve the merits of an unfair labor practice complaint.

In the Council's view, the Assistant Secretary did not make a negotiability determination in the instant case. Rather, as previously noted, the Assistant Secretary held that, ". . . under the circumstances herein, the policing and enforcing of the Agency's Upward Mobility Program were not matters for review under Section 19(a) of the Order," [emphasis added] and he noted additionally that, "'Attachment 10' was formulated in reply to a request of the U.S. Civil Service Commission and reflected merely actions which already had been taken and procedures which were in existence prior to the formulation of the Agency Upward Mobility Program and the Regional Affirmative Action Plan." Therefore, as the Assistant Secretary determined that such issues were not matters for review under section 19(a) of the Order, rather than making a negotiability determination, no basis is presented for Council review of your appeal under section 2411.17 of the Council's rules. Further, since you neither allege nor does it appear that the Assistant Secretary's decision is arbitrary and capricious or raises a major policy issue, no basis is presented for Council review under section 2411.12 of the Council's rules.

Accordingly, since no basis for Council review of your appeal is presented under either section 2411.17 or 2411.12 of the Council's rules of procedure, such appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

D. R. Tripp
EPA

United States Department of Justice, Immigration and Naturalization Service, A/SLMR No. 682. The Assistant Secretary dismissed the complaint filed by the American Federation of Government Employees, AFL-CIO (AFGE), alleging that the agency violated section 19(a)(1) and (6) of the Order when, on a particular day, it refused to provide AFGE with copies of certain requested promotion rosters during negotiations concerning a merit promotion and reassignment plan. AFGE appealed to the Council, contending that the Assistant Secretary's decision was arbitrary and capricious.

Council action (December 20, 1976). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear in any manner arbitrary and capricious, and AFGE neither alleged, nor did it appear, that the decision presented a major policy issue. Accordingly, the Council denied AFGE's petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 20, 1976

Mr. James R. Rosa, Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: United States Department of Justice, Immigration and Naturalization Service, A/SLMR No. 682, FLRC No. 76A-104

Dear Mr. Rosa:

The Council has carefully considered your petition for review of the Assistant Secretary's decision and the supplement thereto in the above-entitled case.

In this case, as found by the Assistant Secretary, on May 16, 1975, during negotiations between the United States Department of Justice, Immigration and Naturalization Service (INS) and the American Federation of Government Employees, AFL-CIO (AFGE) concerning a merit promotion and reassignment plan, AFGE requested copies of promotion rosters for the Officer Corps of the INS that were developed pursuant to the current negotiated Merit Promotion and Reassignment Plan which had been in effect since October 1970. In response to this request, INS informed AFGE that it would look into the matter, as the furnishing of the rosters could be violative of the Privacy Act of 1974 (Privacy Act) and the rosters probably would not be available under the Freedom of Information Act (FOIA). INS promised to research the demand and respond as quickly as possible. Immediately thereafter, AFGE served INS with the precomplaint charge in this matter.*/ INS took AFGE's request under advisement and, subsequent to the negotiations on May 16, 1975, sought legal counsel as to the applicability of the Privacy Act and FOIA with regard to providing AFGE copies of the rosters. Based upon the subsequent advice of counsel in this regard, on June 18, 1975, INS offered to give copies of the promotion rosters to AFGE on the condition that the names of individual employees be deleted. The AFGE Chief Negotiator rejected the offer. On June 20, 1975, INS' Chief Negotiator spoke to a staff counsel for AFGE who suggested that AFGE needed a means to trace individual employees and promotions over a period of time and that, as an alternative, a code could replace employees' names on any promotion rosters

*/ The Assistant Secretary found that the precomplaint charge, although dated May 22, 1975, "was, in fact, delivered to the [INS] at the May 16, 1975 meeting involved herein, approximately 20 minutes after the initial demand for the subject rosters was made by the AFGE."

offered. In response to this suggestion, INS' Chief Negotiator noted that such a request would take several months to accomplish and would require several employees to code several thousand names. No further word was received from AFGE until it filed an unfair labor practice complaint in the instant case on July 21, 1975. The complaint alleged, in substance, that INS violated section 19(a)(1) and (6) of the Order when on May 17, 1975, it refused to provide AFGE with copies of the requested promotion rosters.

The Assistant Secretary dismissed the complaint in its entirety, finding that, in the particular circumstances of this case, the evidence did not establish a refusal by INS to provide copies of the requested promotion rosters. As stated by the Assistant Secretary in his decision:

> . . . In my judgment, such action by the [INS] did not constitute a refusal to supply the requested information herein, nor did it constitute a failure to meet and confer in good faith. Accordingly, . . . I find that the [INS] did not violate Section 19(a)(1) and (6) of the Order. [Footnote omitted.]

In your petition for review on behalf of AFGE, you allege that the decision of the Assistant Secretary is arbitrary and capricious in that, contrary to his holdings and findings, the record in the instant case clearly demonstrates that AFGE's precomplaint charge was not filed until May 22, 1975. In this regard, you assert that the Assistant Secretary improperly relied on an unrelated letter from AFGE to INS dated May 16, 1975, which was not part of the record in this case, to support his finding that AFGE's precomplaint charge was filed on May 16, 1975.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not appear in any manner arbitrary and capricious, and you do not allege, nor does it appear, that his decision presents a major policy issue.

With regard to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision that the evidence did not establish a violation of section 19(a)(1) and (6) of the Order in the facts and circumstances of this case. As to your contentions concerning evidence considered and relied upon, your appeal fails to establish that the Assistant Secretary improperly considered any document not admitted into evidence in reaching his conclusion herein. In this regard, we note particularly that the Assistant Secretary, in his response to your request that he reconsider his decision in the instant case in light of the points raised in your petition for review filed with the Council, "reviewed the entire record . . ., including the exhibits which were received into evidence without objection, and the official transcript"; affirmed his earlier finding that the activity did not violate section 19(a)(1) and (6) of the Order; and, as to the disputed letter dated May 16,

1975, stated that "[it] was not in evidence, nor an official exhibit in the [instant] case, and, therefore, was not relied upon or considered in reaching my conclusions herein." Finally, your contention that the Assistant Secretary's finding as to the date on which AFGE filed its precomplaint charge against INS is unsupported by the record herein constitutes, in effect, nothing more than disagreement with the Assistant Secretary's factual findings and therefore provides no basis for Council review.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and you neither allege, nor does it appear, that his decision presents a major policy issue, your appeal fails to meet the requirements for review set forth in section 2411.12 of the Council's rules and regulations. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

L. F. Chapman,Jr.
Justice

Department of the Navy, Naval Plant Representative Office, Assistant Secretary Case No. 22-6655(CA). The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), found that the evidence was insufficient to establish a reasonable basis for the allegation in the unfair labor practice complaint filed by National Federation of Federal Employees, Local 1624 (NFFE) that the activity had violated section 19(a)(1) and (6) of the Order by not implementing an arbitrator's award within 10 days, as required by the terms of the parties' negotiated agreement, and by subsequently implementing the award in an improper manner. Accordingly, the Assistant Secretary denied NFFE's request for review seeking reversal of the ARA's dismissal of the complaint. NFFE appealed to the Council, contending that the decision of the Assistant Secretary presented major policy issues and was arbitrary and capricious.

Council action (December 21, 1976). The Council held that NFFE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's decision did not present any major policy issues or appear arbitrary and capricious. Accordingly, the Council denied NFFE's petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 21, 1976

Ms. Janet Cooper, Staff Attorney
National Federation of Federal Employees
1016 16th Street, NW.
Washington, D.C. 20036

Re: Department of the Navy, Naval Plant Representative Office, Assistant Secretary Case No. 22-6655(CA), FLRC No. 76A-113

Dear Ms. Cooper:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the activity's opposition thereto,*/ in the above-entitled case.

In this case, the National Federation of Federal Employees, Local 1624 (NFFE) filed an unfair labor practice complaint against the Department of the Navy, Naval Plant Representative Office (the activity). The complaint alleged that the activity had violated section 19(a)(1) and (6) of the Order by not implementing an arbitrator's award within 10 days, as required by the terms of the parties' negotiated agreement, and by subsequently implementing the award in an improper manner. The Assistant Secretary, in agreement with the Acting Regional Administrator (ARA), found that "the evidence herein is insufficient to establish a reasonable basis for [NFFE's] allegation that the [activity] failed to timely or properly implement the arbitrator's award here involved." Accordingly, he denied NFFE's request for review seeking reversal of the ARA's dismissal of the complaint.

In your petition for review on behalf of NFFE, you allege that the decision of the Assistant Secretary presents the following major policy issues:

---

*/ Your subsequently filed motion to strike the activity's opposition to your petition for review of the Assistant Secretary's decision herein asserts that the activity's opposition filed on November 4, 1976, was not timely filed pursuant to section 2411.13(c) of the Council's rules. However, the statement of service attached to your petition for review indicates that it was mailed to the activity on September 30, 1976. Where a petition for review has been served by mail, section 2411.13(c) must be read in conjunction with section 2411.45(c), which provides an additional 5 days in which to file an opposition with the Council. Accordingly, the opposition herein was timely filed and your motion to strike is therefore denied.

A. Whether a party is bound by negotiated time limits for filing exceptions which are shorter than those prescribed by the Federal Labor Relations Council?

B. Whether the Assistant Secretary's dismissal of this case without a hearing of [sic] even an investigation is contrary to his holdings in A/SLMR No. 87 and A/SLMR No. 486; and A/SLMR No. 656?

C. Whether the Assistant Secretary's dismissal of this case without a hearing or even an investigation is contrary to his holdings in A/SLMR No. 412 and A/SLMR No. 517?

D. Whether the Assistant Secretary may dismiss an unfair labor practice case based on bad faith implementation of an arbitrator's award on the grounds that the Civil Service Commission declared that the implementation does not violate merit promotion principles? [Capitalization and underscoring omitted.]

You further allege that the Assistant Secretary's refusal to hold a hearing or to conduct an investigation as requested in this case was arbitrary and capricious since it contradicted his previous decisions.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not appear arbitrary and capricious or present any major policy issues.

As to your first alleged major policy issue concerning whether a party is bound by negotiated time limits for filing exceptions, in the Council's view, no major policy issue is presented warranting review. Rather, such contention constitutes, in effect, nothing more than disagreement with the Assistant Secretary's determination that there was insufficient evidence to establish that the activity had failed to timely or properly implement the award. Moreover, it should be noted in this regard that while an allegation of a failure to abide by the terms of a negotiated agreement is susceptible to adjudication through the negotiated grievance procedure, procedures and requirements for obtaining review of arbitration awards, including time limits for filing exceptions, are prescribed by the rules of the Council. Nor are major policy issues raised by your allegation that the Assistant Secretary's dismissal of the complaint herein without conducting a hearing or an investigation was contrary to his holdings in prior cases. In this regard, your appeal fails to establish that there is a clear, unexplained inconsistency between this decision and the Assistant Secretary's previously published decisions. See, e.g., Veterans Administration Center, Bath, New York, Assistant Secretary Case No. 35-3551(CA), FLRC No. 75A-124 (Apr. 12, 1976), Report No. 102, and authorities cited therein; and U.S. Civil Service Commission, Atlanta Region, Atlanta, Georgia, Assistant Secretary Case No. 40-6699(CA), FLRC No. 76A-62 (Aug. 31, 1976), Report No. 111. Moreover, such contention constitutes,

essentially, a disagreement with the Assistant Secretary's conclusion that the evidence is insufficient to establish a reasonable basis for the complaint. With respect to your allegation concerning the Assistant Secretary basing his dismissal upon certain findings by the Civil Service Commission (CSC), no major policy issue is presented warranting Council review, noting particularly that the Assistant Secretary's decision neither refers to nor relies upon any findings by the CSC. Rather, as previously stated, his decision was based upon a finding that "the evidence herein is insufficient to establish a reasonable basis for [NFFE's] allegation that the [activity] failed to timely or properly implement the arbitrator's award here involved." Finally, as to your contention that the Assistant Secretary's decision was contrary to his prior decisions and therefore arbitrary and capricious, for the reasons previously stated, it does not appear that the Assistant Secretary acted without reasonable justification in reaching his decision herein.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

Capt. T. J. Thompson
Air Force

246-469 O - 78 - 42

National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No. 670. The Assistant Secretary, adopting the findings, conclusions and recommendations of the Administrative Law Judge, dismissed the complaint filed by the individual complainant, Mr. David A. Nixon, which alleged, in substance, that the activity and the agency violated section 19(a)(1) and (4) of the Order by according him an adverse "professional appraisal" because he utilized and/or exercised rights provided to him under the Order, namely, the filing of grievances and unfair labor practice complaints. Mr. Nixon appealed to the Council, alleging that the decision of the Assistant Secretary presented major policy issues and was arbitrary and capricious.

Council action (December 22, 1976). The Council held that Mr. Nixon's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the Assistant Secretary's decision did not present a major policy issue and did not appear in any manner arbitrary and capricious. Accordingly, the Council denied Mr. Nixon's petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 22, 1976

Mr. David A. Nixon
c/o National Labor Relations Board
Seventeenth Regional Office
616 Two Gateway Center
Fourth at State
Kansas City, Kansas 66101

Re: National Labor Relations Board, Region 17, and National Labor Relations Board, A/SLMR No. 670, FLRC No. 76A-93

Dear Mr. Nixon:

The Council has carefully considered your petition for review of the Assistant Secretary's decision in the above-entitled case.

This case arose when you, as an employee, filed an unfair labor practice complaint against the National Labor Relations Board, Region 17 (the activity) and the National Labor Relations Board (the agency). The complaint alleged, in substance, that the activity and the agency violated section 19(a)(1) and (4) of the Order by according the employee an adverse "professional appraisal" because he utilized and/or exercised rights provided to him under the Order, namely, the filing of grievances and unfair labor practice complaints.

The Assistant Secretary, adopting the findings, conclusions and recommendations of the Administrative Law Judge, found, in pertinent part, that there was no showing that the fact a grievance was filed by the employee played any part in the adverse appraisal; that the employee had failed to sustain the burden of proof to support an allegation of disparate treatment predicated upon the employee's participation in activities protected by the Order; and that the evidence, as a whole, was insufficient to support a finding that any possible disparate treatment of the adverse appraisal itself was predicated on the employee's protected activity.

In your petition for review, you allege that the decision of the Assistant Secretary "is in conflict with the policies underlying the Order and the applicable legal principles and case authority" and therefore presents "major policy considerations." In this regard, you contend that "[t]he written appraisal shows outright prohibited reliance upon [your] protected communications devoid of connection with assigned case handling matters" and that "[t]he written appraisal is manifestly rooted in prohibited considerations." You further allege that the decision of the Assistant Secretary is arbitrary and capricious in that "[t]he decision is barren of required treatment of the central issue" raised by your complaint.

In the Council's opinion, your petition for review does not meet the requirements of section 2411.12 of the Council's rules; that is, the decision of the Assistant Secretary does not present a major policy issue, nor does it appear in any manner arbitrary and capricious.

With respect to your allegation, in effect, that the decision of the Assistant Secretary raises a major policy issue, such assertion, in essence, constitutes nothing more than disagreement with the Assistant Secretary's finding that the record evidence fails to support the allegations of your complaint, and therefore presents no basis for Council review. As to your allegation that the Assistant Secretary's decision is arbitrary and capricious, it does not appear, in the circumstances of this case, that the Assistant Secretary acted without any reasonable justification in reaching his decision. In this regard, your appeal neither discloses any probative evidence that the Assistant Secretary failed to consider, nor establishes that there is a clear, unexplained inconsistency between the decision and the Assistant Secretary's previously published decisions.

Since the Assistant Secretary's decision does not appear arbitrary and capricious or present a major policy issue, your appeal fails to meet the requirements for review as provided in section 2411.12 of the Council's rules of procedure. Accordingly, your petition for review is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

G. Norman
NLRB

Agency for International Development, Department of State, A/SLMR No. 676. The Assistant Secretary adopted the findings, conclusions, and recommendations of the Administrative Law Judge and dismissed the complaint filed by American Federation of Government Employees, AFL-CIO, Local 1534 (AFGE), which alleged that the agency violated section 19(a)(1) and (6) of the Order by failing and refusing to furnish the union with copies of certain reports prepared by the agency. AFGE appealed to the Council contending that the Assistant Secretary's decision was arbitrary and capricious and raised major policy issues.

Council action (December 27, 1976). The Council held that AFGE's petition for review did not meet the requirements of section 2411.12 of the Council's rules of procedure; that is, the decision of the Assistant Secretary did not appear arbitrary and capricious or present any major policy issues. Accordingly, the Council denied AFGE's petition for review.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 27, 1976

Mr. James R. Rosa, Staff Counsel
American Federation of Government
Employees, AFL-CIO
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

Re: Agency for International Development, Department of State, A/SLMR No. 676, FLRC No. 76A-103

Dear Mr. Rosa:

The Council has carefully considered your petition for review of the Assistant Secretary's decision, and the agency's opposition thereto, in the above-entitled case.

In this case, the American Federation of Government Employees, AFL-CIO, Local 1534 (the union) filed an unfair labor practice complaint against the Agency for International Development, Department of State (AID). The complaint alleged that AID violated section 19(a)(1) and (6) of the Order by failing and refusing to furnish the union with copies of reports prepared by the agency which purportedly contained information necessary and relevant to the union's exercise of its duty to properly represent unit employees. As found by the Assistant Secretary herein, AID decided to conduct a reduction-in-force (RIF) and met with the union to discuss the effect of the RIF on unit employees. At one such meeting, a management representative mentioned the existence of two reports concerning manpower projections for and staffing problems at AID. The union requested copies of these reports, but AID eventually denied the request, stating that it would not furnish copies of the reports because they "were internal reviews or studies . . . made in the course of [a RIF] decision . . . and not required to be made public." On the basis of such refusal, as previously stated, the union filed the instant unfair labor practice complaint against AID.

The Assistant Secretary adopted the following findings, conclusions, and recommendations of the Administrative Law Judge (ALJ) (who had inspected the two reports in camera):

> . . . [T]he illustrative principle is well taken that an employer is not required to furnish a union with all information which the latter conceives may be helpful in bargaining or processing grievances. In the case at bar, the [union] was supplied with the relevant and necessary data re the retention register, reassignment, and positions

to be abolished. The union urges, however, that it was concerned with the future plans for employees as well as motivation. In neither instance do I view such information as bearing on the imact [sic] of the reduction in force. Nor do I deem it requisite that these reports be furnished so that the union may answer queries posed by the employees. The obligation of an employer to supply data to a bargaining representative does not turn on the ability of the representative to effectively reply to employees' questions any more than it does on the union's intelligent dealings with Congress. In sum, I conclude that neither . . . [r]eport was necessary or relevant to enable [the union] to bargain re the impact and implementation of the RIF herein, [and] that [AID] was under no obligation to furnish said reports . . . .

Accordingly, he ordered that the union's complaint be dismissed in its entirety.

In your petition for review on behalf of the union, you allege that the Assistant Secretary's decision is arbitrary and capricious because it deviates from private and public sector precedent which favors disclosure by management of necessary and relevant information so as to enable the union to intelligently discuss and negotiate issues arising during the implementation of agreements, and because, in effect, he erroneously concluded that the reports "contain no information [or] data bearing on the RIF." You further allege that his decision "raises a major policy issue regarding the scope of information necessary and relevant for impact bargaining in a RIF situation as well as a major policy issue regarding the union's Section 10(e) responsibility to exert its best efforts to counsel employees seeking guidance from the union regarding the best use of those options open to them during a RIF."

In the Council's opinion, your petition for review of the Assistant Secretary's decision does not meet the requirements of section 2411.12 of the Council's rules. That is, his decision does not appear arbitrary and capricious or present any major policy issues. As to your allegation that the Assistant Secretary's decision was arbitrary and capricious, it does not appear that the Assistant Secretary acted without reasonable justification in concluding that the subject reports were not necessary or relevant to enable the union to bargain concerning the impact and implementation of the RIF in the circumstances of this case. Your assertion herein thus constitutes, in effect, nothing more than disagreement with the Assistant Secretary's contrary determination and therefore presents no basis for Council review. With respect to your further allegation that the Assistant Secretary, in effect, deviated from established precedent in reaching his decision, your appeal fails to establish that there is a clear, unexplained inconsistency between this decision and the previously published decisions of the Assistant Secretary. Nor is a major policy issue presented herein, as alleged, with respect to the scope of information necessary and relevant for bargaining over the impact and

implementation of a RIF or regarding the union's bargaining obligation under section 10(e) of the Order in the circumstances of this case. In this regard, we note particularly that you do not allege that the Assistant Secretary adopted a standard which was inconsistent with the purposes of the Order in reaching the determination that the information requested herein was not necessary or relevant; instead, the essence of such alleged major policy issue is merely a restatement of the union's disagreement with the Assistant Secretary's determination.

Since the Assistant Secretary's decision does not appear arbitrary and capricious and does not present a major policy issue, your appeal fails to meet the requirements for review as provided under section 2411.12 of the Council's rules of procedure. Accordingly, review of your appeal is hereby denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

P. Johnson
State

U.S. Department of Agriculture, Agricultural Research Service, Southern Regional Research Center, New Orleans, Louisiana, A/SLMR No. 757. The agency appealed to the Council from the Assistant Secretary's decision and direction of election. Such election among the employees in the unit the Assistant Secretary found to be appropriate had not been conducted and no certification of the results or certification of representative had issued.

Council action (December 29, 1976). Since a final decision had not been rendered by the Assistant Secretary on the entire proceeding before him, the Council, pursuant to section 2411.41 of its rules of procedure, denied review of the agency's interlocutory appeal, without prejudice to the renewal of its contentions in a petition duly filed with the Council after a final decision on the entire case by the Assistant Secretary.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

December 29, 1976

Mr. S. B. Pranger
Director of Personnel
United States Department of Agriculture
Office of the Secretary
Washington, D.C. 20250

Re: U.S. Department of Agriculture, Agricultural Research Service, Southern Regional Research Center, New Orleans, Louisiana, A/SLMR No. 757, FLRC No. 76A-155

Dear Mr. Pranger:

This refers to your petition for review of the Assistant Secretary's decision and direction of election in the above-entitled case.

In his subject action, from which you are appealing, the Assistant Secretary, among other things, directed a representation election among the employees in the unit he found appropriate. As you acknowledge in your appeal, such election has not been conducted and no certification of the results or certification of representative has issued. Thus, no final disposition of the entire case has been rendered.

Section 2411.41 of the Council's rules of procedure prohibits interlocutory appeals. That is, the Council will not consider a petition for review of a decision of the Assistant Secretary until a final decision has been rendered on the entire proceeding before him. More particularly, in a case such as here involved, the Council will entertain an appeal only after a certification of representative or of the results of the election has issued, or after other final disposition has been made of the entire representation matter by the Assistant Secretary.

Since a final decision has not been so rendered in the present case, your appeal is clearly interlocutory and is hereby denied, but without prejudice to the renewal of your contentions duly filed with the Council after a final decision on the entire case by the Assistant Secretary.

For the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: A/SLMR
Labor

A. Garcia
AFGE

E. Haskins
NFFE

Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, Defense Contract Administration Services District (DCASD), Salt Lake City, Utah, A/SLMR No. 461; Defense Supply Agency, Defense Contract Administration Services Region, San Francisco, A/SLMR No. 559; and Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, Defense Contract Administration Services District (DCASD), Seattle, Washington, A/SLMR No. 564; respectively. These appeals arose from separate decisions of the Assistant Secretary in which he found that three proposed bargaining units in the Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California (wherein three locals of the American Federation of Government Employees, AFL-CIO (AFGE) had filed separate petitions for recognition), were appropriate, and directed an election in each unit. Following the conduct of separate elections and certification of AFGE as the exclusive representative in each unit, the agency appealed to the Council in each case. Upon consideration of the petitions for review, the Council determined that the same major policy issue was presented by each of the decisions of the Assistant Secretary, namely: Whether the Assistant Secretary's decision is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b); and accepted the agency's petitions for review (Report Nos. 80 and 102).

Council action (December 30, 1976). As the three appeals arose out of the same basic circumstances and factual background, involved the same agency and national labor organization, and presented the same major policy issue, the Council consolidated them for purposes of decision on the merits. For reasons fully detailed in its consolidated decision, the Council found that the Assistant Secretary's decision and direction of election in each of the cases was inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of its rules of procedure, the Council set aside the Assistant Secretary's decisions and remanded the cases to him for action consistent with the Council's decision.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

Defense Supply Agency, Defense
Contract Administration Services
Region (DCASR), San Francisco, California,
Defense Contract Administration Services
District (DCASD), Salt Lake City, Utah

and

A/SLMR No. 461
FLRC No. 75A-14

American Federation of Government
Employees, Local 3540, AFL-CIO

Defense Supply Agency, Defense Contract
Administration Services Region,
San Francisco

and

A/SLMR No. 559
FLRC No. 75A-128

American Federation of Government
Employees, Local 2723, AFL-CIO

Defense Supply Agency, Defense
Contract Administration Services
Region (DCASR), San Francisco,
Defense Contract Administration
Services District (DCASD), Seattle,
Washington

and

A/SLMR No. 564
FLRC No. 76A-4

American Federation of Government
Employees, Local 3204, AFL-CIO

DECISION ON APPEALS FROM
ASSISTANT SECRETARY DECISIONS

Background of Cases

These appeals arose from three separate decisions of the Assistant Secretary in which he found that three proposed bargaining units in the Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, California, were appropriate and directed an

election in each. Inasmuch as the three appeals arise out of the same basic circumstances and factual background, involve the same agency and national labor organization, and present the same major policy issue, the Council here consolidates them for decision on the merits.

All three of the decisions of the Assistant Secretary grew out of petitions filed by locals of the American Federation of Government Employees (AFGE) seeking to represent units of employees of the San Francisco DCASR. The San Francisco DCASR is one of 11 regions of the Defense Supply Agency (DSA), all of which provide contract administration services and support for the Department of Defense, as well as other Federal agencies. The San Francisco DCASR covers the States of Utah, Montana, Idaho, Washington, Oregon, Alaska, Hawaii; most of Nevada; northern California; and the Mariana Islands. It consists of a headquarters organization and field activities which are divided into two Defense Contract Administration Services Districts (DCASD's), Seattle and Salt Lake City, as well as six Defense Contract Administration Services Offices (DCASO's) located in Portland, Oregon, and at five contractors' offices in the San Francisco Bay area and a Hawaii Residency Office. The field activities perform basic mission functions of the region in their respective geographic areas. With the exception of the DCASO in Portland, Oregon, which reports through the DCASD in Seattle, all DCASO's and DCASD's within the region report directly to DCASR headquarters in San Francisco. Approximately 1,250 civilian employees are employed throughout the DCASR, San Francisco, with most employees located in northern California. All of the employees of the region are subject to uniform personnel policies and practices established at regional headquarters. Prior to the filing of the subject representation petitions, none of the employees of the DCASR were in units of exclusive recognition.

FLRC No. 75A-14 (A/SLMR No. 461)

In June 1974, AFGE Local 3540 sought an election in a districtwide unit composed of the 77 eligible professional and nonprofessional employees of the Salt Lake City DCASD. The San Francisco DCASR contended that the claimed unit was not appropriate because it excluded employees who share a community of interest with the employees in the unit sought and, further, that the unit sought would not promote effective dealings and efficiency of agency operations. The DCASR contended that the only appropriate unit was one composed of all eligible employees of the DCASR, San Francisco.

The Assistant Secretary, in a decision dated November 27, 1974, determined that the Salt Lake City DCASD unit was appropriate for the purposes of exclusive recognition under the Order. After noting particularly that the petitioned-for employees share common districtwide supervision, perform their duties within the assigned geographical locality of the DCASD, and do not interchange or have job contact with other employees of the region, and that generally transfers to or from the District Office occur only in situations involving promotions or reduction-in-force procedures, the

Assistant Secretary found that the employees in the petitioned-for unit share a clear and identifiable community of interest separate and distinct from other employees of the San Francisco Region. The Assistant Secretary went on to add: "Further, based on the foregoing considerations, I find that such a unit will promote effective dealings and efficiency of agency operations." In making this finding with respect to effective dealings and efficiency of agency operations, the Assistant Secretary rejected the agency's contentions that certification of a less than regionwide unit would limit the scope of negotiations solely to those matters within the delegated discretionary authority of the Commander of the District Office, and thus would not result in effective dealings between the parties or promote the efficiency of agency operations.

FLRC No. 75A-128 (A/SLMR No. 559)

In November 1974, AFGE Local 2723 sought an election in a unit composed of all eligible nonprofessional employees in DCASR headquarters. DCASR officials contended that the claimed unit was not appropriate because it would result in unit fragmentation and would not promote effective dealings and efficiency of agency operations. They maintained that only a single regionwide unit would be appropriate. At the hearing, the union indicated a willingness to include the five DCASO's, all of which are located in the San Francisco Bay area, and the Hawaii Residency Office in the unit. The Assistant Secretary, on September 16, 1975, found that a unit encompassing the employees in DCASR headquarters, the five DCASO's in the San Francisco Bay area, and the Hawaii Residency Office was appropriate for the purpose of exclusive recognition in that the employees in such unit shared a clear and identifiable community of interest with each other, that such a unit would promote effective dealings and efficiency of agency operations, and that the agency contentions to the contrary were "at best, speculative and conjectural."

More particularly, with regard to efficiency of agency operations, the Assistant Secretary observed that more than cost factors should be involved in making such a determination, citing and quoting extensively from the Council's negotiability determination in the Little Rock case.[1/] The Assistant Secretary found it:

> [E]vident that a determination of efficiency of agency operations is dependent upon a complex of factors and that . . . tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization can result in improved efficiency of operations despite increased cost factors. [Footnote omitted.]

1/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30].

He noted:

> . . . that in unit determination proceedings the parties are obligated to come forward, for the use of the Assistant Secretary, with all relevant information including any contrary evidence with respect to efficiency of agency operations; that information related to efficiency of agency operations may well be within the special knowledge and possession of the agency involved; and that where agencies fail or are unable to respond to the solicitation of such information by the Assistant Secretary, the Assistant Secretary should base his decision on the information available to him, making the best informed judgment he can under the circumstances.

He found that the unit "could result in actual economic savings and increased productivity due to the homogeneity of its composition." Noting that "the Activity's contentions that such a unit would not promote efficiency of agency operations were based primarily on its speculative assessments of the manpower and economic costs of less than a regionwide unit, rather than on a balanced consideration of all the factors, including employee morale and well-being," the Assistant Secretary found that "standing alone, such speculation as to what might be helpful or desirable [was] insufficient to establish that the proposed unit is inappropriate within the meaning of section 10(b) of the Order."

With regard to effective dealings, the Assistant Secretary, observing that the principal or ultimate authority within the region involved in the negotiation and approval of negotiated agreements and in the resolution of grievances and other personnel matters is located in the DCASR Headquarters, concluded that the unit found appropriate would promote effective dealings to the extent that the individuals most concerned with labor-management relations, fiscal matters and the direction of operations "are located organizationally with the unit found appropriate." The Assistant Secretary went on to state, however, that, in his view, a claimed unit may be appropriate and be considered to promote effective dealings as well as efficiency of agency operations "even though it does not include all employees directly under the area or regional head, or other activity officials who have final or initiating authority with respect to personnel, fiscal and programmatic matters." Relying on the amendments to section 11(a) of the Order in E.O. 11838,[2/] the

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2/ Section 11(a) provides in pertinent part:

> An agency and a labor organization that has been accorded exclusive recognition, through appropriate representatives, shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations,

(Continued)

Assistant Secretary stated that "it is clearly contemplated by the Executive Order that labor-management negotiations could properly be conducted at lower than agency, regional, or district levels, and that, therefore, units of less broad proportions could be appropriate." Further, he went on to say that:

> . . . the Order not only is intended to encourage negotiations at the local level to the maximum extent possible with respect to personnel policies and practices and matters affecting working conditions, but that such negotiations are desirable as they must perforce promote effective dealings between employees and the agency management with which the particular employees are most closely involved.

The Assistant Secretary concluded:

> Thus, in my view, the Order, while recognizing the appropriateness of broadly based units under certain circumstances, is also, as reflected by the amendment to Section 11(a), supportive of the concept that bargaining units at lower levels may in certain instances, promote effective dealings, as well as result in the increased efficiency of agency operations. [Footnote omitted.]

FLRC No. 76A-4 (A/SLMR No. 564)

In October 1974, AFGE Local 3204 sought an election in a districtwide unit of all eligible General Schedule and professional employees in the Seattle, Washington DCASD. The proposed unit included, in addition to the employees of the Seattle District, employees of the Portland, Oregon DCASO which, organizationally, reports to regional headquarters through Seattle. The region contended that the unit sought was not appropriate because, among other things, it would not promote effective dealings and efficiency of agency operations. In the activity's view, only a single DCASR-wide unit would be appropriate.

The Assistant Secretary found the petitioned-for unit appropriate in September 1975. In doing so, he determined that the approximately 180

(Continued)

> including policies set forth in the Federal Personnel Manual; published agency policies and regulations for which a compelling need exists under criteria established by the Federal Labor Relations Council and which are issued at the agency headquarters level or at the level of a primary national subdivision; a national or other controlling agreement at a higher level in the agency; and this Order. . . . [Emphasis indicates material added by E.O. 11838, February 6, 1975.]

246-469 O - 78 - 43

employees sought to be included within the proposed unit of the Seattle DCASD and the Portland DCASO share a clear and identifiable community of interest separate and distinct from other employees of the region. In disagreement with the claims of regional officials, the Assistant Secretary determined that the proposed unit would promote effective dealings and the efficiency of agency operations. In this regard, he again noted, as in his decision in A/SLMR No. 559 supra, that a determination of effective dealings and efficiency of agency operations is dependent on a complex of factors, including tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization which can result in improved efficiency of agency operations despite increased cost factors and that a claimed unit may promote effective dealings and efficiency of operations even though it does not include all employees directly under the area or regional head, or the activity officials who have final initiating authority with respect to personnel, fiscal, and programmatic matters. He was not persuaded by the region's arguments that the negotiating authority of the District Commander would be extremely limited, noting certain areas of responsibility that the District Commander does have. The Assistant Secretary concluded:

> Under these circumstances, and noting particularly the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements, I find that the petitioned for District-wide unit will promote effective dealings and efficiency of agency operations. [Footnotes omitted.]

Following each of the Assistant Secretary's decisions in these cases, separate elections were conducted in each of the three separate units which had been found appropriate and AFGE was certified as the exclusive representative in each unit. Thereafter, in each case, DSA appealed the Assistant Secretary's decision to the Council. Upon consideration of the petitions for review, the Council determined that the same major policy issue is presented by each of the decisions of the Assistant Secretary, namely: Whether the Assistant Secretary's decision is consistent with and promotes the purposes and policies of the Order, especially those reflected in section 10(b). Neither party filed a brief on the merits.

Opinion

Section 6(a)(1) of the Order assigns to the Assistant Secretary the responsibility for deciding questions as to units appropriate for the purposes of exclusive recognition. The Council, pursuant to section 2411.18(a) of its regulations, will sustain such decisions unless they are arbitrary and capricious or inconsistent with the purposes of the

Order. In the opinion of the Council, the decision of the Assistant Secretary in each of these cases is inconsistent with the purposes of the Order, specifically the language and intent of section 10(b).

Section 10(b) provides, in pertinent part, that:

> A unit may be established on a plant or installation, craft, functional, or other basis which will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations.

The Council on several occasions has considered the meaning and application of section 10(b) in the establishment of appropriate units for the purposes of exclusive recognition. In particular, the Council has addressed the requirement that any proposed unit of exclusive recognition must meet all three appropriate unit criteria prescribed in section 10(b), that is, a unit must (1) ensure a clear and identifiable community of interest among the employees concerned, (2) promote effective dealings, and (3) promote efficiency of agency operations.

In the report accompanying E.O. 11838, the Council, in discussing its belief "that the policy of promoting more comprehensive bargaining units and hence of reducing fragmentation in the bargaining unit structure will foster the development of a sound Federal labor-management relations program," stated:

> We further feel that the Assistant Secretary can do much to foster this policy in carrying out his functions of deciding other representation questions including the appropriateness of newly sought units. Accordingly, in all representation questions, equal weight must be given to each of the three criteria in section 10(b) of the Order. By doing so, the result should be broader, more comprehensive bargaining units.3/

Thus, the Council concluded that the appropriate application of the three criteria will facilitate the reduction of fragmentation in bargaining unit structure in the Federal labor-management relations program and thereby promote the policy of creating more comprehensive units.

In its decision in Tulsa AFS, the Council discussed at length the obligations of the Assistant Secretary in applying the three 10(b) criteria.4/ The Council reviewed the history of the development of exclusive recognition of appropriate units in the Federal labor-management relations program and concluded:

3/ Labor-Management Relations in the Federal Service (1975), at 37.

4/ Department of Transportation, Federal Aviation Administration, Southwest Region, Tulsa Airway Facilities Sector, FLRC No. 74A-28 (May 9, 1975), Report No. 69.

> It is clear that the express language of section 10(b) requires that any proposed unit of exclusive recognition must satisfy each of the three criteria set forth therein, and that the Assistant Secretary must affirmatively so determine, before that unit properly can be found to be appropriate. This conclusion is amply supported by the purpose of the provision, as evidenced by its "legislative history" . . . especially wherein the criterion of community of interest of the employees involved was explicitly balanced with other considerations important to management and protection of the public interest in the promulgation of E.O. 11491 in 1969, i.e., that units found appropriate must also promote effective dealings and efficiency of agency operations.

Further, after quoting those passages of the Council's Report to the President which led to the issuance of Executive Order 11838 wherein the three criteria were discussed, the Council stated as to the required findings under section 10(b) of the Order:

> Thus, the Assistant Secretary must not only affirmatively determine that a unit will ensure a clear and identifiable community of interest among the employees concerned and will promote effective dealings and efficiency of agency operations, but must give equal weight to each of the three criteria before the particular unit can be found to be appropriate.

In Tulsa AFS, the Council also discussed the responsibility of the Assistant Secretary in unit determination proceedings to develop and consider evidence concerning the appropriate unit criteria in section 10(b) of the Order. The Council stressed that it is the obligation of the Assistant Secretary to "develop as complete a record as possible with regard to each of the three criteria . . . and . . . give full and careful consideration to all relevant evidence in the record in reaching his decision." In this regard, the Council noted that parties to a representation proceeding are responsible for providing the Assistant Secretary with all information relevant to the appropriate unit criteria that is within their knowledge and possession, but emphasized that the Assistant Secretary must actively solicit such evidence as necessary to enable him to make a fully-informed judgment as to whether a particular unit will satisfy each of the three 10(b) criteria. In this regard, the Council stated:

> [T]here is a need for a sharper degree of definition of the criteria of effective dealings and efficiency of agency operations to facilitate both the development and presentation of evidence pertaining to those criteria by agencies and labor organizations, and the qualitative appraisal of such evidence by the Assistant Secretary in appropriate unit determinations. As he has done with the community of interest criterion, therefore, the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency

operations. In this way, each of the policy goals to be achieved in unit determinations will have an equal degree of precision and, hopefully, will receive the necessary and desirable equality of emphasis in representation proceedings.

Summarizing the responsibilities of the Assistant Secretary which flow from section 10(b) of the Order: Before the Assistant Secretary may find that a proposed unit is appropriate for purposes of exclusive recognition under the Order, he must make an affirmative determination that the proposed unit satisfies equally each of the three criteria contained in section 10(b). That is, he must consider equally the evidence going to each of the three criteria and, as required by section 10(b), find appropriate only units which not only ensure a clear and identifiable community of interest but also promote effective dealings and efficiency of agency operations. In making the affirmative determination that a proposed bargaining unit satisfies each of the three criteria, the Assistant Secretary must first develop as complete a record as possible, soliciting evidence from the parties as necessary, and then ground his decision upon a careful, thorough analysis of subsidiary factors or evidentiary considerations which provide a sharp degree of definition and precision to each of the three criteria. Finally, and most importantly, the Assistant Secretary must make the necessary affirmative determinations that a unit clearly, convincingly and equally satisfies each of the 10(b) criteria in recognition of and in a manner fully consistent with the purposes of the Order, including the dual objectives of preventing further fragmentation of bargaining units as well as reducing existing fragmentation, thereby promoting a more comprehensive bargaining unit structure. We turn now to the application of these principles to the three cases before the Council. They will be treated seriatim.

A/SLMR No. 461

As outlined above, in this case the Assistant Secretary found that a unit of one geographic element of the San Francisco DCASR, namely the Salt Lake City DCASD, was an appropriate unit for purposes of exclusive recognition under the Order. In so finding, he reviewed the evidence relating to certain subsidiary factors or indicators of community of interest and based upon these evidentiary considerations found that the employees in the petitioned-for unit shared a clear and identifiable community of interest separate and distinct from other employees of the San Francisco Region. Additionally, as required, the Assistant Secretary found that such a unit will promote effective dealings and efficiency of agency operations. However, this latter conclusion was "based on the foregoing considerations," that is, the evidentiary considerations which supported a finding that the employees had community of interest, rather than on any evidence directly bearing on the promotion of effective dealings and efficiency of agency operations.

While the Assistant Secretary made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must conclude that in making that finding he did not fully meet his obligations under the Order. In this regard, as we have indicated, it is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; to give full and careful consideration to all relevant evidence in the record; and then to ground his decision upon a careful, thorough analysis of evidentiary considerations or factors which provide a sharp degree of definition and precision to each of the three criteria. Where the Assistant Secretary finds a unit to be appropriate for purposes of exclusive recognition, he must make an affirmative determination that a unit equally satisfies each of the 10(b) criteria. Finally, and most importantly, the Assistant Secretary must decide appropriate unit questions consistent with the purposes of the Order, including the policy of preventing and reducing fragmentation, thereby promoting a more comprehensive bargaining unit structure.

In this case, while the Assistant Secretary clearly met his responsibilities in developing and analyzing evidence pertaining to the "community of interest" criterion and in making an affirmative finding with respect to that criterion, we conclude that he failed to meet these responsibilities with respect to the criteria of "effective dealings" and "efficiency of agency operations." First, a review of the record reveals that the Assistant Secretary failed to make an intensive effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations," soliciting evidence from the parties as necessary.5/ While the testimony and arguments advanced by the activity as to why the proposed DCASD unit would not promote effective dealings and efficiency of agency operations may not, in the Assistant Secretary's view, have provided him with a sufficient basis on which to make a determination,6/ the development of such evidence does not

5/ A review of the record indicates that, as to effective dealings and efficiency of agency operations, the Hearing Officer asked a few questions concerning the delegated authority of certain management officials to negotiate and sign a collective bargaining agreement and asked an agency witness only three insubstantial questions concerning whether the proposed unit would impair efficiency of agency operations.

6/ In testimony before the Assistant Secretary's Hearing Officer and in its posthearing brief to the Assistant Secretary, the agency presented evidence regarding effective dealings and efficiency of agency operations as well as evidence regarding community of interest of the employees involved. The San Francisco Region Civilian Personnel Officer testified at the hearing, among other things, in effect, that it would be more efficient for the region to negotiate and deal with the exclusive representative of employees in a single regionwide unit rather than with

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stop with the presentation by the parties. Although, as we stated in Tulsa AFS, the parties are responsible for providing the Assistant Secretary with all relevant information within their knowledge and possession, we emphasized in that decision that the Assistant Secretary, in carrying out his responsibility to decide appropriate unit questions, must actively solicit such information and develop the evidence necessary to enable him to make a fully-informed judgment as to whether the proposed unit will satisfy each of the three 10(b) criteria. We conclude that the Assistant Secretary did not meet that responsibility in A/SLMR No. 461. Furthermore, as to the contentions and supporting evidence which were put forward by the activity regarding these two criteria, the Assistant Secretary failed to give such contentions and evidence full and careful consideration. Indeed, his only consideration was in a footnote wherein he rejected the activity's contention that a less than regionwide unit would limit the scope of negotiations solely to those matters within the delegated authority of the Commander of the District Office.7/

(Continued)

representatives of employees in a multiplicity of units within the region. In this regard, he testified in effect that the smaller Salt Lake City unit would, by creating the possibility of multiple units in the region, impair efficiency by exceeding the capacities of the agency's limited labor-management relations staff. In its posthearing brief to the Assistant Secretary, the agency argued, among other things, that the size and composition of the proposed unit, the potential for meaningful negotiations, and the availability of personnel management resources all demonstrate that one regionwide unit would more likely promote efficiency of agency operations and effective dealings.

7/ In rejecting the agency's contention that the certification of a less-than-regionwide unit would limit the scope of negotiations solely to those matters within the delegated discretionary authority of the Commander of the District Office, the Assistant Secretary relied on his decision in A/SLMR No. 372 wherein he had, in turn, relied on the Council's decision in United Federation of College Teachers, Local 1460 and U.S. Merchant Marine Academy, 1 FLRC 211 [FLRC No. 71A-15 (Nov. 20, 1972), Report No. 30]. However, A/SLMR No. 372 was subsequently reviewed by the Council in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 372, FLRC No. 74A-41 (Aug. 13, 1975), Report No. 80. The Council set aside the Assistant Secretary's decision therein and remanded the case to him. In doing so, the Council stated, as to the Assistant Secretary's reliance upon Merchant Marine and as to the relationship of the amendments to section 11(a) of the Order to the principles enunciated in Merchant Marine:

(Continued)

Second, the Assistant Secretary's decision was not based upon a careful, thorough analysis of evidentiary considerations or factors which provide

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> Turning to the instant case [DSA, Cleveland], it is clear that the Assistant Secretary has misinterpreted and misapplied the Merchant Marine decision. For under the Order, as presently effective, labor relations and personnel policies as established (and, of course, published) by the DCASR headquarters may properly serve to bar the matter concerned from the scope of bargaining under section 11(a) of the Order. Since these matters would thus be outside the scope of bargaining at the DCASO level, DCASR, under the Merchant Marine decision, would be under no obligation to provide representatives to negotiate and enter into agreement on such matters at the DCASO level.
>
> Thus, as the Assistant Secretary, in finding the separate DCASO units appropriate in the present case, relied in part on an erroneous interpretation and application of the Merchant Marine decision, we shall remand the case to him for reconsideration and disposition consistent with our opinion.
>
> We are mindful in the above regard that under the amendments to section 11(a), adopted in E.O. 11838 and to become effective 90 days after the Council issues the criteria for determining "compelling need," DCASR directives as such would not thereafter serve to limit the scope of bargaining at the DCASO level—because DCASR appears to be a subdivision below the level of "agency headquarters" or "the level of a primary national subdivision." However, the Assistant Secretary should carefully examine the regulatory framework of DSA, including the DCASR's, which prevails at the time of his reconsideration and then weigh the impact thereon of Merchant Marine as properly interpreted and applied to the existing circumstances in order that the three criteria in section 10(b) can be properly applied. Moreover, in so applying Merchant Marine, the Assistant Secretary should carefully consider that the amendments to section 11(a) as adopted in E.O. 11838 were not designed to render fragmented units appropriate.
>
> In the above regard, as indicated in section V.1. of the Report accompanying E.O. 11838, the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units. The purpose of those recommendations (which were adopted by the President) was principally to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program. [Footnotes omitted.]

a sharp degree of definition and precision to the "effective dealings" and "efficiency of agency operations" criteria. Indeed, there was no discussion of such evidentiary considerations or factors. Instead, the treatment of these two criteria amounted to little more than a conclusionary statement based solely upon evidentiary considerations which had been relied upon to support the finding of a community of interest.

While we realize that certain considerations traditionally discussed in the context of community of interest can also be relevant in ascertaining whether a proposed unit would promote effective dealings or efficiency of agency operations (e.g., supervisory hierarchy and uniformity of personnel policies), other, quite different considerations also apply. As we stated in Tulsa AFS,[8/] there is a need for a sharper degree of definition to the criteria of effective dealings and efficiency of agency operations and the Assistant Secretary should develop subsidiary factors or indicators which will serve as guidelines in determining effective dealings and efficiency of agency operations. Rather than relying solely on the "foregoing considerations," the Assistant Secretary was required to examine the very kind of testimony and contentions put forward by the agency (e.g., more efficient use of negotiation resources derived from single regionwide negotiations rather than a multiplicity of negotiations in segments of the region), as well as the wide range of other considerations raised by the facts of the case. In developing such subsidiary factors or evidentiary considerations, which more precisely define what is meant by promoting effective dealings, the Assistant Secretary might well consider in the circumstances of this case such matters as the locus and scope of authority of the responsible personnel office; the limitations on the negotiation of matters of critical concern to employees because the concerns of Salt Lake City DCASO employees may be inseparable from those of other employees in the region; the likelihood that people with greater expertise in negotiations will be available in a larger unit; the actual experience of this agency in other bargaining units; and the level at which labor relations policy is set in the agency and the effectuation of agency training in the implementation of a number of negotiated agreements and grievance procedures covering employees performing essentially the same duties. As to "efficiency of agency operations" among those factors which should be considered would be the benefits to be derived from a unit structure which bears some rational relationship to the operational and organizational structure of the agency. This is certainly not to say that section 10(b) requires that each bargaining unit always be coextensive with the agency's view of how it can best organize to carry out its mission, but the relationship between the proposed bargaining unit and the operational and organizational structure of the agency should be given substantial weight in ascertaining whether the unit will promote efficiency of agency operations. In the instant case, for example, while the Assistant Secretary relied in part on the fact that the

8/ See page 7 supra.

Salt Lake City DCASD employees share districtwide supervision, he appears to have given no weight to the fact that those employees share a common supervisory structure with all employees in the region and enjoy a commonality of mission, personnel policies and practices and matters affecting working conditions with all employees of the region.

Third, in simply concluding that the proposed unit will promote effective dealings and efficiency of operations based solely upon evidentiary considerations which had been relied upon to support the finding of a community of interest, the Assistant Secretary failed to give equal weight to all three criteria.

Finally, there is the requirement that the Assistant Secretary decide appropriate unit questions consistent with the policy of the Order of preventing and reducing fragmentation in the bargaining unit structure of the Federal labor-management relations program. The Assistant Secretary's decision finding appropriate a unit limited to the Salt Lake City DCASD is clearly contrary to that policy in that his decision tends to foster and promote fragmentation. The San Francisco DCASR is a single organizational element of the agency with a chain of command headed by the Regional Commander, running down through all of the component elements. With the exception of the DCASO in Portland which reports through the DCASD in Seattle, all elements of the region report directly to DCASR headquarters. All employees of the region perform their duties pursuant to policies and procedures established by the regional headquarters staff, and the employees within the region are subject to uniform personnel policies and job benefits. The DCASR's Civilian Personnel Office, located at headquarters, has the responsibility for servicing all components within the region. The region encompasses an organizational structure of an agency which is functionally integrated. It has been established in this manner to accomplish its mission. Its employees thus share a commonality of mission, organization and personnel policies and practices and matters affecting working conditions.

There is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive bargaining unit structure. Against this backdrop, the AFGE petitioned for a single portion of the organizational and functional whole, the Salt Lake City DCASD, a unit of approximately 77 employees out of a total of approximately 1,250 eligible employees in the region. In concluding that these employees shared a community of interest with each other, the Assistant Secretary relied upon those factors which, in his view, reflected some degree of separation between these employees and the remaining employees in the DCASR. In doing so, he failed to give proper recognition to the single organizational structure of the region, its chain of command and authority, the uniform personnel policies and practices within the DCASR, and the existence of a single Civilian Personnel Office within the DCASR. As a result, the unit structure which his decision promotes within the San Francisco DCASR results in artificial distinctions between groups

of employees whose mission and functions, supervisory structure and conditions of employment are identical. Moreover, finding such a unit appropriate left the remainder of the region for further piecemeal organizing efforts, thereby resulting in a fragmented bargaining unit structure, as actually subsequently occured herein.

In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order would dictate a finding that a unit limited to the Salt Lake City DCASD is not an appropriate unit for purposes of exclusive recognition under the Order.9/

A/SLMR No. 559

The Assistant Secretary, as outlined above, in this case found appropriate a unit composed of the employees in DCASR headquarters and the five DCASO's, all in the San Francisco Bay area, along with the Hawaii Residency Office. After reviewing at length the organizational and work environment of the region and its component parts, he found that there was a clear and identifiable community of interest among the employees in the unit found appropriate, noting specifically that such employees share a common mission and are covered by the same personnel and labor relations policies; that there are similar job classifications in each of the components within the headquarters, the five DCASO's and the Hawaii Residency Office; that there have been reassignments to and from the Regional Headquarters and the DCASO's; and that there is employee contact between headquarters and the DCASO's.

While the Assistant Secretary again made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must conclude that in making that finding he did not fully meet those obligations, outlined previously herein, which the Order imposes upon him. In this case, while the Assistant Secretary met his responsibilities in developing and analyzing evidence pertaining to the "community of interest" criterion and in making an affirmative finding with respect to that

9/ In this regard, we note, as did the agency in testimony and brief before the Assistant Secretary, that the Assistant Secretary earlier considered and rejected as inappropriate various less-than-regionwide units in the San Francisco DCASR ranging in size from 18 to 686 employees. He found such units "would artifically [sic] divide and fragment . . . operations, and cannot be reasonably expected to promote effective dealings or efficiency of operations." Defense Supply Agency, Defense Contract Administration Services Region (DCASR), San Francisco, A/SLMR No. 112 (Nov. 30, 1971), decision by the then Assistant Secretary. This precedential decision was neither discussed nor even adverted to in the instant case.

criterion,10/ we conclude that he failed to meet those responsibilities with respect to the criteria of "effective dealings" and "efficiency of agency operations." First, a review of the record reveals that the Assistant Secretary failed to make an affirmative effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations."11/ Furthermore, as to the contentions and supporting evidence which were put forward by the activity regarding these two criteria, the Assistant Secretary failed to give such testimony appropriate and adequate consideration.

As to whether the unit sought in A/SLMR No. 559 would promote efficiency of agency operations, the Assistant Secretary, relying on Council negotiability decisions12/ on the meaning of section 12(b)(4),13/ concluded that more than cost factors should be involved in making such determinations. As previously indicated, he stated:

10/ We do not here decide that the factors relied upon by the Assistant Secretary establish a separate community of interest for the employees in the unit found appropriate. Indeed, many of the factors relied upon by the Assistant Secretary indicate a community of interest that is regionwide in scope rather than limited to the employees in the unit sought by the union.

11/ A review of the record discloses that the Hearing Officer did not at any time solicit testimony concerning the criteria of effective dealings and efficiency of agency operations, limiting direct questioning solely to indicia of community of interest among employees within the unit sought.

12/ Local Union No. 2219, International Brotherhood of Electrical Workers, AFL-CIO, and Department of the Army, Corps of Engineers, Little Rock District, Little Rock, Ark., 1 FLRC 219 [FLRC No. 71A-46 (Nov. 20, 1972), Report No. 30]; American Federation of Government Employees, National Joint Council of Food Inspection Locals and Office of the Administrator, Animal and Plant Health Inspection Service, U.S. Department of Agriculture, FLRC No. 73A-36 (June 10, 1975), Report No. 73 [aff'd National Broiler Council, Inc. v. Federal Labor Relations Council, Civil Action No. 147-47-A (E.D. Va., Sept. 5, 1975)].

13/ Section 12(b)(4) provides in pertinent part:

> Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--
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> . . . . . .
>
> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations--

(Continued)

> From the foregoing, it is evident that a determination of efficiency of agency operations is dependent on a complex of factors and that it has been recognized that the tangible and intangible benefits to employees and activities resulting from employee representation by a labor organization can result in improved efficiency of agency operations despite increased cost factors. [Footnote omitted.]

Based on these considerations, the Assistant Secretary concluded that the proposed unit would promote efficiency of agency operations, stressing that the unit would encompass the employees within the same commuting area and would include the Hawaii Residency Office which otherwise might be fragmented.14/ The Assistant Secretary concluded that the establishment of such a unit "could result" in actual economic savings and increased productivity due to the homogeneity of its composition.

While the Assistant Secretary reached a conclusion as to whether the proposed unit would promote the efficiency of agency operations, in our view, he failed properly to consider the relevant testimony and arguments advanced by the agency and, in effect, thereby failed to give the required equal weight to this criterion. At the outset, the Assistant Secretary found that the agency's views as to both this criterion and the criterion of promoting effective dealings to be "at most, speculative and conjectural." Such a rejection of the agency's views was inappropriate and a misconception of the nature of these criteria. We believe that inherent in determining whether or not a proposed unit will promote the efficiency of agency operations is the need to anticipate the impact of a given unit structure on the agency's operations. Just as the Assistant Secretary considered economic savings and increased productivity which "could result," the Assistant Secretary must also consider the costs and inefficient use of resources that, in management's opinion, "could result" from such a unit structure. The speculative and conjectural nature of a contention, in these circumstances, does not in and of itself render the contention without merit.

As to the specifics of the agency's contentions, the Assistant Secretary stated:

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. . . . . .

> (4) to maintain the efficiency of the Government operations entrusted to them.

14/ In this regard, the same concern about fragmentation might have been expressed about any unrepresented portion of the region, for example, the Seattle DCASD, which in all significant respects had the same relationship with the DCASR headquarters as the Hawaii Residency Office.

> In addition, it was noted that the Activity's contentions that such a unit would not promote efficiency of agency operations were based primarily on its speculative assessments of the manpower and economic costs of less than a regionwide unit, rather than on a balanced consideration of all the factors, including employee morale and well-being, which . . . are relevant factors in making such an assessment. Thus, the Activity's position in this regard was reflected in the testimony of its Civilian Personnel Officer that "it was reasonable" to infer that a region-wide unit would do more to promote efficiency of agency operations (and effective dealings) than the originally petitioned for unit of the DCASR Headquarters, Burlingame, and that it would be a hardship on his office if several agreements were required because this would require expenditure of both manpower and financial resources "that might not be necessary if there were a single unit throughout the Region." I find that, standing alone, such speculation as to what might be helpful or desirable to be insufficient to establish that the proposed unit is inappropriate within the meaning of Section 10(b) of the Order. [Footnote omitted.]

In our view, rather than being rejected, in part, as "speculative," the contentions of the agency were valid considerations to be weighed in determining whether the proposed unit would promote efficiency of agency operations. As we have indicated, a policy of the Order is the promotion of more comprehensive bargaining units. Hence, the activity's contention that a regionwide unit of employees performing the same jobs in an organization with the same mission and subject to the same personnel policies and supervision would do more to promote efficiency of agency operations was consistent with the purposes of the Order. Similarly, while not dispositive, the efficient use of agency labor-management relations and financial resources is a valid factor in determining efficiency of agency operations.

We do not disagree with either the Assistant Secretary's conclusion that more than cost factors are involved in a determination of the promotion of efficiency of agency operations, or his conclusion that the benefits resulting from employee representation by a labor organization can result in improved efficiency of agency operations. However, the according of equal weight to the efficiency of agency operations criteria requires careful consideration of the agency's reasoned view of the impact of the proposed unit on the efficiency of its operations.15/

In finding that the alternative unit sought would promote effective dealings, the Assistant Secretary noted that the unit would promote effective dealings to the extent that the individuals most concerned with labor-management relations, fiscal matters and the direction of operations are located organizationally within the unit found appropriate. Thereafter,

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15/ In this regard, agency testimony concerning the efficiencies in agency operations experienced in other units would be relevant, as would testimony concerning the effectiveness of dealings in such units.

relying on the amendments to section 11(a) of the Order in E.O. 11838,[16] the Assistant Secretary stated:

> Moreover, in my view, a claimed unit may be appropriate and be considered to promote effective dealings as well as efficiency of agency operations even though it does not include all employees directly under the area or regional head, or other activity officials who have final or initiating authority with respect to personnel, fiscal and programmatic matters. Thus, it is clearly contemplated by the Executive Order that labor-management negotiations could properly be conducted at lower than agency, regional, or district levels, and that, therefore, units of less broad proportions could be appropriate.

The Assistant Secretary's reliance on the recent amendments to section 11(a) to support his finding that the unit would promote effective dealings is in error. As stated above in footnote 7, the Council, in its decision in Defense Supply Agency, Defense Contract Administration Services Region (DCASR), Cleveland, Ohio, Defense Contract Administration Services Offices (DCASO's), Akron, Ohio and Columbus, Ohio, A/SLMR No. 372, FLRC No. 74A-41 (Aug. 13, 1975), Report No. 80, emphasized:

> [A]s indicated in section V.1. of the Report accompanying E.O. 11838, the changes in section 11(a) of the Order were intended to "complement" the recommendations of the Council relating to the consolidation of bargaining units. The purpose of those recommendations (which were adopted by the President) was principally to reduce the unit fragmentation that had previously developed and to encourage the creation of more comprehensive bargaining units in the interest of the entire program. [Footnote omitted.][17]

While the changes in section 11(a) were intended to expand the scope of bargaining by eliminating unnecessary constrictions on meaningful negotiations which had been imposed by higher level agency regulations not critical to effective agency management or the public interest, the changes in section 11(a) were also intended, as stated in FLRC No. 74A-41, to complement the recommendations of the Council relating to reduction of unit fragmentation, which reduction would also serve to expand the scope of bargaining. The Assistant Secretary's reliance on the 11(a) changes to support a finding of a less comprehensive unit is therefore totally inappropriate. While the changes to section 11(a) were intended to lessen the impact of certain agency regulations upon the scope of bargaining,

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16/ Note 2 supra.

17/ In the subject decision, A/SLMR No. 559, the Assistant Secretary took note of this language in FLRC No. 74A-41, but concluded that he did not find this concept to be inconsistent with the continued existence or establishment of units less comprehensive than region or districtwide, which otherwise meet the tests of appropriateness under the Order.

contrary to the conclusions of the Assistant Secretary, they were not intended to reflect a policy of encouraging the establishment of bargaining units at lower organizational levels within an agency.

While it is true that units may promote effective dealings and be appropriate under section 10(b) even if established at lower agency organizational levels, in our view it is clear that, generally, effective dealings can be better achieved in more comprehensive units. As we have indicated, negotiations covering more comprehensive units permit the parties to address a wider range of matters of critical concern to greater numbers of employees. For example, employees of the entire region herein would have identical concerns as to such matters as merit staffing procedures, areas of consideration, reduction-in-force procedures, and competitive areas. Moreover, negotiations in less fragmented bargaining unit structures established at higher organizational levels permit unions and agencies to allocate their manpower resources and send to the bargaining table more experienced and skilled negotiators who should do a more efficient job of reaching a satisfactory agreement.

The instant decision of the Assistant Secretary clearly reflects a desire that negotiations be conducted at the lowest organizational levels possible and, hence, as close as possible to the particular employees who will be affected by the outcome of the negotiations; however, such a desire cannot be used as a rationale for creating units in a manner inconsistent with the purposes of the Order. Such reasoning, carried to an extreme as here, results in the fragmentation of units contrary to the policies sought to be served by the Order. Moreover, we do not agree that the resolution of local concerns is sacrificed by the creation of more comprehensive units. To the extent that there may be concerns unique to some employees which are not shared by an entire broader unit, there are obvious, well-recognized ways that these concerns may be addressed within the parameters of the bargaining relationship. And while a unit at a lower organizational level may provide a temporary vehicle to address certain localized problems, in the long run, units broader in scope will facilitate consideration and resolution of a greater range of concerns common to employees and will better serve the interests of both the employees and the agencies. It was to achieve this end that the policies of the Order were adopted. Thus, the Assistant Secretary's contrary unit determination was inconsistent with these purposes of the Order.

As previously stated with respect to A/SLMR No. 461, the Assistant Secretary must decide appropriate unit questions consonant with the policy of the Order of preventing and reducing fragmentation in the bargaining unit structure of the Federal labor-management relations program. In finding appropriate the alternative unit sought in this case, the Assistant Secretary's decision plainly contravenes that policy since his decision tends to foster and promote fragmentation. On the other hand, for the reasons previously detailed at page 14 above, there is no question that a region-wide unit, if alone sought, would meet all of the section 10(b) criteria.

While the employees in the San Francisco Bay area may have, as discussed by the Assistant Secretary, a community of interest with each other and possibly some degree of separation from other elements because of separate local supervision and geographic dispersion, the petitioned-for unit would be inconsistent with the single organizational structure of the region, its chain of command and authority, the uniform personnel policies and practices within the DCASR, and the existence of a single Civilian Personnel Office. The unit structure, which his decision promotes within the San Francisco DCASR, results in artificial distinctions between employees whose mission and functions, supervisory structure and conditions of employment are identical. Further, as noted with regard to A/SLMR No. 461, there is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive bargaining unit structure. Moreover, finding such a unit appropriate left the remainder of the region for further piecemeal organizing efforts, thereby resulting in a fragmented bargaining unit structure, as actually subsequently occurred herein.

In conclusion, the Assistant Secretary's finding that the alternative unit sought would promote effective dealings and efficiency of agency operations was based upon considerations which did not properly provide a sharp degree of definition and precision to these two criteria. Indeed, the considerations upon which the Assistant Secretary relied were not implementive of and were not consistent with those criteria. As a result, the Assistant Secretary failed properly to give equal weight to these criteria in his decision.

In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order, would dictate a finding that the alternative unit sought herein is not an appropriate unit for the purposes of exclusive recognition under the Order.

A/SLMR No. 564

In this case, the Assistant Secretary found that the employees in the petitioned-for unit, the Seattle DCASD, including the Portland DCASO, share a clear and identifiable community of interest separate and distinct from other employees of the region. In response to the activity's claim that such a unit would not promote effective dealings or efficiency of agency operations, the Assistant Secretary found that the activity took the identical position that it took in A/SLMR No. 461; he rejected the activity's position partly on the basis of the circumstances recited in A/SLMR No. 559 and his reasoning therein. The Assistant Secretary concluded:

> Under these circumstances, and noting particularly the absence of any specific countervailing evidence submitted by the Activity as to a lack of effective dealings and efficiency of operations in

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> those regions of the DSA where less than region-wide units have been recognized or certified and where there currently exist negotiated agreements, I find that the petitioned-for District-wide unit will promote effective dealings and efficiency of agency operations. [Footnotes omitted.]

While the Assistant Secretary made an affirmative finding that the proposed unit met all of the appropriate unit criteria of section 10(b), we must again conclude that in doing so he did not fully meet those obligations, outlined previously herein, which the Order imposes upon him. Specifically, a review of the record reveals that the Assistant Secretary failed to make an affirmative effort to develop as complete a record as possible with regard to the criteria of "effective dealings" and "efficiency of agency operations."18/ While the testimony and arguments advanced by the activity as to why the proposed unit would not promote effective dealings and efficiency of agency operations may not have provided the Assistant Secretary with a sufficient basis on which to make a determination, as we have indicated, the development of such evidence does not stop with the parties. It is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; he did not do so here.

With regard to the circumstances which he particularly noted in finding that the unit sought would promote effective dealings and efficiency of agency operations, the Assistant Secretary plainly failed to make an affirmative determination that the unit equally satisfied each of the 10(b) criteria. As we indicated previously, the experience of an agency and labor organization under a given unit structure may be considered in determining whether a petitioned-for unit satisfies the three criteria set forth in section 10(b) of the Order. However, the Assistant Secretary may not rely upon "the absence of any specific countervailing evidence . . . as to a lack of effective dealings and efficiency of operations" in other existing bargaining units to make an affirmative finding regarding these criteria in a proposed unit. Rather, as we have previously emphasized, it is the responsibility of the Assistant Secretary to develop as complete a record as possible with regard to each of the three criteria, soliciting evidence from the parties as necessary; to give full and careful consideration to all relevant evidence in the record; and then to ground his decision upon a careful, thorough analysis of evidentiary considerations or factors which provide a sharp degree of definition and precision to each of the three criteria. Where the Assistant Secretary finds a unit to be appropriate for purposes of exclusive recognition, he must make an affirmative determination that a unit equally satisfies each

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18/ A review of the record discloses that the Hearing Officer did not at any time solicit testimony concerning the criteria of effective dealings and efficiency of agency operations, limiting direct questioning solely to indicia of community of interest among employees within the unit sought.

of the 10(b) criteria. Reliance upon a lack of evidence fails to satisfy the requirement in the Order that the Assistant Secretary make such an affirmative determination.

Accordingly, for the reasons fully discussed above in regard to the Assistant Secretary's decision in A/SLMR No. 559, we must likewise reject the Assistant Secretary's reliance upon that decision in reaching his decision in A/SLMR No. 564. In summary, in the circumstances of this case as reflected in the record before us, equal application of the three criteria in section 10(b) and the resulting consistency with the purposes of the Order, would dictate a finding that the unit sought herein is not an appropriate unit for purposes of exclusive recognition under the Order. However, as noted with regard to both A/SLMR No. 461 and A/SLMR No. 559, there is no question that if the union sought recognition in a regionwide unit, it would meet all of the section 10(b) criteria and, more importantly, would be consistent with the Order's policy of promoting a more comprehensive unit structure.

Conclusion

For the foregoing reasons, we find that the Assistant Secretary's Decision and Direction of Election in each of the above-entitled cases is inconsistent with the purposes of the Order. Accordingly, pursuant to section 2411.18(b) of the Council's rules of procedure, we set aside the Assistant Secretary's decisions and remand the cases to him for action consistent with our decision herein.

In this regard, we have been administratively advised that the Assistant Secretary currently has under consideration a petition for consolidation of units represented by AFGE within the Defense Supply Agency, including the units involved herein. (Assistant Secretary Case No. 22-07578-UC). Should the Assistant Secretary determine that a consolidated unit is appropriate, it would not be inconsistent with this decision to include the units involved herein in such a consolidated unit by reason of the special circumstances here involved, including the fact that the employees in these units have previously indicated through the election process that they wish AFGE to serve as their exclusive representative and the length of time which has elapsed since the elections. Of course, if a consolidation election should be held to determine whether the employees in the proposed consolidated unit wish to be represented in that unit, the employees in the three units involved herein would have the options only of being represented in the consolidated unit or being unrepresented--unless, of course, AFGE files a separate petition seeking to represent the employees involved herein in a regionwide unit which, as already indicated, would be appropriate.

By the Council.

Henry B. Frazier III
Executive Director

Issued: December 30, 1976

INTERPRETATIONS AND POLICY STATEMENTS

January 1, 1976 through December 31, 1976

The Department of the Treasury requested an interpretation of section 10(a) and 10(d)(4) of the Order and a statement on certain alleged major policy issues related to pending unit consolidation petitions filed by the National Treasury Employees Union pursuant to regulations promulgated by the Assistant Secretary. The Assistant Secretary had previously denied a Department of the Treasury request for approval to file the request for interpretation and statement on major policy issues with the Council, finding the matter more appropriate for resolution with the benefit of testimony adduced at a formal hearing. The Department of the Treasury contended that the Assistant Secretary's denial of its request was arbitrary and capricious in that he failed to give it an opportunity to present its reasons in person as to why the approval should be granted.

Council action (August 11, 1976). The Council decided that the Department of the Treasury's request did not provide a basis for waiver of the requirement in section 2410.4(b) of the Council's rules that the Assistant Secretary approve any request to the Council for an interpretation or policy statement concerning a matter pending pursuant to the Assistant Secretary's regulations, such approval having been denied in this case. That is, neither the Assistant Secretary's finding that the matter could be more appropriately resolved with the benefit of testimony adduced at a formal hearing nor his failure to grant Department of the Treasury representatives an opportunity to present reasons in person why his approval should be granted appeared to be without reasonable justification. Moreover, the request by the Department of the Treasury did not satisfy the considerations governing the issuance of interpretations and policy statements set forth in the Council's rules, particularly section 2410.3(b)(1), since the questions raised in the request could more appropriately be resolved through the procedures established by the Assistant Secretary pursuant to the authority conferred upon him by section 6(a)(1) and (d) of the Order to decide questions as to the appropriate unit and related issues and to prescribe regulations to carry out his functions. Accordingly, the Council denied the Department of the Treasury's request.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

August 11, 1976

Mr. Thomas DeScisciolo
Assistant Director of Personnel
for Labor Relations
Department of the Treasury
514 Washington Building
1435 G Street, NW.
Washington, D.C. 20220

Re: FLRC No. 76P-3

Dear Mr. DeScisciolo:

This is in further reply to your request for an interpretation of section 10(a) and 10(d)(4) of the Order and a statement on certain alleged major policy issues related to pending unit consolidation petitions filed by the National Treasury Employees Union (NTEU) pursuant to regulations promulgated by the Assistant Secretary. The alleged major policy issues on which you request a Council statement are:

1. In filing a petition to consolidate existing exclusively-recognized bargaining units pursuant to Section 10 of Executive Order 11491, as amended, is an international labor organization, as petitioner, required to secure the authorizations of local labor organizations, which alone hold exclusive recognition in their own right, to file the consolidation petition on their behalf?

2. Upon the filing of a consolidation petition by an international union on behalf of exclusively recognized local labor organizations, if a question concerning the validity of the petition is raised, should the Department of Labor administratively determine whether the petition is valid or should the burden rest with the agency to establish the alleged invalidity of the petition or with the petitioning labor organization to establish the validity of said petition?

Section 2410.4(b) of the Council's rules provides:

> The Council will not consider a request related to a pending petition, application, charge, or complaint which the Council is advised has been filed pursuant to the Assistant Secretary's regulations unless the party involved in the case filing the request with the Council has first secured the prior approval of the Assistant Secretary.

The Assistant Secretary denied your request for approval to file a request for interpretation and statement on major policy issues with the Council, finding the matter more appropriate for resolution with the benefit of testimony adduced at a formal hearing. You contend that the Assistant Secretary's denial of your request was arbitrary and capricious in that he failed to give you an opportunity to present your reasons in person as to why the approval should be granted.

In the Council's opinion, you have not provided a basis for waiver of the Council's requirement for prior approval of the Assistant Secretary. That is, his finding that the matter could be more appropriately resolved with the benefit of testimony adduced at a formal hearing does not appear to be without reasonable justification. As to the Assistant Secretary's failure to grant you an opportunity to present your reasons in person, it similarly does not appear that his actions were without reasonable justification, noting that you provide no evidence that you were precluded from presenting your reasons in writing.

Moreover, your request for an interpretation of the Order and statement on major policy issues does not satisfy the considerations governing the issuance of interpretations and policy statements set forth in the Council's rules, particularly section 2410.3(b)(1) which provides:

> (b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:
>
> (1) Whether the question presented can more appropriately be resolved by other means available under law, other Executive orders, regulation or the order; . . .

The questions you raise in your request for an interpretation and statement on major policy issues can be more appropriately resolved through the procedures established by the Assistant Secretary pursuant to the authority conferred upon him by section 6(a)(1) and (d) of the Order to decide questions as to the appropriate unit and related issues and to prescribe regulations to carry out his functions. In this connection, it should be noted that among the issues which will be addressed at the hearings which have been directed by the Assistant Secretary in connection with the pending unit consolidation petitions are the following:

1. May the NTEU file in its own name a unit consolidation petition for and on behalf of its constituent locals when certifications lie in the name of the latter?

2. If this is possible, is it a prerequisite for a valid petition for each local union so certified to authorize such a filing?

The final decision of the Assistant Secretary may be appealed to the Council as provided for in section 4(c)(1) of the Order and the Council's implementing regulations in part 2411.

Accordingly, your request for an interpretation of the Order and statement on major policy issues is denied.

By the Council.

Sincerely,

Henry B. Frazier III
Executive Director

cc: (See Attached List)

Mr. Bernard E. DeLury
Assistant Secretary of Labor
for Labor-Management Relations
U.S. Department of Labor
200 Constitution Ave., NW.
Washington, D.C. 20216

Mr. Thomas Angelo
Associate General Counsel
National Treasury Employees Union
Suite 1101 - 1730 K Street, NW.
Washington, D.C. 20006

Mr. James L. Fischer, President
National Treasury Employees Union
Chapter 14
P.O. Box 1434
Central Station
St. Louis, Missouri 63188

Mr. Robert Hastings
Chief, Labor Relations Branch
Internal Revenue Service
Room 814 - Warner Building
501 13th Street, NW.
Washington, D.C. 20024

Mr. Eugene M. Levine
Regional Administrator
Philadelphia Regional Office, LMSA
Room 14120 - Gateway Building
3535 Market Street
Philadelphia, Pennsylvania 19104

Mr. Earl Hart
Area Director
Washington Area Office, LMSA
Vanguard Building - Room 509
1111 20th Street, NW.
Washington, D.C. 20036

National President
American Federation of Government
Employees
1325 Massachusetts Avenue, NW.
Washington, D.C. 20005

National President
National Association of Government
Employees
2139 Wisconsin Avenue, NW.
Washington, D.C. 20007

National President
National Federation of Federal
Employees
1016 16th Street, NW.
Washington, D.C. 20036

International Association of
Machinists
Grand Lodge
1300 Connecticut Avenue, NW.
Washington, D.C. 20036

Dr. Wilson R. Hart
Headquarters, Defense Supply Agency
Attn: DSAH/KL
Cameron Station
Alexandria, Virginia 22314

Director of Labor Relations
Office of Civilian Manpower
Management
Department of the Navy
Washington, D.C. 20390
Attn: Code 04

Director of Labor Relations
Federal Aviation Administration
800 Independence Avenue, SW.
Washington, D.C. 20553

Headquarters, USAF/DPCEU
Washington, D.C. 20314

Headquarters, Department of the
Army
Attn: DAPE-CPL
Washington, D.C. 20310

The Association of Academy Instructors requested a statement on a major policy issue which, according to its submission, arose out of a conflict between the Association and the Federal Aviation Administration concerning the rights of employees during a security investigation. The submission reflects that the Association filed, but subsequently withdrew an unfair labor practice complaint with respect to the matters at issue.

Council action (October 6, 1976). The Council decided that the question presented by the Association's request--in effect, whether the investigation referred to in the request was conducted in derogation of rights guaranteed employees under law, the regulations of appropriate authorities, including the Federal Personnel Manual, or the Order--did not satisfy the considerations governing the issuance of policy statements set forth in the Council's rules, particularly section 2410.3(b)(1), since it could more appropriately be resolved by other means. Accordingly, the Council denied the Association's request.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

October 6, 1976

Mr. Charles R. Gibson
President
Association of Academy Instructors
Post Office Box 63
Bethany, Oklahoma 73008

Re: FLRC No. 76P-1

Dear Mr. Gibson:

This is in further reply to your request for a statement on a major policy issue. You request the Council to issue a statement on the following question:

> Shall the Federal Labor Relations Program guarantee and protect the rights of employees under existing or future laws and the rules or regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual if such are not expressly made a part of the basic agreement between the parties?

According to your submission, the request arises out of a conflict between the Association of Academy Instructors and the Federal Aviation Administration concerning the rights of employees during a security investigation. Your submission reflects that you filed, but subsequently withdrew an unfair labor practice complaint with respect to these matters.

The Council has considered carefully your request for a statement on a major policy issue and has determined that it does not satisfy the considerations governing the issuance of interpretations and policy statements set forth in the Council's rules, particularly section 2410.3(b)(1), which provides:

> (b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:
>
> (1) Whether the question presented can more appropriately be resolved by other means available under law, other Executive orders, regulation or the order [.]

In the Council's opinion, the question presented, in effect -- whether the investigation referred to in your request was conducted in derogation of rights guaranteed employees under law, the regulations of appropriate authorities, including the Federal Personnel Manual (FPM), or the Order, can more appropriately be resolved by other means. In this regard, it

first should be noted that section 6(a)(4) of the Order authorizes the Assistant Secretary of Labor for Labor-Management Relations to decide unfair labor practice complaints filed pursuant to section 19. In fact, you indicated in your request that the "Union filed an Unfair Labor Practice charge and later complaint, with no agreement between the parties. The complaint was later withdrawn." Second, it should be noted that section 19(d) of the Order provides, in pertinent part: "Issues which can properly be raised under an appeals procedure may not be raised under this section." In other words, where an issue can properly be raised under one of the statutory appeal procedures available to an employee, such issue may not be raised under the unfair labor practice procedures of the Order. Thus, the Order has recognized that certain issues pertaining to the rights of Federal employees must be adjudicated under applicable statutory appeal procedures. Finally, section 13(a) of the Order provides, in pertinent part, that:

> (a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances. The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. . . . [Emphasis in original.]

With respect to this particular provision of the Order, the Report and Recommendations of the Council which led to the adoption of the emphasized portion of the above-quoted provision states:*/

> The Council has carefully considered whether the Order should contain any specific limitations upon the scope and coverage of negotiated grievance procedures other than the exclusion of matters covered by statutory appeal procedures. It has concluded that the Order should not contain any other specific limitations. Instead, the coverage and scope of the negotiated grievance procedure should be negotiated by the parties, so long as it does not otherwise conflict with statute or the Order, and matters for which statutory appeal procedures exist should be the sole mandatory exclusion prescribed by the Order. This will give the parties greater flexibility at the negotiating table to fashion a negotiated grievance procedure which suits their particular needs. For example, it will permit them to include grievances over agency regulations and policies, whether or not the regulations and policies are contained in the agreement, provided the grievances are not over matters otherwise excluded from the negotiations by sections 11(b) and 12(b) of the Order or subject to statutory appeal procedures.

*/ Labor-Management Relations in the Federal Service (1975), at 43.

In summary, the Order recognizes a number of procedures through which disputes concerning the alleged derogation of rights guaranteed employees under law, regulations, the Federal Personnel Manual, or the Order may be resolved. Accordingly, your request for a statement on a major policy issue is denied.

By the Council.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

cc: Hon. W. T. Coleman, Jr.
DOT

Hon. J. L. McLucas
FAA

Hon. B. E. DeLury
DOL

Hon. J. F. Scearce
FMCS

Mr. H. W. Solomon
FSIP

The National Association of Government Employees requested an interpretation of the provisions of section 15 of the Order, as amended, requiring agency approval or disapproval of a negotiated agreement within 45 days from the date of its execution, and a specific application of those provisions to the facts of a specific dispute arising out of the submission of a negotiated agreement to the National Guard Bureau for approval pursuant to section 15.

Council action (October 8, 1976). The Council decided that in light of the clear and unambiguous language of section 15, as well as the detailed explanation of its meaning which was contained in the Report and Recommendations of the Council which led to the amendments in section 15, to the effect that the agency must act within 45 days to notify the union of its approval or disapproval of the agreement, the request did not meet the requirements of section 2410.3(b)(6) of the Council's rules. That is, the request did not demonstrate that section 15 generally is so ambiguous as to require the issuance of a general explanatory interpretation by the Council and thereby to promote the purposes of the Order. Moreover, as to the application of section 15 to a specific set of circumstances, the Council decided that the request did not satisfy the considerations governing the issuance of interpretations set forth in the Council's rules, particularly section 2410.3(b)(1), as such questions can more appropriately be resolved by other means available under the Order. Accordingly, the Council denied the National Association of Government Employees' request.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
1900 E STREET, N.W. • WASHINGTON, D.C. 20415

October 8, 1976

Mr. Paul J. Hayes, National President Designee
National Vice President
National Association of Government Employees
31 Holly Drive
Belleville, Illinois 62221

Re: FLRC No. 76P-2

Dear Mr. Hayes:

This is in further reply to your request for an interpretation of section 15 of Executive Order 11491, as amended. In your request you state:

> The specific language concerning which an interpretation is sought is: . . . "An agreement which has not been approved or disapproved within forty-five days from the date of its execution shall go into effect without the required approval of the agency head and shall be binding on the parties subject to the provisions of Law, the Order and the regulations of appropriate authorities outside the agency." . . .
>
> The specific question which the Council is requested to answer in connection with the above cited language is: "Does an executed agreement go into effect on the forty-sixth (46th) day from the date of its execution subject to the provisions of Law, the Order and the regulations of appropriate authorities outside the agency, when the labor organization that is a party to the executed agreement receives no notification of any kind (neither orally or in writing) from anyone connected with the agency that is a party to the agreement within the forty five (45) day period from the date of its execution?"

In effect, your request thus appears to be in two parts. First, you appear to seek a general interpretation of the quoted language from section 15 of the Order and second, a specific application of that language to the facts of a specific dispute arising out of the submission of a negotiated agreement to the National Guard Bureau for approval pursuant to this section of the Order.

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With respect to the first part of your request--for a general interpretation of the quoted provision of section 15 of the Order--the Report and Recommendations of the Council which led to the amendments incorporating that language in section 15 states:1/

> We have concluded, therefore, that the program will benefit by modification of the present policy to impose a reasonable time limit on agency action. Furthermore, we have concluded that 45 days from the date of an agreement being signed by the negotiating parties is a reasonable period of time for agencies to fulfill their review responsibilities. If an agency fails to act within 45 days of an agreement's execution by the negotiating parties, the agreement would become effective automatically on the 46th day, subject only to the requirements of law, the Order, or regulations of appropriate authorities outside the agency. Where an agency fails to act within 45 days from the date of execution of an agreement, with the agreement then going into effect automatically, and a particular provision of the agreement is subsequently found to be violative of law, the Order, or regulation of appropriate authority outside the agency, the provision would be deemed void and unenforceable. Where a provision in such an agreement is found to be contrary to published agency policy or regulation (such as would otherwise bar negotiations under section 11(a)), however, and it is not otherwise violative of law, the Order, or regulation of appropriate authority outside the agency, that provision would continue valid and enforceable until it is renegotiated. Since an agency may waive its own regulations, failure by the agency to act within the 45-day time limit to approve or disapprove the agreement would be deemed a constructive waiver of the published agency policy or regulation.

In light of the clear and unambiguous language of section 15, as well as the detailed explanation of its meaning which was contained in the Report, to the effect that the agency must act within 45 days to notify the union of its approval or disapproval of the agreement, it does not appear that your submission meets the requirements of section 2410.3(b)(6) of the Council's rules which provides:

> (b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:
>
> (6) Whether Council resolution of the question of interpretation or major policy issue would promote constructive and cooperative labor-management relationships in the Federal service and would otherwise promote the purposes of the order.

1/ Labor-Management Relations in the Federal Service (1975), at 45-46.

That is, your request does not demonstrate that section 15 generally is so ambiguous as to require the issuance of a general explanatory interpretation by the Council and thereby to promote the purposes of the Order.

As to the second question raised in your request involving the application of section 15 to a specific set of circumstances, your request does not satisfy the considerations governing the issuance of interpretations as set forth in the Council's rules, particularly section 2410.3(b)(1) which provides:

> (b) In deciding whether to issue an interpretation or a policy statement, the Council shall consider:
>
> (1) Whether the question presented can more appropriately be resolved by other means available under law, other Executive orders, regulation or the order; . . .

To the extent that this second part of your request raises issues involving the application of section 15 to a particular factual situation, in the Council's view, such questions can more appropriately be resolved by other means available under the Order.2/

2/ For example, on unfair labor practice procedures, see The Adjutant General, State of Illinois, Illinois Air National Guard and National Guard Bureau, Washington, D.C., A/SLMR No. 598, FLRC No. 76A-1 (Apr. 23, 1976), Report No. 105, wherein the Council denied review of an Assistant Secretary's finding that the agency violated section 19(a)(1) by the manner in which it had exercised its section 15 review authority, and further stated, in pertinent part:

> As we noted above . . . , the Assistant Secretary dismissed the complaint insofar as it alleged a violation of section 19(a)(6) by the agency herein. Such dismissal has not been appealed to the Council and accordingly is not properly before the Council for review. However, it should be noted that we do not interpret the Assistant Secretary's dismissal as foreclosing under all circumstances such a finding against an agency. That is, where an agency abuses its authority under section 15 of the Order, a finding of a violation of section 19(a)(6) by the agency would usually be appropriate. See United States Department of Agriculture and Agricultural Research Service, A/SLMR No. 519, FLRC No. 75A-65 (December 24, 1975), Report No. 94, wherein the Council denied review of a decision by the Assistant Secretary in which he found that agency management at an organizational level above the level of recognition had violated section 19(a)(6) by taking action inconsistent with section 15.

Further, procedures established in section 11(c) of the Order and the Council's implementing regulations in part 2411, provide a mechanism for the resolution of issues growing out of an agency's determination of nonnegotiability.

Accordingly, your request for an interpretation of the Order is denied.

By the Council.

Sincerely,

Harold D. Kessler

Harold D. Kessler
Acting Executive Director

cc: Major Donald R. Beedle

Mr. James L. Boyer

Colonel Jackie B. Cole

Hon. Bernard E. DeLury
DOL

Lt. Colonel Vincent L. Looby

Mr. Kenneth T. Lyons

Mr. Wayne A. Robertson

Hon. James F. Scearce
FMCS

Mr. Howard W. Solomon
FSIP

FLRC No. 75P-2

Pursuant to section 4(b) of the Order and section 2410.3 of the Council's rules of procedure (5 CFR 2410.3), the Council, as previously announced, determined to provide a major policy statement on the following issue found by the Council to have general application to the Federal labor-management relations program:

> Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

Concurrently, in conformity with section 2410.6 of its rules (5 CFR 2410.6), the Council solicited the written views of interested parties.

Upon careful consideration of the responses submitted to the Council, and after thorough analysis of the subject major policy issue, the Council concluded, for reasons fully detailed in its statement, that:

1. An employee in a unit of exclusive recognition has a protected right under the last sentence of section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit; and

2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with section 11(a) of the Order.

UNITED STATES
FEDERAL LABOR RELATIONS COUNCIL
WASHINGTON, D.C. 20415

FLRC No. 75P-2

STATEMENT ON MAJOR POLICY ISSUE

As previously announced, the Council determined, pursuant to section 4(b) of the Order and section 2410.3 of its rules of procedure (5 CFR 2410.3), to provide a major policy statement on the following issue which the Council found has general application to the Federal labor-management relations program:

> Does an employee in a unit of exclusive recognition have a protected right under the Order to assistance (possibly including personal representation) by the exclusive representative when he is summoned to a meeting or interview with agency management, and, if so, under what circumstances may such a right be exercised?

Concurrently, in accordance with section 2410.6 of its rules (5 CFR 2410.6), the Council invited all interested parties to express their views in writing with regard to the manner in which the issue should be resolved. The responses submitted to the Council, including those from major agencies and labor organizations, were most thorough and helpful and have been carefully considered.

The provisions of the Order which are immediately relevant to the resolution of the above-stated issue are contained in sections 1(a) and 10(e), as follows:[1/]

> Section 1. Policy. (a) Each employee of the executive branch of the Federal Government has the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization or to refrain from any such activity, and each employee shall

1/ Section 7(d)(1) of the Order, which refers to an employee's "choosing his own representative in a grievance or appellate action," is not apposite, since, as the Council has previously held, that section does not grant an employee any right to union representation, but merely ensures that exclusive recognition does not prevent an employee from selecting his own representative (except under a negotiated grievance procedure) if such right is granted elsewhere under law or regulation. Internal Revenue Service, Chicago District, A/SLMR No. 279, FLRC No. 73A-32 (Oct. 22, 1974), Report No. 58.

be protected in the exercise of this right. . . . The head of each agency shall take the action required to assure that employees in the agency are apprised of their rights under this section, and that no interference, restraint, coercion, or discrimination is practiced within his agency to encourage or discourage membership in a labor organization.

. . . . . .

Sec. 10. Exclusive recognition.

. . . . . .

(e) When a labor organization has been accorded exclusive recognition, it is the exclusive representative of employees in the unit and is entitled to act for and negotiate agreements covering all employees in the unit. It is responsible for representing the interests of all employees in the unit without discrimination and without regard to labor organization membership. The labor organization shall be given the opportunity to be represented at formal discussions between management and employees or employee representatives concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

For convenience in considering whether an employee has a right under these provisions of the Order to assistance or representation by the exclusive representative, when he is called to meet with management, we shall consider the problem first with respect to formal discussions between the employee and management, and next with respect to nonformal discussions (particularly investigative interviews) initiated by management officials.2/

1. Formal discussions conducted by management. Section 10(e) of the Order, in the last sentence thereof, specifically requires that an agency afford the exclusive representative an opportunity to be represented at any formal discussion between management and an employee concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit. While this right of representation at formal meetings plainly inures to the union, we are of the opinion that the employee involved likewise is vested with a derivative or companion right to insist that the agency fulfill its express obligation under the Order, when the employee deems such representation imperative for the protection of his own employment interests.

Our conclusion in this regard is compelled by the clear intent and purpose of the last sentence of section 10(e) itself. For that sentence of the

2/ Our concern here is with the duty, if any, of the agency under the Order to permit union representation when requested by the employee, not with such ancillary questions as the obligation of the union to represent the employee, the negotiability of proposed waivers of any employee right to union representation, or the like.

Order was manifestly designed to provide the union with the opportunity to safeguard the interests of unit employees at formal meetings held by management with those employees concerning grievances, personnel policies and practices, or other matters affecting general working conditions. And it would be wholly inconsistent with that purpose to prohibit the immediate beneficiaries of that protection from invoking the agency's obligation under the Order to sanction union representation, if the agency wishes to proceed with such meetings.3/

Accordingly, we hold that an employee has a protected right under the last sentence of section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the employee's request, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit.

2. Nonformal meetings or interviews held by management. Unlike the express provisions relating to formal discussions, section 10(e) provides no right of a union to representation at nonformal meetings or interviews held by management with an employee (absent agreement of the parties),4/ and therefore no derivative or companion right of an employee to such assistance or representation may be predicated on that section of the Order. However, the question remains whether section 1(a) of the Order may be deemed to grant an employee any such right to representation at nonformal meetings or interviews held by management with an employee particularly at nonformal investigative interviews called by management with the employee.

Section 1(a), as here pertinent, grants each employee "the right, freely and without fear of penalty or reprisal, to form, join, and assist a labor organization, or to refrain from any such activity," and guarantees that "each employee shall be protected in the exercise of this right." In our opinion, these provisions fail to establish any right of an employee to union assistance or representation at a nonformal investigative interview

3/ Our determination as to an employee's right to union assistance or representation at a formal discussion concerning matters adverted to in the last sentence of section 10(e) is consonant with the result reached by the Assistant Secretary in U.S. Department of the Army, Transportation Motor Pool, Fort Wainwright, Alaska, A/SLMR No. 278 (June 25, 1973), and related cases, although we do not adopt the reasoning relied upon by the Assistant Secretary in reaching that result. See United States Department of the Navy, Naval Ordnance Station, Louisville, Kentucky, A/SLMR No. 400, FLRC No. 74A-54 (Oct. 23, 1975), Report No. 87. This result, which has not been questioned in any appeal before the Council, has been tacitly recognized by the Federal community over an extended period of time and no persuasive reason has been advanced for reaching a contrary result in the instant proceeding.

4/ As the Council has previously decided, the right of a union to be afforded the opportunity to be represented at a discussion between management and employees (unless otherwise agreed to by the parties) is confined to the circumstances set forth in the last sentence of section 10(e). National Aeronautics and Space Administration (NASA), Washington, D.C., A/SLMR No. 457, FLRC No. 74A-95 (Sept. 26, 1975), Report No. 84.

or meeting conducted by management on matters of individual concern to that particular employee.

Clearly, nothing in the literal wording of section 1(a) refers either to union attendance at a meeting or interview between employees and management or to any employee right to request such union attendance when summoned to a meeting or interview by management. Rather, the subject provisions are expressly confined to the employee's right to organize, become a member of, and support, that organization, or to refrain from any such activity.

Moreover, the stated purposes of the Order would not be effectuated by an interpretation of section 1(a) to afford such right of an employee to union assistance or representation at a nonformal investigative interview or meeting regarding his own possible misconduct and without immediate significance to the employment interests of other personnel in the bargaining unit. Thus, the preamble of the Order, insofar as it pertains to individual employees, refers merely to their participation "in the formulation and implementation of personnel policies and practices," and to the finding that such participation should be improved through proper relations between "labor organizations and management officials."5/ While the Order therefore seeks to enhance employee participation, particularly through their exclusive representative, in the formulation and implementation of

5/ The preamble of the Order reads in full:

> WHEREAS the public interest requires high standards of employee performance and the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency; and
>
> WHEREAS the well-being of employees and efficient administration of the Government are benefited by providing employees an opportunity to participate in the formulation and implementation of personnel policies and practices affecting the conditions of their employment; and
>
> WHEREAS the participation of employees should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials; and
>
> WHEREAS subject to law and the paramount requirements of public service, effective labor-management relations within the Federal service require a clear statement of the respective rights and obligations of labor organizations and agency management:
>
> NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including sections 3301 and 7301 of title 5 of the United States Code, and as President of the United States, I hereby direct that the following policies shall govern officers and agencies of the executive branch of the Government in all dealings with Federal employees and organizations representing such employees.

personnel policies and practices, no intent is reflected to afford union representation at a nonformal investigative interview or meeting where such right of the employee has not been established as a personnel policy or practice of the agency involved.

Furthermore, as to the purposes of the Order, a detailed framework of statutes and regulations already protects an employee in the Federal program against arbitrary action by an agency when serious misconduct is alleged. Thus, for example, adverse actions sought to be taken by agencies against employees (i.e., removals, suspensions for more than 30 days, furloughs without pay, or reductions in rank or pay) are subject to the rigid requirements of 5 U.S.C. Chapters 75 and 77,[6] and of FPM Supplement 990-1, Parts 752 and 772, the latter specifically including the right of representation upon appeal to the Commission from agency actions.[7] And in matters not covered by statutory appeals procedures, and not otherwise in conflict with statutes or the Order, negotiated grievance procedures, including binding arbitration, are sanctioned for employee protection under section 13 of the Order. Consequently, no substantial purpose of the Order would be served by an interpretation of section 1(a) to include the right of an employee to union representation or assistance at a nonformal investigative interview or meeting to which he is called by management.

To repeat, therefore, an employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management.[8]

6/ Certain provisions of the Code applicable to veterans were extended to all employees in the competitive service under section 22 of the Order.

7/ FPM Supplement 990-1, Part 772, section 772.307(c), provides:

> (c) Hearing procedures. (1) An appellant is entitled to appear at the hearing on his appeal personally or through or accompanied by his representative . . . .

8/ Cf. Department of Defense, National Guard Bureau, Texas Air National Guard, A/SLMR No. 336, FLRC No. 74A-11 (June 18, 1974), Report No. 54; and Internal Revenue Service, Washington, D.C., Assistant Secretary Case No. 22-4056(CA), FLRC No. 74A-23 (Oct. 22, 1974), Report No. 58. The decision of the U.S. Supreme Court in NLRB v. Weingarten, 420 U.S. 251 (1975), upholding the right of an employee to union representation at an investigative interview under section 7 of the Labor-Management Relations Act (29 U.S.C. 157) clearly does not compel a contrary determination. Apart from other considerations, the literal provisions and stated purposes of the Order are dissimilar from those of the LMRA relied upon by the Court in its decision. Moreover, the Council, and not the NLRB, is the agency charged by the President under section 4(b) with the authority to "administer and interpret" the provisions of the Order, so the Council is without obligation to accord the special deference to the NLRB ruling in Weingarten which the Court stressed as a basis for its decision upon appeal in that case.

Before concluding, and to avoid any misunderstanding, we must emphasize that, although the Order does not establish a right to union assistance or representation at an investigative interview or meeting, the parties are of course free to agree to establish such right in negotiations conducted in accordance with section 11(a) of the Order. Indeed, such negotiations would be fully consonant with and implementive of the expanded scope of bargaining sought to be accomplished by E.O. 11838, issued on February 6, 1975, and would properly relegate to the bargaining table the definition, conditions, and reach of the subject right, to the extent consistent with statute and the Order.

Conclusion

Accordingly, as set forth above, we find that:

1. An employee in a unit of exclusive recognition has a protected right under the last sentence of section 10(e) of the Order to the assistance or representation by the exclusive representative, upon the request of the employee, when he is summoned to a formal discussion with management concerning grievances, personnel policies and practices, or other matters affecting general working conditions of employees in the unit; and

2. An employee in a unit of exclusive recognition does not have a protected right under the Order to assistance or representation at a nonformal investigative meeting or interview to which he is summoned by management; but such right may be established through negotiations conducted by the exclusive representative and the agency in accordance with section 11(a) of the Order.

By the Council.

Henry B. Frazier III
Executive Director

Issued: December 2, 1976

SELECTED INFORMATION ANNOUNCEMENT

January 1, 1976 through December 31, 1976

UNITED STATES

FEDERAL LABOR RELATIONS COUNCIL

1900 E. STREET, N.W. WASHINGTON, D.C. 20415

INFORMATION ANNOUNCEMENT July 2, 1976

To Heads of Agencies, Presidents of Labor Organizations, and Other Interested Parties:

I. INTRODUCTION

In furtherance of its responsibility to administer Executive Order 11491, as amended, the Council has determined that the following general guidance concerning grievance arbitration in the Federal service and Council review of arbitration awards should be issued.

Executive Order 11491, as amended, requires that agreements negotiated between agencies and labor organizations covering employees in an exclusive bargaining unit include a negotiated grievance procedure. The parties are free to negotiate the coverage and scope of the grievance procedure so long as it does not otherwise conflict with statute or the Order; and matters for which statutory appeal procedures exist are the sole mandatory exclusion prescribed by the Order. Section 13(a) of the Order provides, in pertinent part:

> Sec. 13. Grievance and arbitration procedures. (a) An agreement between an agency and a labor organization shall provide a procedure, applicable only to the unit, for the consideration of grievances. The coverage and scope of the procedure shall be negotiated by the parties to the agreement with the exception that it may not cover matters for which a statutory appeal procedure exists and so long as it does not otherwise conflict with statute or this Order. It shall be the exclusive procedure available to the parties and the employees in the unit for resolving grievances which fall within its coverage. . . .

Section 13(a) is intended to ensure that the parties will develop a procedure to resolve grievances that arise during the life of an agreement and thereby to promote the practical resolution of differences between the parties. Thus, the Order recognizes that the parties to an agreement should be basically free to fashion a negotiated grievance procedure suited to their particular needs, and that the negotiation of such a procedure is an inherent part of the collective bargaining process. It permits, with minimal restrictions, diversity and variation in negotiated grievance procedures in the Federal sector. As the Council indicated in its Report and Recommendations which led to the issuance of section 13(a) in its present form:

> The Council has carefully considered whether the Order should contain any specific limitations upon the scope and coverage of negotiated grievance procedures other than the exclusion of matters covered by statutory appeal procedures. It has concluded that the Order should not contain any other specific limitations. Instead, the coverage and scope of the negotiated grievance procedure should be negotiated by the parties, so long as it does not otherwise conflict with statute or the Order, and matters for which statutory appeal procedures exist should be the sole mandatory exclusion prescribed by the Order. This will give the parties greater flexibility at the negotiating table to fashion a negotiated grievance procedure which suits their particular needs. For example, it will permit them to include grievances over agency regulations and policies, whether or not the regulations and policies are contained in the agreement, provided the grievances are not over matters otherwise excluded from the negotiations by sections 11(b) and 12(b) of the Order or subject to statutory appeal procedures. Moreover, it will eliminate the problems which have arisen concerning the meaning of the term "any other matters."
>
> Thus, with this recommended change in section 13 of the Order, the parties may, through provisions in their negotiated agreement, agree to resolve grievances over matters covered by agency regulations and within the discretion of agency management through their negotiated grievance procedure. In fact, with this change, the parties may make their negotiated grievance procedure the exclusive procedure for resolving grievances of employees in the bargaining unit over agency policies and regulations not contained in the agreement. If the parties should agree to make the negotiated procedure the exclusive procedure, grievances over agency policy and regulation, to the extent covered thereby, would no longer be subject to grievance procedures established by agency regulations. In this connection, we also recommend that section 7(d)(1) of the Order be amended to reflect the possibility that the negotiated grievance procedure may replace the agency grievance procedure to the extent agreed upon by the parties.[1/]

The parties may choose to provide for arbitration of grievances as a part of their negotiated procedure. Section 13(b) provides:

> A negotiated procedure may provide for arbitration of grievances. Arbitration may be invoked only by the agency or the exclusive representative. Either party may file exceptions to an arbitrator's award with the Council, under regulations prescribed by the Council.

This section reflects recognition of the arbitral process as a means of settling grievance disputes in the Federal sector. However, the decision as to whether arbitration will be an integral part of the negotiated grievance procedure is reserved to the negotiation process. Hence, where provision is made for arbitration of grievances, it operates within a framework established by the parties.

Since E.O. 11491 became effective on January 1, 1970, binding arbitration has been sanctioned in the Federal sector, and today the number of negotiated grievance procedures which provide for arbitration has reached substantial proportions. Thus, the Civil Service Commission's Office of Labor-Management Relations, using its Labor Agreement Information Retrieval System (LAIRS), indicates that as of December 1975, nearly 86 percent of the negotiated agreements under the Order in the LAIRS file provide for arbitration as part of the grievance process and 88 percent of those provide that such arbitration shall be final and binding. Concordant with the foregoing, the LAIRS statistics indicate that the use of arbitration in the Federal sector has grown significantly since 1970. In 1970 there were 67 arbitrations in the Federal sector, only 13 (19 percent) of which were binding, with the remainder advisory. In 1975, however, there were, according to statistics available through March 1, 1976, 214 arbitrations, 197 (92 percent) of which were binding.

II. COUNCIL REVIEW OF ARBITRATION AWARDS

A. GENERAL

Section 13(b) of the Order, as quoted above, provides that exceptions to arbitration awards may be filed with the Council. (This is also provided for in section 4(c)(3) of the Order.) Although parties are free to file exceptions to arbitration awards with the Council, the grounds upon which the Council will grant review of such awards are limited in nature.

The concept of permitting arbitration in the Federal sector with review of such awards limited to certain specified grounds was first reflected in the Study Committee's Report and Recommendations, which led to the issuance of Executive Order 11491 in 1969. Concerning arbitration, the Report stated, in part:

> . . . We feel that arbitrators' decisions should be accepted by the parties. Challenges to such awards should be sustained only on grounds similar to those applied by the courts in private sector labor-management relations, and procedures for the consideration of exceptions on such grounds should be developed by the Council. . . .[2/]

In keeping with the intent of the Order, as reflected in this passage from the Study Committee's Report and Recommendations, the Council has issued regulations which prescribe the limited grounds upon which it will grant a petition for review of an arbitration award. Section 2411.32 (5 CFR 2411.32) of the Council's regulations governing review of arbitration awards provides, in pertinent part:

> The Council will grant a petition for review of an arbitration award only where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present grounds that the award violates applicable law, appropriate

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> regulation, or the order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations. . . .

A bare assertion of one of the grounds upon which the Council grants review is not sufficient for the Council to accept the petition for review. The Council's rules require not only that the exceptions present one or more grounds, but also that sufficient facts and circumstances be presented to support the ground(s) alleged. It is not the responsibility of the Council to complete for a party the research necessary to support an allegation of a ground upon which that party believes the Council should modify, set aside, or remand an award, or the research necessary to refute such an allegation.

If a petition for review is accepted, section 2411.36 of the Council's rules (5 CFR 2411.36) provides that the parties may file briefs in the matter. These briefs should contain specific references to the pertinent documents and, where applicable, citations of relevant authorities.[3/]

It is important to note that the acceptance of a petition for review does not connote that the award will be modified, set aside, or remanded. If a petition for review of an arbitration award is granted by the Council, section 2411.37(a) (5 CFR 2411.37(a)) of the Council's rules provides:

> An award of an arbitrator shall be modified, set aside in whole or in part, or remanded only on grounds that the award violates applicable law, appropriate regulation, or the order, or other grounds similar to those applied by the courts in private sector labor-management relations.

Thus, the Council must itself find that the facts and circumstances presented actually establish support for the ground(s) upon which it is sought to have the award modified, set aside or remanded.

Under the Council's rules, therefore, a petition for review of an arbitrator's award will be granted only where it appears, based upon the facts and circumstances described in the petition, that it presents grounds that the award violates applicable law, appropriate regulation, or the Order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in the private sector. These grounds will now be considered.

B. GROUNDS: THE AWARD VIOLATES APPLICABLE LAW, APPROPRIATE REGULATION, OR THE ORDER

The Council's rules embody the limited grounds for challenging arbitration awards outlined by the Study Committee in 1969, i.e., "only on grounds similar to those applied by the courts in private sector labor-management relations." The added specificity in the Council's rules with the reference to "applicable law, appropriate regulation, or the order," codifies grounds

similar to certain grounds applied by courts in the private sector--namely, challenges to arbitration awards will be sustained by a court where it can be shown, for example, that the award is contrary to law or public policy or that compliance with the award would require the performance of an illegal act.[4/]

While these grounds are similar to certain grounds applied by courts in the private sector, the added specificity clearly recognizes the significant impact of the extensive body of statutes and regulations which govern many aspects of the employer-employee relationship in the Federal sector. The impact of these grounds and their significance to the arbitral process are much greater in the Federal sector because of the many major employee benefits and protections and the broad range of fundamental personnel policies and practices which are found in statutes, appropriate regulations, and the Order. This impact is clearly demonstrated by a review of statistics concerning appeals from arbitration awards filed with the Council, which indicate that over three-quarters of the appeals accepted were based on these grounds.[5/]

The importance of the legal framework governing employees in the Federal sector is acknowledged in section 12(a) of the Order, which requires that the administration of each negotiated agreement be governed by laws, the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual, and certain agency policies and regulations.[6/] In this regard, the Council has pointed out that should a negotiated grievance procedure provide for arbitration, an arbitrator considering a grievance alleging a violation of a contract provision which refers to agency policies and regulations could not consider such a grievance in a vacuum. As the January 1975 Report and Recommendations on the Amendment to the Order indicated, "arbitrators of necessity now consider the meaning of laws and regulations, including agency regulations, in resolving grievances arising under negotiated agreements because provisions in such agreements often deal with substantive matters which are also dealt with in law or regulation and because section 12(a) of the Order requires that the administration of each negotiated agreement be subject to such law and regulation."[7/] The Council has also pointed out in this regard that while section 12(a) constitutes an obligation in the administration of labor agreements to comply with the legal and regulatory requirements cited therein, it is not an extension of the negotiated grievance procedure to include grievances over all such requirements.[8/] Further, the January 1975 Report went on to state:

> Of course, final decisions under negotiated grievance procedures, including final and binding awards by arbitrators where the negotiated procedure makes provision for such arbitration, must be consistent with applicable law, appropriate regulation or the Order. Thus, where it appears, based upon the facts and circumstances described in a petition before the Council, that there is support for a contention that an arbitrator has issued an award which violates applicable law, appropriate regulation or the Order,

the Council, under its rules, will grant review of the award. For example, should the Council find that an award violates the provisions of title 5, United States Code, or that an award violates the regulations of the Civil Service Commission, or that an award violates section 12(b) of the Order, the Council would modify or set aside that award.[9/]

We turn now to a more detailed examination of the respective grounds of violation of applicable law, appropriate regulation, and the Order.

1. The Award Violates Applicable Law

The Council has accepted petitions for review of arbitration awards where the exceptions to the award present the ground that the award violates applicable law. As noted previously, such appeals are accepted only where they are supported by facts and circumstances described in the petition for review. Thus, where a petition asserts that the award is contrary to law but fails to describe facts and circumstances to support such an assertion, review of the petition will be denied.[10/]

Where the Council has accepted appeals of arbitration awards on the ground that the award violates applicable law, the statute involved has often dealt with pay matters such as the Back Pay Act of 1966 (5 U.S.C. § 5596)[11/] or an overtime pay statute, such as is codified in 5 U.S.C. § 5544.[12/] Awards which direct the expenditure of Federal funds will be set aside where such expenditure is unsupported by, or contrary to, law. In this regard, it should be emphasized that any payment of Federal funds by an agency directed by an arbitrator must be authorized by law in order to be capable of implementation. Thus, an award directing an agency to pay to a union money in the nature of punitive damages could not be implemented because there was no legal authority for awarding punitive damages against the United States or one of its agencies and, in addition, the Federal Tort Claims Act (28 U.S.C. § 2674) specifically excludes recovery for punitive damages.[13/]

Where there is a statutory basis for the payment of money, such as the Back Pay Act, the Council, consistent with the decisions of the Comptroller General,[14/] has upheld arbitration awards directing such payment, provided the requirements of the statute have been met. Thus, the violation of an otherwise valid mandatory provision in a negotiated agreement, whether by an act of omission or commission, which causes an employee to lose pay, allowances, or differentials is an unjustified or unwarranted personnel action under the Back Pay Act (as is an improper suspension, furlough without pay, demotion or reduction in pay). In those circumstances, the Back Pay Act is the appropriate statutory authority for compensating an employee for pay, allowances, or differentials he would have received, but for the violation of the negotiated agreement. However, before any monetary payment may be made under the provisions of that Act, there must be a determination not only that an employee has undergone an unjustified or unwarranted personnel action, but also that such action directly resulted

in a withdrawal of pay, allowances, or differentials, as defined in applicable Civil Service regulations. Although every personnel action which directly affects an employee and is determined to be a violation of the negotiated agreement may also be considered to be an unjustified or unwarranted personnel action, the remedies under the Back Pay Act are not available until the "but for" test is met. That is, the expenditure of funds under the Act is not permissible unless it is also established that, but for the wrongful action, the withdrawal of pay, allowances, or differentials would not have occurred. Thus, in order to make a valid award of backpay, it is necessary for an arbitrator in the Federal sector not only to find that the otherwise valid mandatory provision in a negotiated agreement has been violated by the agency, but also to find that such improper action directly caused the grievant(s) to suffer a loss or reduction in pay, allowances, or differentials. Where there is no showing that but for the wrongful act (the contract violation) the harm to the individual employee (loss of pay, allowances or differentials) would not have occurred, there is no basis in statute to support an award of backpay.[15/]

2. The Award Violates Appropriate Regulation

The Council has accepted petitions for review of arbitration awards where the exceptions to the award present the ground that the award violates appropriate regulation. Again, as noted previously, such appeals are accepted only where they are supported by facts and circumstances described in the petition for review. Thus, the Council has denied review where a party simply cited and paraphrased a regulation, advancing no persuasive arguments in support of the exception and describing no facts and circumstances sufficient to show that any basis exists for granting review of the award under the exception.[16/]

In addition to providing facts and circumstances to support the exception, the appeal must present grounds that the award violates an appropriate regulation within the meaning of the Council's rules. The Council has found that regulations promulgated by authorities outside the agency, such as Civil Service Commission regulations,[17/] are appropriate regulations within the meaning of the Council's rules.

However, as to an agency's internal regulations, the Council has held that the interpretation of contract provisions, including the interpretation of agency policies and regulations on matters within agency discretion where those policies or regulations are specifically incorporated in a negotiated agreement, is a matter to be left to the judgment of the arbitrator unless the agreement provides otherwise. Hence, where an arbitration award interprets and applies such regulations and the petition for review contends that the arbitrator misinterpreted and, hence, violated such regulations, the petition does not present a ground upon which the Council will grant review of the award because the regulation is not an appropriate regulation within the meaning of the Council's rules.[18/]

Further, the Council has held that where an arbitrator, in the course of rendering his award, considers an agency regulation which was introduced by the parties and which deals with the same subject matter as the provision of the negotiated agreement in dispute, and thereafter applies that regulation in reaching his judgment in the case, a petition for review contending that the award violates the agency regulation does not, in such circumstances, present a ground that the award violates an appropriate regulation within the meaning of the Council's rules.[19]

Where an appeal has been accepted on the ground that the award violates appropriate regulation and it is subsequently found by the Council that the award is contrary to the regulation, the award is modified or set aside.[20]

3. The Award Violates the Order

The Council has accepted petitions for review of arbitration awards where the exceptions to the award present the ground that the award violates the Order.[21] A party filing an exception to an award on this ground should specify the provision(s) of the Order involved and must provide facts and circumstances to demonstrate how the award appears to violate the cited provision(s) of the Order.[22]

Each alleged violation of a provision of the Order by an award is not, of course, thereby subject to review. For example, a contention that an award violates section 19 of the Order because the arbitrator failed to consider and decide, during the course of a grievance arbitration hearing, whether an unfair labor practice has been committed under section 19 of the Order, does not state a ground upon which the Council will accept a petition for review of an arbitration award.[23] In this regard, the Order charges the Assistant Secretary of Labor for Labor-Management Relations with the responsibility for deciding unfair labor practice complaints. Section 19(d) of the Order provides that where an issue may be raised under a grievance procedure or under the unfair labor practice procedures of the Order, the aggrieved party may elect to use either one of the procedures but not both. Where he elects to use the grievance procedure, the grievance decision is not to be construed as an unfair labor practice decision nor as precedent for such decisions.

Only two appeals have resulted in awards being modified or set aside on this ground alone. In one case,[24] the Council found that the award violated the Order by interpreting and applying the seniority clause of a collective bargaining agreement in such a manner as to infringe upon the right reserved to management under section 12(b)(5). The Council found that the award (which compelled a VA hospital to treat one category of personnel as being the functional equivalent of, and interchangeable with, another category even though their assigned duties were distinctly different) interfered with management's reserved right under section 12(b)(5) of the Order to determine the type of personnel by which its hospital

services are to be performed. In the other case,[25] the Council found that the award, insofar as it directed the agency to take action to fill a position, violated the Order by interfering with rights reserved to management officials under section 12(b)(2). Management's reserved rights under section 12(b) of the Order may not be infringed by an arbitrator's award under a negotiated grievance procedure.

C. GROUNDS: THE EXCEPTIONS TO THE AWARD PRESENT OTHER GROUNDS SIMILAR TO THOSE UPON WHICH CHALLENGES TO ARBITRATION AWARDS ARE SUSTAINED BY COURTS IN PRIVATE SECTOR LABOR-MANAGEMENT RELATIONS

The Council's decisions as of the date of this Information Announcement reveal that at least six grounds have been recognized under this rubric: (1) the arbitrator exceeded his authority; (2) the award does not draw its essence from the collective bargaining agreement; (3) the award is incomplete, ambiguous or contradictory so as to make implementation of the award impossible; (4) the award is based on a nonfact; (5) the arbitrator was biased or partial; and (6) the arbitrator refused to hear pertinent and material evidence.

1. The Arbitrator Exceeded His Authority

The Council's rules provide, as noted above, that it will grant a petition for review on "other grounds similar to those upon which challenges to arbitration awards are sustained by courts in private sector labor-management relations." Of these, one of the most frequently cited is that the arbitrator exceeded his authority. The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present the ground that the arbitrator exceeded his authority by determining an issue not included in the question(s) submitted to arbitration.[26] In one case where such an appeal was accepted, the Council held that an arbitrator answered a question not presented to him and thereby exceeded his authority when he awarded relief under the agreement to two nongrievants.[27] On the other hand, the arbitrator does not exceed his authority when, in addition to determining those issues specifically included in the particular question submitted to arbitration, the award extends to issues that necessarily arise therefrom.[28] Furthermore, the Council held in a recent decision that "if there is not a submission agreement with a precise issue, an arbitrator in the Federal sector has unrestricted authority to pass on any dispute presented to him so long as it is within the confines of the collective bargaining agreement."[29] In sustaining the arbitrator's award which the agency alleged went beyond the scope of the submission, the Council stated:

> . . . The Council notes that when the parties to a dispute reach agreement as to the issue to be presented to an arbitrator and thereafter undertake to formulate that issue in a submission agreement, it is important that the agreement define precisely the issues involved. Moreover, it is to be noted that even when the parties have entered

into a submission agreement, the Council, in accordance with private sector precedent, will construe an agreement broadly with all doubts resolved in favor of the arbitrator when a question is presented to the Council as to whether an arbitrator exceeded his authority in a particular manner. . . . [Emphasis in original.][30/]

The Council has on numerous occasions rejected appeals alleging, without presenting supporting facts and circumstances, that the arbitrator exceeded his authority. For example, where an agency's exception alleged that "the arbitrator, by deciding that the agency's action constituted a reorganization, assertedly raised and decided an issue not submitted to arbitration, and thereby exceeded his authority," the Council said, in rejecting the appeal, "it appears that the arbitrator clearly carried out his authority to interpret the collective bargaining agreement between the parties and, indeed, the agency's own brief to the arbitrator indicated that the basic issue for him to arbitrate was whether its actions constituted a reorganization or reassignments."[31/] In another case, when the agency contended that "the arbitrator exceeded the scope of his authority by directing that electroplaters receive 'low degree' environmental differential payments, because the specific issue submitted to him was whether or not electroplaters are entitled to receive 'high degree' payments," the Council denied review of the award, noting that "the parties appear on the basis of the entire record to have intended to resolve the dispute which had arisen as to whether electroplaters are entitled to environmental differential payments," and pointing out that "the issue submitted to arbitration did not specifically deny the arbitrator the authority to determine whether something less than 'high degree' differential payments would be appropriate." [Footnote omitted.][32/]

In yet another case, a union asserted "that the arbitrator went beyond the limits of the issue submitted by the parties, concerning the grievant's alleged absence from the jobsite, by finding the grievant responsible for failing to clock out properly, an issue which the facility had allegedly never considered as the basis for disciplinary action in this case." The Council denied review, finding that "there is no question that the arbitrator answered the question at issue. . . . [T]he arbitrator was not without a reasonable basis from which he could conclude that the grievant's failure to clock out was an issue which necessarily arose from the particular question submitted, and was, therefore, within the scope of his authority in resolving that question and in fashioning the remedy accordingly." Hence, the Council concluded that the petition did not present facts and circumstances necessary to support the assertion that the arbitrator exceeded the scope of his authority by determining an issue not included in the question submitted to arbitration.[33/]

2. The Award Does Not Draw Its Essence from the Collective Bargaining Agreement

The Council will grant a petition for review of an arbitration award where it appears, based upon the facts and circumstances described in the

petition, that the exceptions to the award present the ground that the award does not draw its essence from the collective bargaining agreement. In the one case in which a petition was accepted on this ground, the Council concluded that the arbitrator's award drew its essence from the negotiated agreement. In reaching this conclusion, the Council said, in applying principles which had been used by Federal courts in the private sector:

> . . . We cannot say from the record before us that the arbitrator's award, based upon his interpretation and application of this particular provision of the parties' agreement, "is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling" or could not "in any rational way be derived from the agreement" or evidences "a manifest disregard of the agreement" or on its face represents an implausible interpretation thereof. . . .34/

The Council has denied review in several cases where a party has alleged that the award does not draw its essence from the negotiated agreement. The denial has been based on the finding by the Council that the petition did not describe facts and circumstances to support the ground alleged or because the party was, in substance, contending that the arbitrator reached an incorrect result in his interpretation of the agreement.35/ The Council has consistently held, as have the courts with respect to arbitration in the private sector, that the interpretation of contract provisions is a matter to be left to the arbitrator's judgment and, hence, the Council has held that "a challenge to the arbitrator's interpretation of the agreement does not assert a ground . . . ."36/

Similarly, the Council has held that "[i]t is the award rather than the conclusion or the specific reasoning that is subject to challenge . . . ."37/ Thus, where an arbitrator is empowered to interpret the terms of an agreement, the Council will not accept an appeal of an arbitrator's award merely because the Council's own interpretation of the agreement may be different.38/ Accordingly, an arbitrator is not required to discuss the specific agreement provision involved in the grievance and the fact that he does not mention the provision in his award does not establish a basis for review.39/

Although the interpretation of contract provisions and, hence, the resolution of the grievance are matters to be left to the arbitrator's judgment,40/ the Council has emphasized, consistent with its practice as well as the practice of courts in the private sector, that:

> . . . This does not mean, of course, that an arbitrator's interpretation of an agreement provision need not be consistent with applicable law, appropriate regulation or the Order. For where it appears, based upon the facts and circumstances described in a petition that there is support for a contention that an arbitrator has interpreted an agreement provision in a manner which results in the award violating applicable law, appropriate regulation or the Order, the Council, under its rules, will grant review of the award. . . .41/

3. The Award is Incomplete, Ambiguous or Contradictory So As to Make Implementation of the Award Impossible

The Council has held, consistent with the practice of courts in the private sector, that "an exception to an arbitration award which contends that the award is incomplete, ambiguous or contradictory so as to make implementation of the award impossible" is a ground for review of the award. In the particular case before the Council in which this was recognized as a ground, the Council noted that the "agency's exception does not contend that implementation of the award in the present case is impossible"; thus, the Council found that the exception was not supported by facts and circumstances described in the petition as required by the Council's rules.[42]

4. The Award is Based on a Nonfact

The Council, consistent with the practice of courts in the private sector, will accept an appeal of an arbitration award where it appears, based upon the facts and circumstances described in the petition for review, that the exception to the award presents the ground that the award is based on a "nonfact," that is, the central fact underlying the award is concededly erroneous, and in effect is a gross mistake of fact but for which a different result would have been reached. However, none has yet presented facts and circumstances necessary to support an assertion that the arbitrator based his award on a nonfact but for which a different result would have been reached.[43]

On the other hand, the Council has pointed out that the law is well settled that an arbitrator's findings as to the facts are not reviewable. Therefore, an exception which contends that the arbitrator's findings of fact are erroneous or are not supported by a preponderance of the evidence does not set forth a ground similar to those upon which challenges to arbitration awards are sustained by courts in private sector cases.[44] Likewise, an exception which contends that an arbitrator applied erroneous standards with respect to the burden and measure of proof does not assert a ground for review.[45]

5. The Arbitrator was Biased or Partial

The Council also has recognized as a ground, consistent with the practice of courts in the private sector, the contention that an arbitrator was biased or partial, but no case has yet presented facts and circumstances to support this ground. In one case, the Council noted that:

> . . . While courts sustain challenges to labor arbitration awards on the ground that arbitrators failed, prior to selection, to disclose to the parties relationships or dealings that might create an impression of possible bias, it is clear from the union's petition in this case that the information furnished on the [Federal Mediation and Conciliation Service] fact sheet was adequate to put

> the union on notice that the arbitrator had a significant relationship to the [agency involved]. . . . [T]he union waived its objection to the relationship in this case by withholding any protest until after the arbitrator issued his award. [Emphasis in original.][46]

In another case, the Council noted that while courts sustain challenges to arbitration awards in the private sector on the grounds of bias or prejudice, the fact that an arbitrator conducted a hearing in a way which one side or the other did not like did not establish bias. The Council has acknowledged that it is the arbitrator's responsibility to control the conduct of the hearing.[47]

6. The Arbitrator Refused to Hear Pertinent and Material Evidence

The Council has recognized that a refusal of an arbitrator to hear evidence pertinent and material to the controversy before him is a ground upon which courts in the private sector will sustain challenges to arbitration awards. Therefore, the Council will grant a petition for review of an arbitration award, where it appears, based upon the facts and circumstances described in the petition, that the exceptions to the award present the ground that the arbitrator refused to hear evidence pertinent and material to the controversy before him and, hence, denied a party a fair hearing. None of the cases which have alleged this ground to date has presented facts and circumstances in support of it.[48]

On the other hand, an exception which asserts that the arbitrator tended to confine the scope of the hearing to the substance of the grievance he was commissioned to resolve and refused to consider an issue in a grievance which was not before him does not state a ground for review. Whether a single arbitrator will consider more than one grievance is a procedural question to be left to his final disposition.[49]

III. CONCLUSION

In summary, the Council will grant a petition for review of an arbitrator's award where it appears, based on the facts and circumstances described in the petition, that it presents grounds that the award violates applicable law, appropriate regulation, or the Order, or other grounds similar to those upon which challenges to arbitration awards are sustained by courts in the private sector. The Council has identified, on a case-by-case basis, several grounds upon which challenges to arbitration awards are sustained by courts in the private sector. These include: the arbitrator exceeded his authority; the award does not draw its essence from the collective bargaining agreement; the award is incomplete, ambiguous or contradictory so as to make implementation impossible; the award is based on a nonfact; the arbitrator was biased or partial; and the arbitrator refused to hear pertinent and material evidence. Undoubtedly, there are other grounds upon which challenges to arbitration awards are sustained by courts in the private sector. Future cases will establish whether they are grounds in the Federal sector.

Nevertheless, the grounds in the private sector are limited; likewise, the grounds in the Federal sector are limited. The Council, like the courts, is loath to interfere in the arbitral process. As the Council has said:

> The parties to this case have adopted arbitration as the final stage of a negotiated procedure for resolving grievances over the interpretation of their agreement. That one of the parties may subsequently disagree with the interpretation reached by the arbitrator is beside the point; it is the arbitrator's interpretation of the agreement, and no one else's, for which the parties have bargained and by which they have agreed to be bound. And so long as it appears, as here, that the parties have obtained substantially that which they bargained for, the Council, consistent with the clear practice followed by the courts in reviewing private sector arbitration awards, will not interfere with the arbitrator's award solely because our own interpretation of the agreement might have been different. As the Fifth Circuit has put it so well: "The arbiter was chosen to be the Judge. That Judge has spoken. There it ends." [Footnote omitted.][50/]

Henry B. Frazier III
Executive Director

Attachments:
1. Footnotes
2. Selected Cases In Which The Recognized Grounds Are Discussed

FOOTNOTES

1/ Labor-Management Relations in the Federal Service (1975), at 43-44; see Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (January 30, 1976), Report No. 96.

2/ Labor-Management Relations in the Federal Service (1975), at 74.

3/ It is noted that the Council's rules do not require the parties to file merits briefs and that the parties may, if they wish, rely on the petition or opposition filed at the acceptance stage.

4/ E.g., United Steelworkers of America v. United States Gypsum Co., 492 F.2d 713 (5th Cir. 1974); Associated Milk Dealers, Inc. v. Milk Drivers Union, Local 753, 422 F.2d 546 (7th Cir. 1970); Electrical Workers Local 453 v. Otis Elevator Co., 314 F.2d 25 (2d Cir. 1963), cert. denied, 373 U.S. 949 (1963); Glendale Mfg. Co. v. Local 520, ILGWU, 283 F.2d 936 (4th Cir. 1960), cert. denied, 366 U.S. 950 (1961); Local 985, UAW v. W. M. Chace Co., 262 F. Supp. 114 (E.D. Mich. 1966); Puerto Rico District Council of Carpenters v. Ebanisteria Quintana, 56 L.R.R.M. 2391 (D. Puerto Rico 1964); Minkoff v. Scranton Frocks, Inc., 181 F. Supp. 542 (S.D.N.Y. 1960), aff'd, 279 F.2d 115 (2d Cir. 1960); Dunau, "Judicial Review of Labor Arbitration Awards," N.Y.U. Conference on Labor 175 (1971).

5/ Council practice from 1970 through 1975 reveals that 92 appeals from arbitration awards were filed. As of April 1, 1976, the Council had acted on 88 of these appeals, accepting 28 (32 percent) and rejecting 51 (58 percent). (Nine appeals (10 percent) were withdrawn, which figure includes three appeals withdrawn after Council acceptance.) Of those accepted, 21 (75 percent) were accepted only on the grounds that the award violates applicable law, appropriate regulation, or the Order; 4 (14 percent) were accepted on other grounds similar to those applied by courts in the private sector; and 3 (11 percent) were accepted both on the grounds that the award violates applicable law, appropriate regulation, or the Order and on other grounds similar to those applied by courts in the private sector.

It should be noted that of the 21 appeals accepted only on grounds that the award violates applicable law, appropriate regulation, or the Order, 7 (33 percent) involved exceptions to the award on the basis that it violated the Back Pay Act of 1966 (5 U.S.C. § 5596) and applicable Comptroller General decisions. With the issuance of the Comptroller General's decisions in 54 Comp. Gen. 312 (1974) and subsequent related cases in which he has outlined the circumstances under which an arbitrator's award of backpay may be implemented under the Back Pay Act, it is expected that the number of arbitration awards appealed to the Council on this basis will be greatly reduced.

6/ Section 12 of the Order provides in pertinent part:

Sec. 12. Basic provisions of agreements. Each agreement between an agency and a labor organization is subject to the following requirements--

(a) in the administration of all matters covered by the agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published agency policies and regulations in existence at the time the agreement was approved; and by subsequently published agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling agreement at a higher agency level . . . .

7/ Labor-Management Relations in the Federal Service (1975), at 44; accord, Bureau of Prisons and Federal Prison Industries, Inc., Washington, DC and Council of Prison Locals, AFGE, 73 FSIP 27, FLRC No. 74A-24 (June 10, 1975), Report No. 74.

8/ Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (January 30, 1976), Report No. 96.

9/ Labor-Management Relations in the Federal Service (1975), at 44.

10/ National Archives and Records Service and American Federation of Government Employees, Local 2578 (Strongin, Arbitrator), FLRC No. 75A-74 (October 10, 1975), Report No. 87; Pearl Harbor Naval Shipyard, Hawaii, and Honolulu, Hawaii, Metal Trades Council, AFL-CIO (Tinning, Arbitrator), FLRC No. 72A-22 (January 24, 1973), Report No. 33.

11/ Veterans Administration Center, Temple, Texas and American Federation of Government Employees, Local 2109 (Jenkins, Arbitrator), FLRC No. 74A-61 (February 13, 1976), Report No. 99; Social Security Administration and American Federation of Government Employees, AFL-CIO, SSA Local 1923 (Strongin, Arbitrator), FLRC No. 74A-51 (November 18, 1975), Report No. 91; Community Services Administration and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator), FLRC No. 74A-29 (November 18, 1975), Report No. 91; Naval Ordnance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers (Thomson, Arbitrator), FLRC No. 75A-91 (November 6, 1975), Report No. 89; General Services Administration, Region 3 and American Federation of Government Employees, Local 2456, AFL-CIO (Lippman, Arbitrator), FLRC No. 74A-58 (February 20, 1975), Report No. 64; Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60; American Federation of Government Employees, Local 2449 and Headquarters, Defense Supply Agency and DSA Field Activities, Cameron Station, Alexandria, Virginia (Jaffee, Arbitrator), FLRC No. 73A-51 (September 24, 1974), Report No. 57.

12/ Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator), FLRC No. 74A-64 (March 3, 1976), Report No. 100; Professional Air Traffic Controllers Organization and Federal Aviation Administration, Portland, Maine, Air Traffic Control Tower (Gregory, Arbitrator), FLRC No. 74A-15 (November 7, 1975), Report No. 89; Naval Rework Facility, Naval Air Station, Jacksonville, Florida, and National Association of Government Employees, Local R5-82 (Goodman, Arbitrator), FLRC No. 73A-46 (October 8, 1975), Report No. 86.

13/ Office of Economic Opportunity and American Federation of Government Employees, Local 2677 (Doherty, Arbitrator), FLRC No. 75A-23 (December 31, 1975), Report No. 95.

14/ In a 1975 report issued by the Comptroller General of the United States (B-180021, March 20, 1975, letter to the Honorable David N. Henderson, Chairman, Committee on Post Office and Civil Service, House of Representatives), he points out that since the latter part of 1974 the General Accounting Office has issued a number of decisions which have broadened the applicability of the Back Pay Act of 1966, the basic statutory authority for recompensing Federal employees who are found to have been wrongfully deprived of pay, allowances or differentials. Especially significant in this regard is the determination that the Act is applicable as a basis for making employees whole in situations where an arbitrator determines that, as the direct result of a violation of a collective bargaining agreement, an employee has been deprived of pay, allowances or differentials he would otherwise have received. The report indicates that this broadened applicability of the Act is encompassed in amended regulations to the Back Pay Act which have been proposed by the Civil Service Commission.

A second report, dealing specifically with the remedial portion of arbitrators' awards, was issued by the Comptroller General in October 1975 (Grievance Arbitration Awards Made Under the Federal Labor Relations Program, FPCD-76-14, October 17, 1975). The basis for the report was an analysis of 509 grievance arbitration cases decided in the Federal sector and its primary focus was on awards made in 175 of the cases in which arbitrators fashioned remedies granting some form of monetary relief. According to the report, of these 175 awards, 18 were not accommodated by statute.

15/ Mare Island Naval Shipyard and Mare Island Navy Yard Metal Trades Council, AFL-CIO (Durham, Arbitrator), FLRC No. 74A-64 (March 3, 1976), Report No. 100.

16/ Indiana Army Ammunition Plant, Charlestown, Indiana and National Federation of Federal Employees Local 1581 (Render, Arbitrator), FLRC No. 75A-84 (November 28, 1975), Report No. 92; Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (August 15, 1975), Report No. 82.

17/ Federal Aviation Administration, Department of Transportation, Fort Worth Air Route Traffic Control Center and Professional Air Traffic Controllers Organization (Jenkins, Arbitrator), FLRC No. 75A-31 (December 31, 1975), Report No. 95; Tooele Army Depot, Tooele, Utah, and American Federation of Government Employees, AFL-CIO, Local 2185 (Linn, Arbitrator), FLRC No. 75A-104 (December 19, 1975), Report No. 93; Social Security Administration and American Federation of Government Employees, AFL-CIO, SSA Local 1923 (Strongin, Arbitrator), FLRC No. 74A-51 (November 18, 1975), Report No. 91; Community Services Administration and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator), FLRC No. 74A-29 (November 18, 1975), Report No. 91; Defense Commercial Communications Office and 1400 Air Base Wing, Scott Air Force Base, and National Association of Government Employees, Local Union No. R7-23 (Roberts, Arbitrator), FLRC No. 75A-87 (November 7, 1975), Report No. 89; Naval Ordnance Station, Louisville, Kentucky and Local Lodge No. 830, International Association of Machinists and Aerospace Workers (Thomson, Arbitrator), FLRC No. 75A-91 (November 6, 1975), Report No. 89; Office of Economic Opportunity and Local 2677, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator), FLRC No. 75A-26 (September 17, 1975), Report No. 83; Defense General Supply Center, Richmond, Virginia and American Federation of Government Employees, Local 2047, AFL-CIO (Di Stefano, Arbitrator), FLRC No. 74A-99 (May 22, 1975), Report No. 72; Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60; American Federation of Government Employees, Local 2449 and Headquarters, Defense Supply Agency and DSA Field Activities, Cameron Station, Alexandria, Virginia (Jaffee, Arbitrator), FLRC No. 73A-51 (September 24, 1974), Report No. 57.

18/ Federal Aviation Administration, Department of Transportation and Professional Air Traffic Controllers Organization (Schedler, Arbitrator), FLRC No. 74A-88 (July 24, 1975), Report No. 78; accord, Federal Aviation Administration, Kansas City, Missouri and Professional Air Traffic Controllers Organization (Yarowsky, Arbitrator), FLRC No. 75A-54 (July 24, 1975), Report No. 78; Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Eigenbrod, Arbitrator), FLRC No. 75A-15 (July 24, 1975), Report No. 78; Federal Aviation Administration and Professional Air Traffic Controllers Organization (MEBA, AFL-CIO) (Hanlon, Arbitrator), FLRC No. 75A-9 (July 24, 1975), Report No. 78.

19/ American Federation of Government Employees, Local 2612 and Department of the Air Force, Headquarters 416th Combat Support Group (SAC), Griffiss Air Force Base (Gross, Arbitrator), FLRC No. 75A-45 (December 24, 1975), Report No. 94.

20/ Federal Aviation Administration, Department of Transportation, Fort Worth Air Route Traffic Control Center and Professional Air Traffic Controllers Organization (Jenkins, Arbitrator), FLRC No. 75A-31 (December 31, 1975), Report No. 95; Social Security Administration and American Federation of Government Employees, AFL-CIO, SSA Local 1923 (Strongin, Arbitrator), FLRC No. 74A-51 (November 18, 1975), Report No. 91; Community Services Administration

and American Federation of Government Employees, Local Union No. 2649 (Rohman, Arbitrator), FLRC No. 74A-29 (November 18, 1975), Report No. 91; Office of Economic Opportunity and Local 2677, American Federation of Government Employees, AFL-CIO (Maggiolo, Arbitrator), FLRC No. 75A-26 (September 17, 1975), Report No. 83; American Federation of Government Employees, Local 2449 and Headquarters, Defense Supply Agency and DSA Field Activities, Cameron Station, Alexandria, Virginia (Jaffee, Arbitrator), FLRC No. 73A-51 (September 24, 1974), Report No. 57.

21/ Veterans Administration Center, Temple, Texas and American Federation of Government Employees, Local 2109 (Jenkins, Arbitrator), FLRC No. 74A-61 (February 13, 1976), Report No. 99; Tooele Army Depot, Tooele, Utah, and American Federation of Government Employees, AFL-CIO, Local 2185 (Linn, Arbitrator), FLRC No. 75A-104 (December 19, 1975), Report No. 93; Defense Commercial Communications Office and 1400 Air Base Wing, Scott Air Force Base, and National Association of Government Employees, Local Union No. R7-23 (Roberts, Arbitrator), FLRC No. 75A-87 (November 7, 1975), Report No. 89; National Council of OEO Locals, AFGE, AFL-CIO, and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61; Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York (Miller, Arbitrator), FLRC No. 73A-42 (July 31, 1974), Report No. 55.

22/ Department of the Air Force, Scott Air Force Base and National Association of Government Employees, Local R7-27 (Harrison, Arbitrator), FLRC No. 75A-101 (January 30, 1976), Report No. 96.

23/ Indiana Army Ammunition Plant, Charlestown, Indiana and National Federation of Federal Employees Local 1581 (Render, Arbitrator), FLRC No. 75A-84 (November 28, 1975), Report No. 92; Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (August 14, 1975), Report No. 81; Office of Economic Opportunity and American Federation of Government Employees Local 2677 (Matthews, Arbitrator), FLRC No. 74A-76 (June 26, 1975), Report No. 76.

24/ Veterans Administration Hospital, Canandaigua, New York and Local 227, Service Employees International Union, Buffalo, New York (Miller, Arbitrator), FLRC No. 73A-42 (July 31, 1974), Report No. 55.

25/ National Council of OEO Locals, AFGE, AFL-CIO, and Office of Economic Opportunity (Harkless, Arbitrator), FLRC No. 73A-67 (December 6, 1974), Report No. 61.

26/ Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (March 18, 1976), Report No.101; Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60; American Federation of Government Employees, Local 12

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(AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42.

27/ American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42.

28/ Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), FLRC No. 74A-40 (January 15, 1975), Report No. 62; Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60; American Federation of Government Employees, Local 12 (AFGE) and U.S. Department of Labor (Jaffee, Arbitrator), FLRC No. 72A-3 (July 31, 1973), Report No. 42.

29/ Pacific Southwest Forest and Range Experiment Station, Forest Service, Department of Agriculture and American Federation of Government Employees, Local 3217 (Myers, Arbitrator), FLRC No. 75A-4 (March 18, 1976), Report No. 101.

30/ Id. at 8 of the Decision.

31/ American Federation of Government Employees, Local 2532 and Small Business Administration (Dorsey, Arbitrator), FLRC No. 73A-4 (April 18, 1973), Report No. 36.

32/ Naval Air Rework Facility, Pensacola, Florida and American Federation of Government Employees, Lodge No. 1960 (Goodman, Arbitrator), FLRC No. 74A-12 (September 9, 1974), Report No. 56.

33/ Long Beach Naval Shipyard and Federal Employees Metal Trades Council (Steese, Arbitrator), FLRC No. 74A-40 (January 15, 1975), Report No. 62.

34/ NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79.

35/ Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (November 14, 1975), Report No. 89; Internal Revenue Service (Ogden Service Center) and National Association of Internal Revenue Service Employees, Chapter 67 (Gorsuch, Arbitrator), FLRC No. 75A-56 (October 3, 1975), Report No. 85; Social Security Administration, Bureau of Retirement and Survivors Insurance, Chicago, Illinois and AFGE, National Council of Social Security Payment Center Locals, Local 1395 (Davis, Arbitrator), FLRC No. 75A-17 (June 26, 1975), Report No. 76; Picatinny Arsenal, Dept. of the Army, and Local 225, American Federation of Government Employees (Falcone, Arbitrator), FLRC No. 72A-44 (May 2, 1973), Report No. 37.

36/ American Federation of Government Employees, Local 12 and U.S. Department of Labor (Daly, Arbitrator), FLRC No. 72A-55 (September 17, 1973), Report No. 44. See also, Labor Local 12, AFGE (AFL-CIO) and U.S. Department of Labor (Mallet-Prevost, Arbitrator), FLRC No. 75A-36 (September 9, 1975), Report No. 82; Airway Facilities Division, Federal Aviation Administration, Eastern Region and National Association of Government Employees, Local R2-10R (Kronish, Arbitrator), FLRC No. 75A-50 (August 15, 1975), Report No. 82; Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (August 14, 1975), Report No. 81; American Federation of Government Employees, AFL-CIO, Local 2649 and Office of Economic Opportunity (Sisk, Arbitrator), FLRC No. 74A-17 (December 5, 1974), Report No. 61.

37/ NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79.

38/ Community Services Administration and National Council of CSA Locals (American Federation of Government Employees) (Edgett, Arbitrator), FLRC No. 75A-48 (August 15, 1975), Report No. 81.

39/ Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (November 14, 1975), Report No. 89; Social Security Administration, Bureau of Retirement and Survivors Insurance, Chicago, Illinois and AFGE, National Council of Social Security Payment Center Locals, Local 1395 (Davis, Arbitrator), FLRC No. 75A-17 (June 26, 1975), Report No. 76; Office of Economic Opportunity and American Federation of Government Employees Local 2677 (Matthews, Arbitrator), FLRC No. 74A-76 (June 26, 1975), Report No. 76; Small Business Administration and American Federation of Government Employees, Local 2532 (Kleeb, Arbitrator), FLRC No. 73A-44 (November 6, 1974), Report No. 60.

40/ The Supervisor, New Orleans, Louisiana Commodity Inspection and Grain Inspection Branches, Grain Division, United States Department of Agriculture and American Federation of Government Employees, AFL-CIO, Local 3157 (Moore, Arbitrator), FLRC No. 74A-75 (June 26, 1975), Report No. 74.

41/ Professional Air Traffic Controllers Organization and Federal Aviation Administration, Department of Transportation (Britton, Arbitrator), FLRC No. 74A-1 (June 21, 1974), Report No. 53.

42/ National Weather Service, N.O.A.A., U.S. Department of Commerce and National Association of Government Employees (Strongin, Arbitrator), FLRC No. 75A-63 (August 15, 1975), Report No. 82.

43/ Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (August 15, 1975), Report No. 81.

44/ Community Services Administration and American Federation of Government Employees, Local 2677 (Edgett, Arbitrator), FLRC No. 75A-102 (January 30, 1976), Report No. 96; Norfolk Naval Shipyard and Tidewater Virginia Federal Employees Metal Trades Council, AFL-CIO (Strongin, Arbitrator), FLRC No. 74A-85 (August 14, 1975), Report No. 81; Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator), FLRC No. 74A-49 (December 20, 1974), Report No. 61; Federal Employees Metal Trades Council, Vallejo, California and Mare Island Naval Shipyard, Vallejo, California (Hughes, Arbitrator), FLRC No. 73A-20 (September 17, 1973), Report No. 44.

45/ Federal Employees Metal Trades Council, Vallejo, California and Mare Island Naval Shipyard, Vallejo, California (Hughes, Arbitrator), FLRC No. 73A-20 (September 17, 1973), Report No. 44.

46/ Mare Island Naval Shipyard, Vallejo, Calif. and Federal Employees Metal Trades Council, AFL-CIO (Childs, Arbitrator), FLRC No. 72A-13 (April 17, 1973), Report No. 36.

47/ Federal Employees Metal Trades Council, Vallejo, California and Mare Island Naval Shipyard, Vallejo, California (Hughes, Arbitrator), FLRC No. 73A-20 (September 17, 1973), Report No. 44.

48/ American Federation of Government Employees, AFL-CIO, Local 2677 and Community Services Administration (Lundquist, Arbitrator), FLRC No. 75A-105 (January 30, 1976), Report No. 96; Community Services Administration and American Federation of Government Employees (AFL-CIO), Local 2677 (Dorsey, Arbitrator), FLRC No. 75A-71 (November 18, 1975), Report No. 92; Office of Economic Opportunity, Kansas City Regional Office, Region VII and National Council of OEO Locals, Local 2691, AFL-CIO (Yarowsky, Arbitrator), FLRC No. 74A-102 (August 15, 1975), Report No. 81; see also, Frances N. Kenny and National Weather Service (Lubow, Arbitrator), FLRC No. 75A-30 (November 14, 1975), Report No. 89.

49/ Local 1164, American Federation of Government Employees, AFL-CIO and Bureau of District Office Operations, Boston Region, Social Security Administration (Santer, Arbitrator), FLRC No. 74A-49 (December 20, 1974), Report No. 61.

50/ NAGE Local R8-14 and Federal Aviation Administration, Oklahoma City, Oklahoma (Stratton, Arbitrator), FLRC No. 74A-38 (July 30, 1975), Report No. 79.

SELECTED CASES IN WHICH THE RECOGNIZED GROUNDS ARE DISCUSSED:*/

Ground: The Award Violates Applicable Law

74A-64 (100), 74A-61 (99), 75A-23 (95), 74A-51 (91), 74A-29 (91), 74A-15 (89), 75A-74 (87), 73A-46 (86), 73A-44 (60), 73A-51 (57), 72A-22 (33)

Ground: The Award Violates Appropriate Regulation

75A-31 (95), 75A-45 (94), 75A-84 (92), 74A-51 (91), 74A-29 (91), 75A-26 (83), 75A-50 (82), 73A-44 (60), 73A-51 (57)

Ground: The Award Violates the Order

75A-101 (96), 74A-85 (81), 73A-67 (61), 73A-42 (55)

Ground: The Arbitrator Exceeded His Authority

75A-4 (101), 74A-40 (62), 73A-44 (60), 74A-12 (56), 72A-3 (42)

Ground: The Award Does Not Draw Its Essence from the Collective Bargaining Agreement

75A-30 (89), 75A-56 (85), 74A-38 (79), 75A-17 (76), 72A-44 (37)

Ground: The Award Is Incomplete, Ambiguous or Contradictory So As to Make Implementation of the Award Impossible

75A-63 (82)

Ground: The Award is Based on a Nonfact

74A-102 (81)

Ground: The Arbitrator was Biased or Partial

73A-20 (44), 72A-13 (36)

Ground: The Arbitrator Refused to Hear Pertinent and Material Evidence

75A-105 (96), 75A-71 (92), 75A-30 (89), 74A-102 (81)

*/ The first number refers to the FLRC case number. The number in parentheses is the Report of Case Decisions in which the decision letter denying review or the decision on the merits appears.

PART III.

SUBJECT MATTER INDEX

January 1, 1976 through December 31, 1976

SUBJECT MATTER INDEX*

January 1, 1976 through December 31, 1976

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FLRC No(s).

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